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Business rescue-validity of resolution of 29 May 2021- especially having regard to the allegation that at the time when it was taken the compulsory liquidation application was extant- compulsory liquidation application in this case must prevail over the business rescue

This is an urgent application that traces its origins to a resolution of the First Respondent("MFM") adopted on 29 May 2021 placing It in business rescue. The resolution was subsequently submitted and filed with the Eighth Respondent ("the Commission") on 31 May 2021. Believing that the resolution was in contravention of Section 129 of the Companies Act, 71 of 2008 the Applicant launched this urgent application seeking final relief in the following terms: That the resolution taken by the Second and Third Respondents to place he First Respondent in business rescue in terms of **Section 129(1)** of the **Companies Act 38 of 2008** be set aside in terms of **Section 130(1)(a)** of the **Companies Act 38 of 2008**; That, pursuant to an order granted in terms of prayer 2 *supra*, it be declared that the business rescue of the First Respondent has ended in terms of **Section 132(2)(a)(i)** of the **Companies Act 38 of 2008**; That, pursuant to an order granted in terms of prayer 2 *supra*, it be declared that the First Respondent is in voluntary winding-up under the supervision of the Fourth and Fifth Respondents with effect from 12 April 2021; That the Eighth Respondent be ordered to change the status of the First Respondent within its records from "Business Rescue" to "In Liquidation"; That the Second and Third Respondents be ordered to pay the costs of this application on a scale as between attorney and client, jointly and severally with any other party opposing;

[2] On 12 April, the Seventh Respondent ("Keysha"), a shareholder of MFM, approved a resolution placing the latter in voluntary liquidation. The resolution took effect on 15 April 2021. Following the coming into effect of the voluntary liquidation of MFM, the Fourth and Fifth Respondents ("Rampatla and Van Den Heaver") respectively, were appointed as liquidators. On 3 May 2021 and ostensibly unhappy with the voluntary winding-up, the Applicant initiated compulsory liquidation proceedings against MFM in this Court ["the compulsory liquidation application"]. On 6 May 2021, the aforesaid application, which is still pending, was served upon MFM.

[3] On 7 May 2021, the Second Respondent ("Roux") challenged the voluntary placement of MFM in liquidation. The challenge was through a legal entity for which he is the sole director and the entity is a creditor of MFM. Following a successful intervention as a creditor of MFM, the Applicant opposed the application by Roux. On 28 May 2021, the North Gauteng Division per Davis J, granted an order reversing the voluntary liquidation status of MFM.

[4] Purporting to be Acting in terms of the provisions of Section 129(1) of the 2008 **Companies Act, on** 29 May 2021, Roux and Van Oosthuizen as directors of Keysha, a shareholder in MFM, took a resolution placing MFM in business rescue. On 31 May 2021, the resolution was submitted to the Commission following which the Sixth Respondent ("Chittenden") became the appointed business rescue practitioner for MFM.

[5] On 31 May 2021, the Applicant launched an application for leave