INSOLVENCY LAW UPDATES JUNE 2021[1]

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EDITORIAL

The notes are for reference purposes, to give one an idea of cases reported. However, two announcements might not deviate from this. One, a Master's office was established in Middelburg dealing with limited issues.

Two: On 1 July 2021 the Gauteng High Court gave a judgment that the Government Gazette should get their act together and publish the notices!! SARIPA brought an urgent application as the Government Printer did not perform. (To be discussed in July 2021 updates)

CASE NAMES

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

Firstrand Bank Limited v Van Dyk (77/2020) [2021] ZAFSHC 159 (17 June 2021)

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K2013046547/07 (South Africa) (Pty) Ltd and Others v Hyde Construction CC and Another (513/2020) [2021] ZASCA 82 (17 June 2021)

Massyn v De Villiers N.O and Others (109/2021) [2021] ZAWCHC 106 (1 June 2021)

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Murray N.O v Ramphele (25067/2020) [2021] ZAGPPHC 409 (13 June 2021)

Mutale v Van Tonder (33282/2020) [2021] ZAGPPHC 410 (14 June 2021)

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

Nedbank Ltd v Pilisanani Trading Enterprise 59 CC and Another (1301/2020P) [2021] ZAKZPHC 34 (18 June 2021)

Silostrat (Pty) Ltd & Others v Pieter Hendrik Strydom N.O & Others (845/2019, 898/2019) [2021] ZASCA 93 (25 June 2021)

Starbuck N.O and Another v Timana and Others (49784/2020) [2021] ZAGPPHC 389 (11 June 2021)

Telemax (Pty) Ltd v Kievits Kroon Country Estate (Pty) Ltd (18482/2020) [2021] ZAGPPHC 379 (15 June 2021)

University of Johannesburg v Auckland Park Theological Seminary and Another (CCT 70/20) [2021] ZACC 13 (11 June 2021)

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University of Johannesburg v Auckland Park Theological Seminary and Another (CCT 70/20) [2021] ZACC 13 (11 June 2021):

Cession of rights- personal or real rights- contextual evidence-not precluded by the parol evidence rule as it does not seek to add to, vary, modify or contradict the terms of the lease agreement -the rights were personal-the rights were clearly personal to

ATS. Further, given the nature of the rights, the Court held that ATS's cession of the rights to Wamjay effectively rendered the contract inoperative and led UJ to reasonably conclude that ATS had repudiated the lease agreement. UJ was accordingly entitled to cancel the agreement.

[1] I make bold to say that it is not just for the sake of poetry that the old adage, context is everything, holds true. In so many scenarios, words alone ring hollow. Context gives life and meaning to what is said or written. Is a court of law then entitled, or *required*, to take cognisance of context when interpreting a contract? That is the question that this Court is called upon to answer.

[2] At the core of this matter is a dispute over the permissibility of the cession of rights in a long-term lease agreement. The solution to the dispute lies in the answer to whether or not the rights in question are personal to the first respondent (*delectus personae*) and therefore incapable of cession. This requires the Court to consider an antecedent question: can contextual evidence be brought, and used, to demonstrate the personal nature of rights in an agreement to support an argument that the rights therein may not be freely ceded? The judgment of the Supreme Court of Appeal answered this in the negative and held that the contract was unambiguous and that the words should therefore be read objectively. Further, it held that the evidence the applicant sought to adduce to show that the rights in the contract were *delectus personae* was, in fact, brought to vary, add to or contradict the contract and was therefore inadmissible in terms of the parol evidence rule. This matter therefore requires this Court to consider the interplay, in the *delectus personae* setting, between the interpretative injunction on courts to interpret contracts within their context, having regard to relevant contextual evidence, and the accepted legal principles that form part of the parol evidence rule. In particular, it requires this Court to consider whether the Supreme Court of Appeal conflated the relevant legal principles and thus applied the incorrect principles to the determination before it. More on this later.

The applicant is the University of Johannesburg (UJ), a public institution of higher education established in terms of section 23(1) of the Higher Education Act.**[3]** It is the successor of the Rand Afrikaans University, which was established in terms of the Rand Afrikaans University Act.**[4]** The Rand Afrikaans University and another institution of higher education, Technikon Witwatersrand, merged in 2005 to form UJ. Throughout this judgment, I refer to the applicant as UJ, for ease of reference, even when referring to the pre-2005 entity.

The first respondent is Auckland Park Theological Seminary (ATS), an entity which provides theological training to students who wish to become pastors of the Apostolic Faith Mission of South Africa. The second respondent is Wamjay Holdings Investments (Pty) Limited (Wamjay), a company wishing to build a faith-based school on premises in Auckland Park owned by the applicant.

The Supreme Court of Appeal disagreed with the findings of the High Court and Full Court, and upheld ATS's and Wamjay's appeal with costs. It held that all contractual rights can be transmitted unless they are either of such a personal nature that the identity of the contracting party matters and is instrumental to the contract (*delectus personae*), or it can be shown that the contract conveys an intention that the rights not be transferred. It held that existing jurisprudence indicates that, in a long lease, the lessor does not expect that the obligations of the lease will be carried out

personally by the lessee throughout the whole term and that there is therefore no *delectus personae* in long-term lease agreements. Additionally, the Supreme Court of Appeal held that there was no evidence in the lease agreement which indicated that the rights were *delectus personae*. It further held that UJ was not permitted to adduce evidence as to the parties' intentions and the surrounding circumstances of the lease agreement. It formed this conclusion on the basis of the whole agreement clause in the lease agreement, which stipulates that the written agreement constitutes the entire agreement and cannot be varied by extrinsic evidence. Thus, the Supreme Court of Appeal held that the parol evidence rule rendered UJ's contextual evidence inadmissible, and that an objective interpretation of the lease agreement indicates that the rights were not *delectus personae*, and could be ceded to Wamjay. The Supreme Court of Appeal accordingly replaced the order of the High Court with an order dismissing UJ's claim.

As the basis of its appeal in the Constitutional Court, UJ made two main arguments. Firstly, it argued that the Supreme Court of Appeal erred by conflating the two mechanisms by which a creditor may be prohibited from ceding a contractual right without the debtor's consent. These two distinct mechanisms are: first, where there is a term in the contract stipulating the prohibition (*a pactum de non cedendo*); and second, where the right is so personal to the creditor that it is incapable of being ceded to another without the consent of the debtor (*delectus personae*). UJ contended that the Supreme Court of Appeal's conclusion that the rights were cedable in the absence of an express term in the lease agreement prohibiting the cession flowed from it approaching the inquiry incorrectly, and without due regard to the distinction between a *pactum de non cedendo* and *delectus personae*. Secondly, UJ argued that the Supreme Court of Appeal's failure to consider the context of the lease agreement was inconsistent with its established jurisprudence on the general principles relating to the interpretation of contracts, which has been endorsed by the Constitutional Court. Moreover, UJ submitted that, had the Supreme Court of Appeal followed the correct contextual approach to the interpretation of the lease agreement, it would have concluded that the rights were personal to ATS, because the cession of the rights to Wamjay clearly defeated the purpose of the lease agreement.

ATS and Wamjay argued that the nature of the right in issue is easily capable of determination from a plain reading of the lease agreement. They contended that once the right is determined from the plain reading of the agreement, the only question is whether the right, by its nature, is capable of cession. They accordingly argued that the right in question is clearly capable of cession, because it makes no difference to UJ whether the obligations in the lease agreement are performed by ATS or another party. This is so because the characteristics of the performance owed to UJ are not altered by virtue of ATS ceding the rights to Wamjay. They accordingly submitted that the Supreme Court of Appeal was correct to exclude the contextual evidence, and argued that UJ's interpretation of the lease agreement is at odds with the express wording of the lease agreement. Alternatively, ATS and Wamjay argued that, even if the rights are to be interpreted as being personal in nature, ATS's conduct fell short of repudiation and, in addition, raised the defences of waiver and estoppel against UJ's claim.

The Constitutional Court, in a unanimous judgment penned by Khampepe J (Mogoeng CJ, Jafta J, Madlanga J, Mathopo AJ, Mhlantla J, Theron J and Tshiqi J

concurring), held that this matter raises arguable points of law of general public importance that ought to be considered by this Court, and that it was in the interests of justice for leave to appeal to be granted.

The Court considered the principles surrounding the concept of *delectus personae*, together with the general principles of contractual interpretation as espoused in its own jurisprudence, as well as that of the Supreme Court of Appeal. This analysis led the Court to confirm that a court interpreting a contract has to, from the onset, consider the contract's factual matrix, its purpose, the circumstances leading up to its conclusion, and the knowledge at the time of those who negotiated and produced the contract. The Court clarified that, although this does not mean that extrinsic evidence is always admissible, there will be times where contextual evidence will be necessary for interpretive purposes. The Court accordingly held that, to the extent that the Supreme Court of Appeal purported to revert to a position where contextual evidence may only be adduced when a contract or its terms are ambiguous, it erred. Context must be considered when interpreting any contractual provision and it must be considered from the outset as part of the unitary exercise of interpretation. The Court held that the position is no different when the interpretive exercise involves the *delectus personae* inquiry, and rejected ATS's and Wamjay's contention that no contextual evidence is necessary to determine the nature of the rights in question. The Court held that the correct approach to the inquiry involves taking the firmly established contextual approach to interpreting the contract in question, and determining the nature of the rights and obligations that flow from it.

In the light of the general legal principles for determining *delectus personae*, the Court held that contextual evidence ought to have been admitted in this case to determine whether the rights in question were personal to ATS. It held that contextual evidence in this sense is not precluded by the parol evidence rule as it does not seek to add to, vary, modify or contradict the terms of the lease agreement. Rather, it gives context and background to the lease agreement, which can be used by a court in its interpretation of that agreement and when seeking to ascertain whether the circumstances give rise to an intention of the parties (at the time of the conclusion of the agreement) that the rights were personal to ATS. In adopting this interpretive approach, the Court held that the High Court's findings could not be faulted: the rights were clearly personal to ATS. Further, given the nature of the rights, the Court held that ATS's cession of the rights to Wamjay effectively rendered the contract inoperative and led UJ to reasonably conclude that ATS had repudiated the lease agreement. UJ was accordingly entitled to cancel the agreement. Lastly, the Court rejected ATS's and Wamjay's attempts to rely on estoppel and waiver, because they had failed to meet the necessary legal requirements to successfully raise these defences.

The Constitutional Court accordingly upheld UJ's appeal, confirmed the findings of the High Court, and replaced the order of the Supreme Court of Appeal with an order dismissing ATS's and Wamjay's application for leave to appeal with costs.

Firstrand Bank Limited v Van Dyk (77/2020) [2021] ZAFSHC 159 (17 June 2021):

Application-provisional sequestration-opposed on basis that claim not porved-order granted

The is an application for the provisional sequestration of the respondent`s estate.

[2] The applicant's *locus standi* for the sequestration of the respondent is based upon a judgment granted by the Court under civil case cover number 2834/2017 which amounts to R4 814 596.11 plus further interest from 15 February 2021 to date of payment.

[3] The genesis of the dispute is the respondent`s failure to make payment on the mortgage loan facility provided to him by the applicant who holds as security three mortgage bonds over the farm Houmoed 516 district Brandfort, Province Free State, for the respective amounts of R2 160 000.00, R2 040 000.00 and R1 200 000.00.

[4] In terms of section 10 of the Insolvency Act 24 0f 1936 (the Act), an applicant needs to make out a *prima facie* case that:

> '*(a) The petitioning creditor has established against the debtor a claim such as is mention in subsection (1) of section nine; and*
>
> *(b) The debtor has committed an act of insolvency or is insolvent; and*
>
> *(c) There is reason to believe that it will be to the advantage of creditors of the debtor if his estate is sequestrated.'*

[5] The applicant has a liquidated claim in the judgment it obtained against the respondent. Furthermore, an acknowledgement of indebtedness was made an order of court on 1 September 2020 under case number 2834/2017.

[6] The applicant relies on the provisions of section 8(g) of the Act in its submission that the respondent committed acts of insolvency. The respondent has acknowledged his indebtedness and inability to pay in the acknowledgement. He has also made an undertaking to pay the debt but failed to do so.

[7] Mr Edeling, on behalf of the respondent, rightly conceded that the respondent committed the acts of insolvency and the application should succeed if the points *in limine* raised by the respondent, which I shall deal with shortly, is dismissed.

[8] The points *in limine* raised are as follows:

> 8.1 The applicant`s Mortgage Bond Loan Agreements (MLAs) and the accompanying bonds was sold to a Third Party iKaya.
>
> 8.2 The applicant failed to disclose or attach the true copies, certified as the most current operative MLAs, sourced from the Safe Custody Agent of iKaya that bought Applicant`s MLA as Proof of claim, serving as the applicant`s *causa*.
>
> 8.3 Since the respective loan accounts does not form part of the Bank`s estate, after the perfection of the sale transaction with iKaya the Issuer of the Certificate of Balance, could not certify the quantum of the applicant`s claim.
>
> 8.4 The judgment obtained against the respondent was obtained by fraud and is therefore void *ab initio.* The matter of representation cannot be resolved without hearing of evidence and applicant`s representative being cross-examined.

[9] The securitisation scheme relied upon by the respondent was concluded on 9 March 2007. It is abundantly clear from the agreement that the applicant retain the responsibility to collect payments and to administer and manage the Receivables on

an ongoing basis. The applicant has in its capacity as administrator to the Issuer, iKaya, the necessary standing to institute action where there is default in payments. This was the state of affairs when the respondent entered into his MLAs with the applicant some nine years after the conclusion of the securitisation scheme.

[10] The respondent is silent on when he became aware of the scheme. This is unsurprising because it is for the first time that he raised the defences despite being embroiled in litigation on this matter since 2017. It is in my view a futile attempt to delay his inevitable sequestration.

Nedbank Ltd v Pilisanani Trading Enterprise 59 CC and Another (1301/2020P) [2021] ZAKZPHC 34 (18 June 2021)

Business rescue- setting aside of the resolution in terms of s130(1)(a)(ii) on the basis that there is no reasonable prospect of the first respondent being rescued-failure to observe the statutory time limits-such failure does not render the resolution a nullity in terms of s129(5), thus *ipso facto* bringing the business rescue proceedings to an end, is undermined by the condonation granted by the Commissioner- *Panamo Properties (Pty) Ltd v Nel NNO* **2015 (5) SA 63** (SCA) quoted

[1] By notice of motion issued on 18 February 2020 the applicant commenced proceedings seeking the following relief:

> "*1. The resolution taken by the first respondent on 20 June 2019 to voluntarily begin business rescue proceedings in terms of* **Section 129** *of the* **Companies Act, 71 of 2008***, be, and is hereby, set aside;*
>
> *2. The appointment of the second respondent as a business rescue practitioner be, and is hereby, set aside;*
>
> *3. Costs of this application against the first and second respondents, jointly and severally, the one paying the other to be absolved;*
>
> *4. Further and/or alternative relief.*"

[2] The background to the dispute insofar as relevant is set out below. The first respondent is an agricultural concern conducting farming operations on Portion 41 (of 12) of the farm Umlaas No. 902 at Eston, KwaZulu-Natal. The Applicant was its banker. As such the first respondent conducted with the applicant a current account with an overdraft facility, an instalment sale agreement, as well as a loan account secured by a mortgage bond.

[3] The second respondent is alleged to be a company, despite the fact that its letterhead which was freely used in the course of these proceedings does not reflect this. It appeared to be the alter ego of Mr Adrian Vengadesan, a business rescue practitioner. In the course of the affidavits the parties have made no distinction between Mr Vengadesan and the second respondent company and dealt with both interchangeably as the business rescue practitioner for the first respondent. For purposes of this judgment I do not propose to dwell upon this distinction.

[4] When the first respondent breached the repayment terms of its various accounts with the applicant, the applicant instituted legal action against it under case number 1007/2019P for recovery of the amounts due. This resulted in a meeting

convened on 5 March 2019 where the first respondent's representatives explained that it was experiencing cash flow difficulties. At that time the first respondent was indebted to the applicant in respect of the various accounts as follows;

a. Its current account number 1106 794 621 for R316 442-35;

b. An instalment sale agreement number 146 9075/002 for R258 643-80; and

c. The Nedbond Facility loan account number 146 9075/0001 for R1 843 257-63.

[5] Various options and possible solutions were considered and debated, but in the end it was agreed that the applicant would keep further action in abeyance for a period of three months from 1 April to 30 June 2019 to enable the first respondent's representatives time to rationalize its position and either turn the farming business around, or to sell the farm to best advantage. Consents to judgment were signed, both on behalf of the first respondent, as well as by its two sureties Mr Ibanathan Govender and Ms Indranie Govender.

[6] In terms of the understanding and during the moratorium the first respondent would pay what it could in respect of the various accounts. At that stage its instalment obligations had been R6 602-72 per month in respect of the instalment sale agreement and R26 987-04 per month in respect of the Nedbond loan account facility. There was no pre-existing repayment schedule for the overdraft account which had been called up and technically was repayable forthwith in full.

[7] According to the applicant and during the period from 1 April to 1 August 2019 the first defendant paid a total of R91 000-00 towards the Nedbond loan account facility, but nothing in respect of the other two accounts, nor had it made any arrangements to otherwise settle its indebtedness to the applicant.

[38] With regard to the failure to comply with the requirements of s129 counsel for the applicant submitted that in his letter of 15 August 2019 the Commissioner only intended to extend the period contemplated in s129(4)(a) relevant to the filing of the notice of the appointment of the business rescue practitioner with the Commission. That, so the submission ran, was because the Commissioner's powers were limited in terms of Regulation 166 to extending time limits for the filing of any documents with the Commission only. Accordingly, so it was submitted, the remaining failures were not condoned and amounted to failures to observe the provisions of s129(3) and 129(4)(b).

[39] I do not agree with this submission. That approach may be in keeping with Regulation 166(1) but Regulation 166(2) clearly provides a much wider discretion because the Commissioner may condone late performance of any act in respect of which the Act, or the Regulations, prescribe any time limit, other than a time limit that is binding on the Commission itself. That, in my view, is what the Commissioner had in mind in his letter of 15 August 2019 and in so doing he was authorised to exercise his discretion. In addition, s129(3) of the Act also endows the Commissioner with a discretion to allow a company a longer period to comply with its provisions.

[40] The initial approach of the applicant's attorney, given the failure to observe the statutory time limits, that such failure rendered the resolution a nullity in terms of s129(5), thus *ipso facto* bringing the business rescue proceedings to an end, is undermined by the condonation granted by the Commissioner. In *Panamo Properties*

(Pty) Ltd v Nel NNO **2015 (5) SA 63** (SCA), Wallis, JA explained in para's 28 and 29 that s132(2)*(a)*(i) of the Act provides for business rescue proceedings only to end when the court sets aside the resolution that commenced those proceedings. Accordingly, and even if the resolution had lapsed and become a nullity in terms of s129(5)*(a)*, the business rescue proceedings set in motion by that resolution had not terminated until the court set the resolution aside. Where a resolution lapsed and became a nullity it may be set aside under s130(1)*(a)*(iii), but the court still needs to be approached for the resolution to be formally set aside, thereby only then terminating the business rescue proceedings.

[41] The court further held that in considering the setting aside of a resolution on any of the grounds contained in s130(1)(a), the court in addition needs to be satisfied that, in the light of all the facts, it was just and equitable to set aside the resolution and thereby terminate the business rescue proceedings (at par 32).

[42] It follows that, by reason of this approach, the lapsing contemplated in s129(5)(a) is provisional in nature and only becomes effective once the court, being so satisfied, makes an order in terms of s132(2)(a)(i) setting aside the resolution. That also makes it clear why, where non-compliance with s129(3) or (4) resulted in a lapsing of the resolution in terms of s129(5)(a), the Commissioner is nevertheless empowered to condone late performance, thus effectively reviving the business rescue process.

[43] It follows that I agree with counsel for the respondents that their failure to comply with the provisions of s129(3) and (4) had been condoned in the Commissioner's letter of 15 August 2019 and that in the light thereof it would not be just and equitable, by reason thereof alone, to set aside the resolution and terminate the business rescue proceedings.

[44] There remains, however, the applicant's reliance upon the provisions of s130(1)(a)(ii), namely that there is no reasonable prospect of rescuing the first respondent. I have earlier set out a number of factors relevant to the consideration of this aspect. Not only does it appear that the business rescue plan was not formally adopted by the creditors of the first respondent, but there was no indication that the second respondent had given effect to the proposed business rescue plan at all. Such payments as the applicant received all came from an individual, not associated with the second respondent, but instead with the active member of the first respondent.

[45] It was also undisputed that the applicant had no further contact with the second respondent or Mr Vengadesan after 6 September 2019, nor have the latter given any indication of how, since that time and until the matter was heard on 29 May 2021, a period in excess of twenty months, the business rescue had progressed, or what the prospects were of actually rescuing the first respondent.

[46] In this regard it is relevant that the proposed business rescue plan envisaged that creditors and more particularly the applicant, would have been paid in full by 30 July 2020, which as regards the applicant was not the position. In the schedule of claimed payments put up as annexure AV3 in the answering affidavit of Mr Vengadesan it was alleged that payments made to the applicant during the eighteen month period from March 2019 to 6 August 2020 totaled only R460 577-37, a far cry from settling the full indebtedness.

[47] By way of comparison, the first respondent's instalment obligations had been R6 602-72 per month in respect of the instalment sale agreement and R26 987-04 per month in respect of the Nedbond loan account facility. Without making allowance for the repayment the debt in respect of the overdraft account, these came R33 589-76 per month which, over the same eighteen month period totaled R604 615-68. Effectively the first respondent's debt to the applicant therefore increased during this period.

[48] It follows that even if the business rescue plan had been adopted and implemented, the financial position of the first respondent has markedly deteriorated during the period of its alleged currency and it does not appear that there is any reasonable prospect of the first respondent being rescued and avoiding ultimate liquidation.

[49] In the circumstances any further delay brought about by the resolution would undoubtedly be prejudicial to the applicant and indeed also to such other creditors as the first respondent may have. The submission by counsel for the applicant that the business rescue exercise in this instance was a calculated delaying tactic is not without merit.

[50] In all the circumstances I have come to the conclusion that the applicant has established, with the requisite degree of certainty grounds for the setting aside of the resolution in terms of s130(1)(a)(ii) on the basis that there is no reasonable prospect of the first respondent being rescued. I have in addition concluded in the light of all the evidential material placed before the court and in compliance with the requirements of s130(5)(a)(ii) that it would be just and equitable to set aside the resolution, thus finally bringing to an end the protracted attempt at voluntary business rescue.

[51] Neither counsel made any particular submissions with regard to the costs of the application. Counsel for the respondents submitted that the application should be dismissed, with costs and counsel for the applicant asked for costs as per para 3 of the notice of motion against the respondents jointly and severally. In the circumstances I see no reason to depart from the usual approach that costs should follow the result. Insofar as the second respondent has associated itself with the justification for the alleged exercise in business rescue, I am also of the view that an order for liability for costs payable jointly and severally is justified in all the circumstances of the matter.

[52] In the result I make an order substantially in the form sought by the applicant in its notice of motion, namely:

> a. The resolution taken by the first respondent in terms of **s129** of the **Companies Act 71 of 2008** on 20 June 2019 to voluntarily begin business rescue proceedings is hereby set aside in terms of s130(5)(a) of the Act.
>
> b. For the sake of clarity it is declared that in terms of s132(2)(a)(i) of the Act the order contained in para 1 hereof also brings to an end such business rescue proceedings.
>
> c. In the result the appointment of the second respondent as the business rescue practitioner for the first respondent is set aside.

d. The costs of the application, including any reserved costs, shall be paid by the first and second respondents jointly and severally, the one paying the other to be absolved.

Vilakazi v Master of the High Court and Another (13810/19) [2021] ZAGPPHC 374 (9 June 2021)

Master of the High Court- being unreasonable- the Master delayed in the applicant's appointment and in issuing the letter of executorship- only applicant's threat of further legal proceedings that appears to have triggered the issue of the relevant letter a week later-the Master's litigation conduct has been unreasonable and caused the applicant to incur unnecessary costs. It warrants censure by this Court.

1. The applicant is the half-brother of the late Almo Morris Langa. Mr Langa died intestate on 6 April 2018. On 15 June 2018, the applicant caused his death to be reported to the office of the first respondent, the Master, and attempted to procure his appointment as executor so that he could wind up the estate.

2. Despite repeated attempts at engagement by the applicant, no letter of executorship was forthcoming. On 27 February 2019, the applicant instituted proceedings in this Court to compel the Master to issue him with the relevant letter. The Master did not oppose the application. Instead, her office initially called for further documents, which the applicant provided to the extent that he was able. Later, the Master, through the State Attorney, tendered to abide the High Court application and to issue a report if the applicant abandoned his prayer for costs of the application. The applicant declined to forego his costs.

3. The matter came before Mr Justice Mabuse on 7 August 2019 where an order was made, by agreement, stipulating time periods on which (*a*) the Master would identify the further documents she still required to issue the executorship letter, (*b*) the applicant would furnish those documents, and (*c*) the Master would issue the letter of executorship. The costs were reserved.

4. The Master adhered to the initial deadline imposed by the order, by sending a letter stipulating the documents that were still required on 12 August 2019. Some of those documents had previously been provided by the applicant, but others were requested for the first time. The applicant submitted the documents approximately 5 weeks later, on 19 September 2019. The Master ultimately issued the letter of executorship appointing the applicant as executor on 7 November 2019 – almost 6 weeks after the applicant had submitted the requisite documents and 1½ years after the death of Mr Langa had been reported.

5. I am called to determine the question of costs. The applicant seeks an order granting costs of the application against the first respondent on the punitive attorney-client scale.**[1]** His counsel, Ms Erasmus, claims that he is entitled to those costs because he enjoyed substantial success in the application, and because of the unreasonable manner in which the Master's office handled the matter.

6. For the Master, Ms Mboweni submits that not only should costs not be awarded in the applicant's favour, but rather it is the Master who should recover her costs. That, she submitted, was because the application to court was premature, as

evidenced by the fact that the relief sought in the notice of motion could not be granted at the hearing of 7 August 2019. Further documents had to be lodged with the Master's office before the appointment could be made and the letter of executorship issued.

But even if the Master did not instruct the State Attorney to offer the bargain that he did, the Master's handling of the matter was delinquent. She was plainly aware of the pending proceedings. A perusal of her files would have revealed that the applicant was incurring the ongoing cost of security, and was thus suffering prejudice as a result of her delayed performance. And it should have been apparent to the Master that she required further documents to finalise the appointment. In those circumstances, the Master ought proactively to have called for the necessary information from the applicant. It was not reasonable for her to allow the matter to proceed to court on 7 August 2019, to agree on an order on the day (once the applicant had incurred the legal costs for the hearing), and then steadfastly to persist in seeking costs against the applicant as a penalty for exercising his rights.

16. Added to this, I note that even in the face of Mabuse J's order, the Master delayed in the applicant's appointment and in issuing the letter of executorship. Indeed, it was only the applicant's threat of further legal proceedings, made on 31 October 2019, that appears to have triggered the issue of the relevant letter a week later.

17. The Master's litigation conduct has, in my view, been unreasonable and caused the applicant to incur unnecessary costs. It warrants censure by this Court.

18. The Master's counsel finally urged me to consider the administrative load of the Master's office as an explanation for the Master's delays. No evidence in this regard is provided in the Master's affidavit. But, perhaps more importantly, it cannot excuse the Master's failure to adhere to a court order – particularly one that imposed deadlines to which she had agreed.

19. I am satisfied that an award of punitive costs is justified in this case.

20. I consequently make the following order:

(a) The first respondent is ordered to pay the costs of the application (including the costs of counsel) on an attorney-client scale.

(b) Such costs are to include the reserved costs of the hearing of 7 August 2019, on an unopposed scale.

Starbuck N.O and Another v Timana and Others (49784/2020) [2021] ZAGPPHC 389 (11 June 2021)

Liquidators-duties-where party hinders liquidator interdict can be obtained

[1] The applicants are the duly appointed liquidators of Timana Properties (Pty) Ltd ("Timana Properties"). They brought an urgent application for an interim interdict which was granted on 11 November 2020 in the following terms:

"*1. In light of urgency, condonation is granted for the non-compliances with the normal Rules of Court with*

regard to service, form and time-period s as contemplated in Rule 6(12).

2. That an interim interdict returnable on 30 November 2020 at 10:00 be granted in terms of which the first respondent and any affected person must show cause why the order should not be made final:

2.1 That the first respondent and/ or any individual associated with first respondent be interdicted and restrained from accessing or entering the property of Timana Properties (Pty) Ltd known as Farm Schagen 273 Ptn 5 ("the property");

2.2 That the first respondent and its employees, and/ or any other representatives, be restrained from in any manner interfering with or conducting themselves in any manner that would prejudice access or possession of the property of Timana Properties (Pty) Ltd, and the applicants' operations to include applicants employees, and/ or any other representatives on behalf of the applicants.

3. That prayer 2 be regarded as an interim interdict with immediate effect;

4 In the event that the first respondent or any associated person with first respondent fails to adhere to the interdict contemplated in paragraphs 2 and 3 above,
that the applicants shall be authorised to appoint the relevant Sheriff of the above court, with the assistance of the South Africa n Police Services if necessary, as their duly authorised agent, and instruct the Sheriff to take all necessary steps to give effect to this order;

*5 Costs be granted against the first respondent"**[1]***

[2] The Rule *nisi* was extended several times and eventually the matter was heard on 31 May 2021 being the return date. On the return date, the first respondent appeared in court to oppose the granting of the final interdict.

[3] The requirements for an interim interdict are as follows:

"*3.1 a prima-facie right on the part of the applicant;*

3.2 a well-grounded apprehension of irreparable harm if the interim relief is not granted and the ultimate relief is granted;

3.3 a balance of convenience in favour of granting the interim relief; and

*3.4 the absence of any satisfactory remedy available to the applicant"**[2]***

[4] In *Joubert NO and Others***[3]** the court reiterated the grounds of an interim interdict as follows:

"*The requisites for an interim interdict are well known. The applicants are obliged to show that the right which is the subject matter on the main application which they seek to protect by means of an interim relief is clear, or if not clear, is prima facie established, though open to some doubt. If the right is only prima facie established then it must be shown that there is a well grounded apprehension of irreparable harm to the applicants if the interim*

relief is not granted and they ultimately succeed in establishing their right; that the balance of convenience favours the granting of interim relief, and that the applicants have no other satisfactory remedy."

In *casu*, Teffo J in granting an interim relief made a finding that the applicants succeeded in proving all the requirements of an interim interdict. In my view the court's finding was correct. I shall not burden this judgement by repeating her finding but shall defer to the judgment for the full reasons.

[5] The requirements for a final interdict are:

"*6.1 a clear right on the part of the applicant;*

6.2 an injury actually committed or reasonable apprehension; and

6.3 there is no other satisfactory remedy available to the applicant.

[7] The applicants are the appointed liquidators of Timana Proper ties (Pty) Ltd. They are therefore obligated by legislation to take control of the affairs of Timana Properties in order, *inter alia,* to protect the interests of creditors. This fact was not disputed by Mr. Mapila who a p pea re d for the first respondent at the hearing of this application. In my view, the applicants have a clear right to seek a final order.

[8] It has already been established that the first respondent interfered with the applicants in the execution of their duties as liquidators. It is therefore reasonable to apprehend such interference more so that the first respondent still maintains that he never prevented the applicants to carry out their duties.

[9] In my view, and in the circumstances of this case, a final order is an appropriate remedy. Otherwise, any other remedy would frustrate the statutory functions of the liquidators to the detriment of the creditors.

[10] The defences raised by the first respondent before Teffo J were that, the debt owed to Nedbank which formed the subject of the insolvency proceedings had been paid in full and that there was a pending appeal challenging the final liquidation order. There was no proof placed before court to substantiate these allegations.

[11] In *casu,* it was submitted by Mr.Van Rensburg, for the applicants, that the final order should be granted because nothing had changed since the granting of the interim order. I am inclined to agree with Mr. Van Rensburg because, still no proof of payment of the debt and the appeal were placed before the court. Instead, Mr. Mapila conceded that the debt had not been paid in full. It further emerged as a common cause factor, although made from the bar, that the appeal was heard and dismissed.

[12] The contentions made by the first respondent in an attempt to show cause why a final order should not be granted were a repeat of what was said to Teffo J. These contentions were dealt with in the judgment and rejected.

[13] I therefore do not find any compelling reason why I should not grant the order sought by the applicants. In the circumstances I make the following order:

1. The final interdict is granted;

2. The first respondent is to pay costs inclusive of costs of Counsel.

Murray N.O v Ramphele (25067/2020) [2021] ZAGPPHC 409 (13 June 2021):

Sequestration application-attorney cost order agains-no constitutional rights infringed by the order

This is an application for the provisional sequestration of Mr T. D. Ramphele, an attorney and director of Ramphele Attorneys, in terms of the provisions of sections 8 and 9 of the Insolvency Act (Act 24 of 1936) ("the Act").

The Applicant is Mr Cloete Murray in his capacity as curator *bonis* of Mr Norman Molubi Tloubatla following a provisional preservation order obtained by the South African Revenue Services on 29 July 2014, which was confirmed by Mali J on 31 March 2017.

The aforementioned preservation proceedings was followed by proceedings before Windell J brought by Mr Tloubatla, in which he was represented by the Respondent and Adv Dauds. The nature of these proceedings is not relevant, but the costs order made is. In light of conduct described by Windell J as conduct that was "*inappropriate and unbecoming of an attorney and counsel" and "a clear deviation from the standard expected of legal practitioners*", Windell J ordered Mr Dauds and the Respondent to pay the costs of the application before her *de bonis propriis*, jointly and severally, the one paying the other to be absolved, on the scale as between attorney and client.

4. The Respondent sought leave to appeal against Windell J's cost order, which was refused. He then petitioned the Supreme Court of Appeal, which was also refused. Not deterred, he then applied to the Constitutional Court for relief, but was also rebuffed. In each instance a cost order was made against the Respondent in person and in favour of the Applicant.

5. As a result of these costs orders, the Respondent is indebted to the Applicant in the sum of R428,723.13, which amount is comprised of taxed legal costs awarded in favour of the Applicant against the Respondent in his personal capacity. This amount was not in dispute, nor was it in dispute that the Applicant was a creditor of the Respondent.

6. The Applicant relies on the Respondent having committed acts of insolvency as contemplated in sections 8(b), (e) and (g) of the Act, as well as the Respondent being insolvent as contemplated in section 10 of the Act. In argument this was challenged. I say in argument, because a study of the answering affidavit shows that these grounds were not materially challenged and the Respondent's opposition is directed at trying to foist the liability which personally bears onto Ramphele Attorneys. He is both wrong upon the facts and wrong in law.

24. Counsel for the Respondent entreated me to exercise my discretion in favour of the Respondent by not ordering a provisional sequestration of the Respondent.

25. The argument advanced was that the provisional sequestration order may unduly violate the Respondent's constitutional rights. I could find no authority for such a proposition, nor could I find facts that show that the Respondent's constitutional rights were being impacted by what is a law of general application. But even if I am wrong in my assessment of the facts, the Respondent is not deprived of raising this argument (buttressed by additional facts if he so chooses) on the return day of the rule.

26. Counsel for the Respondent also entreated me to not order a provisional order for sequestration because there is some indication that the property owned by the Respondent in the North West province exceeds the Applicant's claim. This too may be something that the court hearing the application for final winding-up may consider with the benefit of more facts. As it stands at present, the court has not been furnished with sufficient facts about this property to properly consider what its relevance should be (beyond showing that there is a benefit to creditors should the Respondent be provisionally sequestrated).

27. On the facts before me, I find no grounds to exercise my discretion against the granting of a provisional order sequestrating the Respondent in terms of section 10 of the Act.

28. The Applicant is accordingly entitled to a provisional sequestration order.

ORDER:

In the premises I make the following order:

1. The Respondent estate is hereby placed under provisional sequestration in the hands of the Master of the High Court, returnable on 2 August 2021.

2. The Respondent, and all other interested parties, is called upon to show cause, if any, why a final order for the sequestration of his estate should not be granted on the return date mentioned in paragraph 1 above.

3. This order is to be served upon:

   3.1 The Respondent;

   3.2 The Master of the High Court;

3.3 The South African Revenue Services; and

3.4 The employees of the Respondent.

4. The costs of this application are costs in the administration of the insolvent estate.

Mutale v Van Tonder (33282/2020) [2021] ZAGPPHC 410 (14 June 2021):

Sequestration application-the applicant's claim is not liquidated. She relies on an auxiliary agreement. She seeks to have the amount calculated based on the rate paid to the previous bookkeeper and the last bookkeeper appointed by the respondent

[1] In the present matter, the applicant sought an order on 9 March 2021 for the provisional sequestration of the respondent in the following terms:

"*1. That the estate of the Respondent be placed under provisional sequestration.*

2. The Respondent and any other party who wishes to avoid such an order being made final to advance reasons why such an order of sequestration of the said estate should not be made final on 11 December 2020 at 10 h00 or soon after as the parties may be heard in the matter.

3. The service of the order personally on the Respondent.

3.1 The Respondent's employees.

3.2 All trade unions of which the employees of the Respondent are member's, if any;

3.3 On the Master;

3.4 On the South African Revenue Services.

4. The costs of this application are costs in the sequestration of the Respondent's estate."

The respondent opposed the application. The matter was initially enrolled on the urgent roll and was struck off for lack of urgency. The matter was subsequently enrolled on the opposed roll.

[2] The applicant is a female accountant. She pursued a law degree and was in her fourth year of study of law at the University of South Africa(UNISA)when the respondent employed her. The respondent is an attorney practising under the name of Mike Potgieter Attorneys. The applicant signed a general contract of employment with the respondent whilst he was still practising as Potgieter Marais Attorneys. The employment contract provided that the applicant would be paid R7000 per month. She would work as a candidate attorney during her period of employment.

[3] Before accepting the general contract of employment, the applicant had worked as an accountant for various small businesses and ran a tuckshop to supplement her income. At some point, she had also offered her accounting services to the firm Potgieter Marais Attorneys at a reduced fee. However, the offer was not taken up. The employment contract with the respondent was thus to support her acquisition of practical legal knowledge to support her theoretical legal studies to enable her to become a legal practioner.

[4] Initially, the applicant continued working as a bookkeeper during weekends to supplement her income to cover all her living expenses. Her salary as a candidate attorney in the firm did not meet her family's needs. This arrangement also allowed time for her clients to find an alternative bookkeeper. She eventually discontinued offering bookkeeping services to her clients. She was informed that she was required to commence doing the the respondent's bookkeeping when Mr Marais' wife stopped doing so through her company. The applicant commenced doing the bookkeeping for the respondent only after she was sent on a three-day course to familiarise herself with the program utilised by the respondent.

[5] According to the applicant, she worked under the supervision of the professional assistant Mr Britz as a candidate attorney. When Mr Britz resigned, she was required to take over his files and take on new clients. The respondent did not employ a new professional assistant in place of Mr Britz. The respondent did increase the applicant's remuneration, and she was paid a higher salary of in excess of R 15000 but was not paid a salary similar to that of a professional assistant. At that stage, the applicant was carrying the increased workload after the departure of Mr Britz, the complexity which was beyond what she was qualified to attend to. She states she acquitted herself well in her view as there was positive feedback. She also maintained the new client base well in her view.

In the present matter, the applicant's claim is not liquidated. She relies on an auxiliary agreement. She seeks to have the amount calculated based on the rate paid to the previous bookkeeper and the last bookkeeper appointed by the respondent. She had issued a letter of demand, but it is not clear on what basis her rate is calculated in the letter of demand. There are increases from time to time, and this is disputed. By all accounts, this is not a liquidated claim in that the amount has not been fixed, agreed upon or determined by a court. The applicant has issued summons against the respondent, which may yield an amount that she could issue sequestration proceedings upon if she is successful and the amount remains unsatisfied. The application is dismissed.

Telemax (Pty) Ltd v Kievits Kroon Country Estate (Pty) Ltd (18482/2020) [2021] ZAGPPHC 379 (15 June 2021):

Winding up application- minor creditor applies-will only be ordered if the applicant can show that due to the mismanagement the company it will rapidly be reduced to a condition of insolvency so as to prejudice the creditors' prospects of being paid: NOTE THIS NEEDS FURTHER DISECTION!

1. This is a final winding-up application. The Applicant is Telemax (Pty) Ltd, a company that conducts business in what it termed the information technology sphere, and the Respondent is Kievits Kroon Country Estate (Pty) Ltd, an upmarket

country estate with a luxury hotel and a wellness spa situated in Pretoria. For the sake of convenience I distinguish between the Respondent as the company and the actual estate where necessary.

2. The parties were in a contractual relationship with one another, which came to its demise during November and December 2019 and the Applicant now seeks the winding-up of the Respondent on the following grounds:

2.1 That the Respondent is unable to pay its debts in terms of section 344(f), read with section 345(1)(a) of the Companies Act (At 61 of 1973) ("*the 1973 Companies Act*"); or

2.2 That it would be just and equitable to do so.

3. The notice of motion did not seek for a provisional winding-up and the matter was argued in front of me on the basis that the relief sought was in the form of a final winding-up. The relevance of this lies in the onus that the Applicant has to discharge in order to obtain the relief that it seeks.

A brief background

4. The record comprised of the usual set of affidavits. On the Applicant's side, the founding affidavit was deposed to by Llewellyn Bailie, who described himself as the Managing Director of the Applicant. After deposing to the founding affidavit Bailie resigned as a director of the Applicant and the replying affidavit was deposed to by Ryno Mathee, a director of the Applicant. Bailie deposed to a confirmatory affidavit in support of Mathee's replying affidavit but only confirmed the contents thereof "*insofar as it relates to myself*". The answering affidavit was deposed to by Francois Stremmelaar, the Respondent's general manager.

5. There is no dispute that the Respondent required a total overhaul of its information technology ("*IT*") structure at the estate. Unfortunately, neither party provided a definition of what was meant by the term of "information technology structure" and I could also find no definitive treatment of the phrase. I deal with how the term should be interpreted further below.

6. During March 2019, the Applicant and the Respondent entered into an oral agreement. Counsel for both parties approached the matter on the basis that the parties were largely *ad idem* regarding the terms of this oral contract. While it is so for the greater part, it is not so in several critical respects.

The highlight of the Applicant's case in regard to just and equitable is the allegation that the Respondent is currently trading in insolvent circumstances "*that are submitted to be reckless and negligent, which not only needs to be stopped, but also needs to be investigated*".

57. Smit JP said in that Katsapas v Norvalspont Investments (Pty) Ltd**[20]** at 406F - H that in circumstances where a minor creditor applies for the winding-up of a company a winding-up will only be ordered if the applicant can show that due to the mismanagement the company it will rapidly be reduced to a condition of insolvency so as to prejudice the creditors' prospects of being paid. The Applicant falls squarely in the position of a minor creditor and the above *dictum* applies to it.

58. The Applicant has not in any way substantiated the statement that the Respondent is trading recklessly and negligently in insolvent circumstances, nor have any facts been put before me to show any mismanagement of the Respondent

and its financial affairs. The mere statement of what should be a conclusion on the facts, does not suffice.

59. In contrast stands Stremmelaar's statements referred to above, which paints a picture of a company being managed as a successful business.

60. In the premise the reliance on just and equitable ground also cannot succeed.

61. In the circumstances the application for a final winding-up order must fail.

Order:

62. In the premises I make the following order:

62.1 The Applicant's application is dismissed.

62.2 The Applicant is to pay the costs of the application on the party and party scale.

Van Zyl v Auto Commodities (Pty) Ltd (279/2020) [2021] ZASCA 67 (3 June 2021)

Business rescue – effect on liability of surety – interpretation of s 154 of Companies Act 71 of 2008 – deed of suretyship – interpretation – liability of surety thereunder.

[1] The appellant, Mr van Zyl, was formerly the Chief Executive Officer of Blue Chip Mining and Drilling (Pty) Ltd (BCM). The respondent, Auto Commodities (Pty) Ltd (Auto Commodities) supplied BCM with petroleum products on credit, but required Mr van Zyl to bind himself as surety for its resulting liabilities, which he did in July 2014. Thereafter BCM fell on hard times and on 10 December 2014 it was placed under business rescue. A business rescue plan was proposed and adopted on 2 June 2015 and implemented, with Auto Commodities receiving two dividends totalling nearly R1.9 million in December 2015 and December 2016 respectively. The business rescue terminated on 31 January 2017 as a result of the substantial implementation of the plan. On 21 July 2017 Auto Commodities issued summons against Mr van Zyl for an amount in excess of R6 million being the shortfall in regard to BCM's original indebtedness. Its claim was based upon the deed of suretyship. After a trial, the claim succeeded before Coetzee AJ in the Northern Cape Division of the High Court, Kimberley and he granted leave to appeal to this court.

[2] Although Mr van Zyl originally raised other defences, the only issue remaining in dispute between the parties is whether he is liable under the deed of suretyship to pay the amount claimed by Auto Commodities. His contention was that, when BCM's business rescue was terminated, **s 154(2)** of the Companies Act 71 of 2008 (the Act) released BCM from any further indebtedness to Auto Commodities. He submitted that this in turn released him from liability because suretyship is an accessory obligation. In argument, the parties focussed on the perceived differences between the judgment in *Tuning Fork***[1]** and an *obiter dictum* in *New Port*.**[2]** However, as a second string to its bow Auto Commodities contended that the terms of the deed of suretyship were in any event wide enough to maintain Mr van Zyl's liability whatever the effect of s 154(2) on BCM's liability to Auto Commodities.

The deed of suretyship

[3] A business rescue plan must be read in the light of the provisions of the Act governing the consequences of such a plan being adopted and implemented. Under s 152(4) of the Act, the plan is binding on both the company and its creditors, but the only provision dealing expressly with the consequences of implementing the plan are the provisions of s 154. The business rescue plan is framed somewhat imprecisely in regard to these consequences. As required by s 150(2)(b)(ii), clause 7.2 of the business rescue plan dealt with the extent to which the company was to be released from payment of its debts. Clause 7.2.5 said:

'The BRPs are of the view that the controlled winding down of the Company's affairs and the successful finalisation of Proceedings will only be achieved upon adoption of this Business Rescue Plan in terms of which the Company will be released from the payment of some of its debts.'

It is unclear from this language whether the BRPs had in mind anything more than the statutory inability of the creditors to enforce claims against the company after the implementation of the plan, but for present purposes we will assume in favour of Mr van Zyl that it meant the discharge of BCM's debt to Auto Commodities.

[4] Although a principal debtor's discharge from liability ordinarily releases the debtor's surety, the accessory nature of a surety's liability is not so rigidly applied in our law as to preclude some derogation by way of agreement between the creditor and the surety. In addition to customary terms whereby Mr van Zyl assumed liability as a surety and co-principal debtor and renounced the benefit of excussion, the suretyship contained several such unobjectionable provisions which, in varying formulations, are fairly standard in commercial practice.

[5] Clause 3 provided that Auto Commodities was at liberty 'to extend any leniency or extension of time to, or compound or make such other arrangements with, [BCM]', and that no such action on Auto Commodities' part 'shall affect or in any way be construed to operate as a waiver or abandonment of any of [Auto Commodities'] rights or claims against us or any of us hereunder.' Clause 5 listed various provisions which would apply in the event of the 'insolvency, liquidation, sequestration, assignment or placing under judicial management of' BCM's estate or in the event of 'compromise between [BCM] and any creditor of [BCM]'. One such listed provision (clause 5.4) was that no dividends or payments which Auto Commodities received from BCM in one or other of these eventualities would prejudice Auto Commodities' 'right to recover from us … to the full extent of this Suretyship, any sum which, after the receipt of such dividends or payments, will remain owing to [Auto Commodities] by [BCM]'.

The primary argument on behalf of Mr van Zyl that his liability as surety to Auto Commodities was discharged upon adoption and implementation of BCM's business rescue plan must fail. We hold that s154(2) does no more than preclude creditors from pursuing claims against the company after the business rescue plan has been implemented. It does not affect or extinguish the liability of a surety for the debt. It is

unnecessary to consider whether or how the terms of the business rescue plan could provide otherwise. The appeal is dismissed with costs.

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

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

[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.

[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.

Massyn v De Villiers N.O and Others (109/2021) [2021] ZAWCHC 106 (1 June 2021)

Interrogations- setting aside of the enquiry and all the extended powers granted to the liquidators. Alternative substantive relief sought was the removal of the commissioner and the setting aside of the subpoenas he authorised. The applicant has failed in all these challenges

[1] This application arises out of the liquidation of Imagina FX (Pty) Ltd (hereinafter 'the company') which was placed into final liquidation on 9 November 2020 after having been provisionally liquidated on 7 October 2020. The company conducted the business of a fund manager trading in foreign currencies by buying and selling currencies and taking advantage of fluctuating relative values between

them. To this end it used funds solicited from members of the public which funds were estimated to have been in excess of R1.5bil.

[2] The applicant in the present matter was one of two directors of the company and allegedly the guiding force behind the so-called Imagina FX Investments Scheme. The company was liquidated at the instance of three investors/creditors who alone placed more than R20mil in the scheme and sought its liquidation when it was unable to honour their withdrawal request made after their investigations apparently revealed that the company's business activities were both in contravention of financial services legislation and fraudulent. The company did not oppose the liquidation and in fact consented thereto.

[3] The first applicant [should be respondent] is Advocate Almero de Villiers S.C. and he abides the Court's decision. The second and third respondents in this application are the provisional liquidators (hereinafter 'the liquidators') of the company and the relief sought against them arises from an application which they made to this Court on an ex parte basis pursuant to which they obtained an order on 19 October 2020 authorising the bringing of that application, extending their powers to include certain of those listed in sec 386(4) of the Companies Act, 61 of 1973 ('the Act'), establishing an enquiry into the affairs of the company in terms of sec 417 of the Act, appointing Mr de Villiers as commissioner and authorising him to summons persons to be examined by at the enquiry including but not limited to twenty two persons amongst whom was the applicant. I shall refer to that application as the extension of powers application.

[4] The sec 417 enquiry (hereinafter 'the enquiry') appears to have got off to a stuttering start and presently stands adjourned pending the outcome of this application. It gave rise to an application in November 2020 in which the applicant sought to set aside a subpoena served on him to appear before the enquiry. Further litigation relating to the affairs of the company comprised an application by the liquidators for an Anton Piller order executable against the applicant and two others which application was heard before Baartman J, the setting aside application having been heard by Binns-Ward J.

[5] In terms of the amended notice of motion the applicant seeks the following relief:

1. the rescission of the order of this Court per Salie AJ in the extension of powers application which established the enquiry and extended the powers of the respondents.
2. in the first alternative, removing Mr de Villiers as the commissioner and setting aside the subpoenas issued by him on 2 November and 1 December 2020 for the applicant's interrogation at the enquiry, in the further alternative, merely setting aside the subpoenas.

[6] The relief sought is opposed by the liquidators. Inasmuch as the alternative relief involved a review proceeding, a voluminous record of more than 800 pages was filed. I deal firstly with the applicant's argument that the extension of powers order made by Salie AJ establishing the enquiry and extending the powers of the liquidators should be rescinded.

[72] The above brief description of the commissioner's conduct during the enquiry in the *Hoberman* matter is a world removed from the conduct of the commissioner complained of by the applicant in this matter, namely, issuing two subpoenas against the applicant, a co-director of a company in liquidation and which power was specifically authorised by Salie AJ, and requesting the liquidators' attorneys both to compile the Rule 53 record in these proceedings subject to his approval and to transmit his reasons for not setting aside a subpoena to the applicant's attorneys.

[73] In argument Mr Sievers emphasised that he relied also on the cumulative weight of the various instances of alleged bias of lack of impartiality as making his case for a reasonable perception of apprehension of bias by the applicant. However, in my view the weight of each instance of conduct complained is so little that having regard to their cumulative weight makes no difference at all to my conclusion that such conduct could never justify a reasonable apprehension of bias on the part of the commissioner by the applicant or someone in his position.

[74] For these reasons, save for the two extended powers found not to have been justified, the application must fail. The main relief sought by the applicant was the setting aside of the enquiry and all the extended powers granted to the liquidators. Alternative substantive relief sought was the removal of the commissioner and the setting aside of the subpoenas he authorised. The applicant has failed in all these challenges and such relief as he has achieved is minimal and of little practical relevance to the enquiry. In the result I see no reason to depart from the general rule that a successful party is entitled to its costs. The applicant utilised the services of three counsel, including two senior counsel to deal with a range of legal issues, some relatively complex. In the circumstances the liquidators are entitled to the costs of the two counsel they used. No case for the costs order to be on an attorney and client scale has, to my mind, been made out.

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

1. Paragraphs 2.5 and 2.6 of the Order of Salie AJ dated 19 October 2020 in case number 15082/2020 are rescinded;

2. The application is otherwise dismissed with costs such to include the costs of two counsel.

K2013046547/07 (South Africa) (Pty) Ltd and Others v Hyde Construction CC and Another (513/2020) [2021] ZASCA 82 (17 June 2021):

Sale of business- s 34(3) of the Insolvency Act 24 of 1936 – whether transfer of property to purchaser and bond passed over property is void for the purpose of enforcing a claim – requirement that seller be a trader – onus to show that seller is not a trader discharged – s 34(3) not applicable – transfer and hypothecation not void.

[1] The first respondent (Hyde Construction) applied in the Western Cape Division of the High Court, Cape Town to set aside a transfer of immovable property

and a mortgage bond hypothecating the property in question. By way of an agreement, the third appellant (Blue Cloud) had sold to the first appellant (K company) the property in question. The second appellant (Investec) had provided K company with finance against the registration of a mortgage bond. Hyde Construction contended that the provisions of s 34(3) of the Insolvency Act 24 of 1936 (the Act) rendered the transfer and registration of the mortgage bond void. The second respondent (the Registrar) did not enter the lists either in the court of first instance or on appeal.

[2] In the high court, Kusevitsky J allowed the application and set aside both the transfer and the mortgage bond as void. She held that they were hit by the provisions of s 34(3) of the Act. The relevant parts of the order were:

a) The transfer was 'declared void in terms of s 34(3) of the Insolvency Act No. 24 of 1936 (as amended) in respect of Hyde Construction and that the transfer . . . to [K company] accordingly is declared void, limited to Hyde Construction'.

b) The registration of the mortgage bond was 'declared void in respect of Hyde Construction'.

c) The property was 'declared specially executable and the Sheriff of Knysna (or his/her Deputy) is authorised, upon a duly issued writ of execution, to attach the property, limited to the sum of Hyde Construction's judgment'.

d) Costs against the three appellants were ordered.

The basis for this was a finding that, at the time of transfer, Blue Cloud was a trader as defined in s 2 of the Act. The present appeal is with the leave of the high court.

[3] The property in question, erf 2941 (the erf), is in Plettenberg Bay. It was purchased by Blue Cloud in 2003. Three mortgage bonds in favour of Investec were passed over the erf. I shall refer to these collectively as the old bonds. In 2007, the erf was subdivided into 12 sectional title units in a sectional title scheme called 'SS The Square' (the scheme). Section 1 is a retail shopping centre complex called 'The Square' (section 1) and sections 2 to 12 are residential units. The shopping centre existed prior to this subdivision. In mid-2005, Hyde Construction was contracted by Blue Cloud to conduct renovations to the shopping centre on section 1. Disputes arose between Hyde Construction and Blue Cloud over the renovations. Arbitration proceedings followed in which Hyde Construction was largely successful. This did not resolve the issues between the parties.

[4] In 2010, Hyde Construction instituted action against Blue Cloud for payment of what it claimed was due and owing to it. By then, all of the sections in the scheme, other than section 1, had been sold. In addition, all of the other properties previously owned by Blue Cloud had been sold. This, Blue Cloud says, was as a result of the adverse effect of the 2008 financial crisis on the property market. An order was made separating the issues in the action in terms of Uniform rule 33(4). Judgment on these issues was handed down on 12 August 2015. Hyde Construction was substantially successful, and the court a quo and this Court refused applications for leave to appeal.

[5] Between 2013 and 2015, rental income from the shopping centre proved insufficient to service the old bonds and Blue Cloud had no alternative source of income. Shareholders were obliged to make contributions to service the old bonds, municipal charges and insurance premiums. In October 2013, a call was made on the shareholders to contribute R168 128.36. A further call for a contribution of R423 074.88 was made in November 2013. Other financial pressures mounted. It is fair to say that tensions arose between the two directors of Blue Cloud, who were also the guiding minds behind the respective shareholders.

[6] On 11 April 2014, a sale agreement was concluded between Blue Cloud and K company. What was sold was a rental enterprise in respect of section 1 of the scheme. The purchase price of R36 million was funded by a loan from Investec of R30 million secured by a mortgage bond. The balance was contributed by other investors. One of the two directors of Blue Cloud and his family trusts were obliged to sign deeds of suretyship in favour of Investec before it would lend the R30 million to K company. That director then became a director of K company, but the other director of Blue Cloud did not. Transfer of section 1 to K company took place on 14 August 2014.

[24] At best for Hyde Construction, this described the situation of Blue Cloud as it obtained in August 2014. Even if it can be said that the original core business rendered it a trader, by August 2014 it was no longer one. At the time of the transfer of section 1, on any version, Blue Cloud was not a trader. The court of first instance thus misdirected itself on its finding that Blue Cloud was a trader at the relevant time. The transfer is accordingly not hit by the provisions of s 34(3) of the Act, which applies only to traders.

[25] The application was based squarely on s 34(3) of the Act both in respect of the transfer and the mortgage bond of Investec. There can likewise be no basis for s 34(3) to apply to the mortgage bond if Blue Cloud was not a trader. If the transfer is not affected, neither can a subsequent hypothecation be hit by it. This much was correctly conceded by Hyde Construction in argument. That, then, is an end to the matter.

[26] Unfortunately, however, the waters were muddied by Investec's assertion that it was an 'innocent bystander'. Although this did not bear at all on the point in issue, it prompted Hyde Construction to allege that Investec had been involved in an unlawful and contrived transaction. Since Hyde Construction did not seek to formulate any cause of action other than that under s 34(3), nothing more need have been said about the matter. The court of first instance, however, found itself drawn into making a finding against Investec on the point. Apart from being irrelevant, they were in any event not warranted on the facts. In *Gold Circle (Pty) Ltd v Maharaj*,**[9]** this Court sounded a cautionary note in this regard:

'I consider next the issue whether the court a quo's remarks constituted a lack of judicial restraint. It is indeed so that judicial officers wield great power. While judges

may have occasion to express critical views about litigants or witnesses, such criticism requires circumspection and must be supported by all the facts.'

Those comments apply equally here.

[27] Because the court of first instance dealt with the matter on the basis that s 34(3) applied to the transfer, it made a finding that the mortgage bond was hit by its provisions. Investec urged us to deal with this issue so as to correct what it says is an incorrect application of s 34(3) to a mortgage bond registered over property where the transfer is hit by s 34(3).

[28] As I have indicated, the factual issue of whether Blue Cloud discharged the onus of showing that it was not a trader is dispositive of the appeal. This ought also to have been dispositive of the application. The transfer is not hit by s 34(3). Interesting though the point may be, it would be unwise to enter this terrain, since it is not necessary for the determination of the matter. It should be said, however, that our silence on this issue should not be construed as an endorsement of the correctness of the finding of the court below on this aspect of the application of s 34 to the mortgage bond.

[29] It follows that the provisions of s 34(3) of the Act do not apply to the transfer from Blue Cloud to K company. Neither the transfer nor the registration of the mortgage bond is thus void for the purpose of Hyde Construction enforcing its claim against Blue Cloud. The appeal must succeed. In that instance, the costs must follow the result. In the light of the relative complexity of the matter, the costs of two counsel are warranted where they were so employed.

[30] In the result:

1 The appeal is upheld with costs, such costs to include those consequent upon the employment of two counsel, where so employed.

2 The order of the high court is set aside and substituted with the following order:

'The application is dismissed with costs, such costs to include those consequent upon the employment of two counsel, where so employed.'

Silostrat (Pty) Ltd & Others v Pieter Hendrik Strydom N.O & Others (845/2019, 898/2019) [2021] ZASCA 93 (25 June 2021)

Cession – interpretation of three competing cessions – principles of interpretation of legal documents applicable – importation of words not used in the cession not permitted.Rectification of cession – insufficient evidence to prove mistake common to both parties to the cession for purposes of a claim for rectification thereof.

Trustees- Institution of proceedings against the trustees of the insolvent estate where a debt had been proved and admitted by the trustees improper.

[1] Central to this appeal is the validity and ranking of three cessions executed by Mr Frederick Christoffel Kirsten (Kirsten), whose estate was sequestrated in August 2016. The three cessionaries were: the second appellant, Standard Bank of South Africa Limited (Standard Bank or the bank), the third appellant, Suidwes Landbou (Pty) Ltd, a dealer in agricultural commodities (Suidwes), which had ceded a portion of its book debt to the second respondent, the Land and Agricultural Development Bank of South Africa (Land Bank), and the fifth respondent, Technichem Oesbeskerming (Pty) Ltd (Technichem), a supplier of agricultural chemicals. In the high court each of the three cessionaries, relying on their respective cessions, asserted an entitlement to the proceeds of Kirsten's 2015 maize crop. The first appellant, Silostrat, a grain trader, also laid claim to those funds, based on contracts of sale for the 2015 maize produce, which it had concluded with Kirsten at the start of the 2015/16 maize production season.

[2] The high court:

1. Dismissed Standard Bank's claim against each of the trustees of Kirsten's insolvent estate, Suidwes and the Landbank, with costs including those of two counsel.

2. Dismissed Silostrat's conditional counterclaim against Standard Bank with costs including those of two counsel.

3. Dismissed Silostrat's conditional counterclaim against Suidwes with costs including those of two counsel.

4. Declared Technichem's cession dated 5 October 2014 valid and enforceable.

5. Held that Technichem's cession predates the cessions relied upon by Suidwes and the Landbank in respect of Kirsten's 2015 crop income.

6. Ordered Suidwes to pay Technichem's costs.

Standard Bank appeals against paragraph (1) of the order of the high court, Silostrat against paragraphs (2) and (3) and Suidwes against paragraph (6). In each instance the appeal is with the leave of the high court.

Background

[3] Until his estate was sequestrated in 2016, Kirsten was a widely respected maize, sunflower and cattle farmer in the North West Province, having taken over the farming enterprise from his father, and extended it by renting some of the neighbouring farms. In the course of his farming operations, Kirsten held several bank accounts and enjoyed credit facilities with Standard Bank. He also enjoyed credit facilities with Suidwes and Technichem. As security for these credit facilities, Kirsten executed deeds of cession in favour of his creditors, Standard Bank, Suidwes and Technichem. He also registered a mortgage bond in favour of Standard Bank and a General Notarial Covering Bond in favour of Suidwes.

[4] From October 2014, Kirsten defaulted on his loan repayments. He also failed to deliver the 2015 maize crop, which Silostrat had bought from him. On 13 August 2015, Standard Bank instituted proceedings against Kirsten and the other parties herein, asserting its entitlement to payment of the balance outstanding in Kirsten's loan account from the proceeds of his 2015 maize crop. On 29 April 2016, his estate was provisionally sequestrated. This triggered a contest amongst the cessionaries. On 31 August 2016, a final order of sequestration was granted against Kirsten. After

his sequestration, Kirsten was substituted by his three joint trustees (the Trustees) in the proceedings before the court below. They are collectively cited as the first respondent in the present appeal.

The Standard Bank claim

[5] As a client of the bank, Kirsten held an overdraft and several loan accounts. From 2009, his credit profile was reviewed by the bank during September of each year. In 2011, Mr Lood Mathee (Mathee), a relationship manager with the bank, conducted the review of Kirsten's bank accounts. At that time, Kirsten's indebtedness to Standard Bank was R6.5 million. Kirsten had applied for an increase in his overdraft facility to R 8 million. His financial position was assessed as 'extremely strong' and his farming operation as 'outstanding'. At that stage, the bank held no security for the line of credit afforded to Kirsten. The increase sought was duly approved on condition that he execute a deed of cession in favour of the bank in respect of his crop income and provide proof of the maize that he then held in the silos. It was recorded in his bank file that he owed R16 432 428 to Suidwes and R5 836 988 to another agricultural co-operative, Senwes Limited. Mathee had to investigate and confirm that Kirsten had paid these moneys to the respective institutions.

At the time of sequestration Kirsten's liabilities exceeded his assets by approximately R44 751 458.20. Standard Bank, the Land Bank and Technichem proved their claims against his insolvent estate.**[3]** Silostrat's claim against the insolvent estate was conceded by the trustees during the course of the trial in the high court and judgment was entered by agreement in respect thereof. Nevertheless, Silostrat persisted with its counter claims against Standard Bank and Suidwes.

[35] In dismissing Standard Bank's claim, the high court found that the interpretation contended for by the bank on the wording of its cession was untenable. The learned judge further found that, having proved its claim against the insolvent estate in the sequestration proceedings, Standard Bank had no cause of action in relation to the 2015 maize crop. Further, no proper basis had been laid for rectification of the cession as the bank had failed to establish that Kirsten and the bank were labouring under a common mistake when the cession was executed. The learned judge held that, in any event, rectification of the cession subsequent to the establishment of the *concursus creditorum* would place Standard Bank in a stronger position than it occupied at *concursus creditorum*, to the prejudice of the other creditors.

[36] The high court rejected the interpretation of Suidwes' cessions as evergreen. It found that each cession related to the crop produced in a specific season. As to the Suidwes 2014 cession, the court held that it ranked after the Technichem cession because it was executed later. With regard to the perfected General Notarial Bond, it found that, due to the sale by Suidwes of part of its book debt to the Land Bank, neither entity held any security from Kirsten.

[37] Silostrat's forward agreements were upheld by the high court (in line with the concession made by the Trustees). This meant that Silostrat's claim would be administered in the insolvent estate. However, as already stated, Silostrat persisted with its conditional counter claims, even on appeal.

[38] With regard to its delictual claim against Suidwes, the court found that, contrary to the allegation by Silostrat, Suidwes had not appropriated Kirsten's maize.

Instead, Kirsten had sold the maize to Africum ‘on his own folio number in his own name’.

[39] The high court upheld Technichem’s claim, having found that its cession, executed by Kirsten on 5 October 2014, predated the Suidwes cession. It is noteworthy that none of the parties have sought to assail this conclusion on appeal. The court then awarded the costs incurred by Technichem in the application against Suidwes.

It was Technichem that had instituted proceedings against Suidwes insofar as the ranking of the cessions was concerned. After Silostrat had been joined by agreement between the two parties it (Silostrat) counterclaimed against the Trustees, Standard Bank and Suidwes. The trial lasted 10 days. As stated, Techichem had to be present throughout the proceedings in the high court to protect its interests. There is no valid basis on which this Court can interfere with the exercise of the high court’s discretion in awarding costs against Suidwes in these circumstances.

[59] In the result:

The appeal in each instance by:

(i) the first appellant, Silostrat (Pty) Ltd, against paragraphs 2 and 3;

(ii) the second appellant, Standard Bank, against paragraph 1; and

(iii) the third appellant, Suidwes Landbou (Pty) Ltd, against paragraph 6;

of the order of the court below is dismissed with costs, including those of two counsel where so employed.

Guardrisk Premium Finance (Pty) Limited v Buphe Management (Pty) Limited (39696/2019) [2021] ZAGPJHC 75 (3 June 2021)

Winding-up application- section 344(f) as read with section 345(1)(a) and (c) of the Companies Act, 1973- sufficient evidence to grant

1. The applicant seeks the winding-up of the respondent in terms of section 344(f) as read with section 345(1)(a) and (c) of the Companies Act, 1973.

2. The applicant contends that it is a creditor of the respondent and that the respondent is deemed to be unable to pay its debts.

3. It is unnecessary to detail the nature of the indebtedness due by the respondent to the applicant as the respondent has on its own version, on at least two occasions, admitted an indebtedness to the applicant in a sum of R706 198.11. Suffice it to state that the indebtedness arose from the applicant providing a financing solution to the respondent in respect of short-term insurance premiums which the respondent collects from its clients on a monthly basis.

4. The applicant contends that the respondent is deemed to be unable to pay its debts because the respondent has for three weeks after service upon it in June 2019 of a demand in terms of section 345(1)(a) neglected to pay the sum

reflected in the demand, or to secure or compound for it to the reasonable satisfaction of the creditor and that in any event it has been proven to the satisfaction of the court that the respondent is unable to pay its debts. The respondent disputes this, contending that it *bona fide* disputed the indebtedness on reasonable grounds (more particularly that the amount claimed in the demand of R933, 483.90 is incorrect) and, as developed in argument before me, the respondent's failure to pay its admitted indebtedness is reflective of an unwillingness rather than an inability to pay its debts.

5. It is appropriate to describe certain developments that took place in court before argument commenced on the merits of the application.

6. The applicant previously in June 2020 launched an interlocutory application to compel the respondent to deliver its heads of argument and practice note so that the matter could proceed on an opposed basis. This is because the respondent had not done what is required of its procedurally to enable the matter to be enrolled for hearing. The respondent did then belatedly deliver heads of argument.

7. The applicant proceeded to enrol the matter and it came before Meyer J on 26 November 2020 on an opposed basis. The matter was again postponed that day, with the respondent to pay the costs occasioned by the postponement on the opposed attorney and client scale. The court order expressly provides in paragraph 3 that "*it is recorded that this is the second time that the Respondent's attorneys of record withdrew at the eleventh hour before the hearing of the application*".

44. I am satisfied that such evidence as is before the court does not rebut the presumption of the respondent's inability to pay its debts but to the contrary demonstrates that the respondent is unable to pay its debts Accordingly, upon a consideration of all the affidavits I am satisfied that the applicant has *prima facie* established on a balance of probabilities its entitlement to a provisional winding up order.

45. In doing so, I did not consider the respondent's replying affidavit, which was not commissioned and therefore did not serve as evidence. The applicant's counsel confirmed that no reliance can be placed upon the replying affidavit.

COOPERATIVA MURATORI & CEMENTISTI AND OTHERS v COMPANIES AND INTELLECTUAL PROPERTY COMMISSION AND OTHERS 2021 (3) SA 393 (SCA)

Company — External company — Whether external company may avail itself of business rescue — Companies Act 71 of 2008.

First appellant was a company incorporated in Italy, and registered in this country as an external company (see [1]). It fell into financial difficulties and in Italy instituted proceedings for making an arrangement with its creditors (see [1]). An order initiating this process was obtained from an Italian court (see [1]).
The company's directors later resolved that it was financially distressed and should be placed in business rescue in this country. To this end, business rescue

practitioners were appointed and they approached first respondent. It, however, informed them that as the company was an external company, it could not be placed in business rescue. The application was dismissed but leave granted to appeal to the Supreme Court of Appeal. (See [2], [4].)

Held

Business rescue was, given the wording of s 1*(a)*(i) and part B of ch 2, as compared to part C, of the Companies Act 71 of 2008, not available to external companies (see [6] – [7] and [10] – [12]).

An application to adduce additional evidence on appeal would be dismissed, as would the claim of an order recognising the Italian court's order (see [27] – [28] and [35]). This because (i) it was moot (see [28]); (ii) nothing in it could be enforced or recognised (see [29]); it was unsupported by authority proposed (see [31]); and (iii) it was brought by the wrong party, first appellant, rather than Italian judicial commissioners concerned (see [32] – [33]). The application to lead evidence on appeal would hence be dismissed and likewise the appeal (see [35]).

MONTIC DAIRY (PTY) LTD (IN LIQUIDATION) AND OTHERS v MAZARS RECOVERY & RESTRUCTURING (PTY) LTD AND OTHERS 2021 (3) SA 527 (WCC)

Company — Winding-up — Unlawful alienations and preferences — Void disposition — Payments by company to business rescue practitioner to remunerate them, after commencement of winding-up of company by business rescue practitioner — Whether amounting to void dispositions contrary to law — Consideration of preferential ranking of practitioner's claim for remuneration and expenses — Payments by company amounting to void dispositions — Companies Act 71 of 2008, ss 141(2)*(a)* and 143; Companies Act 61 of 1973, s 341(2).

Company — Business rescue — Business rescue practitioner — Remuneration of — Payments by company to business rescue practitioner, after commencement of winding-up of company by business rescue practitioner — Whether amounting to void dispositions contrary to law — Consideration of preferential ranking of practitioner's claim for remuneration and expenses — Payments by company amounting to void dispositions — Companies Act 71 of 2008, ss 141(2)*(a)* and 143; Companies Act 61 of 1973, s 341(2).

The first-applicant company, Montic Dairy (Pty) Ltd (Montic), was previously under business rescue. The second and third respondents (the BRPs) had been appointed business rescue practitioners in that regard. They were employed by the first respondent, Mazars Recovery & Restructuring (Pty) Ltd (Mazars), which dealt with the day-to-day administration of the business recue proceedings and the rendering of invoices on behalf of the BRPs in respect of their remuneration and expenses. On 16 May 2016, acting under s 141(2)*(a)* of the new Companies Act 71 of 2008, and being of the view that there was no reasonable prospect of Montic being rescued, the BRPs applied in the Pretoria High Court for the discontinuation of business rescue proceedings and the company's final winding-up. An order finally winding up Montic was granted on 14 June 2016.

The subject of the present application in the Western Cape High Court were two payments totalling R1,5 million the BRPs caused to be made to Mazars on 23 May 2016 and 2 June 2016, which amounts, the BRPs claimed, were owing to them for their disbursements and services they had rendered to Montic. In the present application Montic, joined by its liquidators, sought the repayment of such amounts. The basis for such relief was that the payments in question were self-evidently dispositions (by a company being wound up) of property *after the commencement* of the winding-up, and accordingly void in terms of s 341(2) of the old Companies Act 61 of 1973. In this regard, as per the provisions of s 348 of the old Companies Act, winding-up was deemed *to commence* at the time of the presentation to the court of the application for winding-up. Both ss 341(2) and 348 of the old Act were still applicable to the winding-up of commercially insolvent companies such as Montic, by virtue of items 9(1) and (2) of sch 5 to the new Companies Act.

The BRPs opposed the relief sought. They argued that, purposively interpreted, s 341(2) did not prohibit payments made by a company, after the commencement of liquidation proceedings against it, to a BRP to remunerate them in respect of the disbursements and fees they had incurred, both prior to their decision to discontinue business rescue proceedings, as well as thereafter in discharge of the obligation to place the distressed company under final liquidation. In justification of its argument, the BRPs submitted that the interpretation of s 341(2), and more particularly as to what would constitute a disposition by the company of its property, had to be informed by the subsequent (and therefore more recent) provisions of ch 6 of the new Companies Act relating to business rescue, and more particularly the BRPs' preferential entitlement to be paid their remuneration and expenses during the business rescue proceedings. The relevant provision s 143(5) of the new Act provided that '(t)o the extent that the practitioner's remuneration and expenses [were] not fully paid, the practitioner's claim for those amounts [would] rank in priority before the claims of all other secured and unsecured creditors'.
Held, that the effect of s 348 of the old Companies Act was to establish the concursus creditorum at the time that the application for winding-up was lodged. The retention of that provision from the old Act as part of the overall matrix of the law relating to the winding-up of companies meant that the legislature intended it to apply to companies wound up under the new Companies Act where business rescue proceedings had not achieved the desired result and s 141(2)*(a)*(ii) was implemented. (See [28].) It therefore followed that s 341(2) proscribed the disposition of a company's assets after the lodging of an application to wind up (whether that application was at the behest of an ordinary unpaid creditor or a BRP who concluded that the company could not be rescued). Section 143 only afforded the BRP a limited measure of priority when their claim for remuneration was considered by the liquidator in the winding-up process. (See [29].)

Held, further, that to grant the BRPs the relief that they sought in this case would require the court to find that it was implicit in s 143 that they had the right to be paid after the commencement of the winding-up process, before a final order was granted and before the liquidators had done their work to liquidate and distribute the assets in the insolvent company. To import such an interpretation into s 143 would be destructive of the whole basis of the winding-up process, which recognised defined classes of creditors and afforded them priority in respect of their claims according to such classes.

Held, in conclusion, that the payments made by the BRPs to Mazars after their application for an order of liquidation had been lodged on 16 May 2016 were hit by the provisions of s 341(2) of the old Act and fell to be repaid by Mazars.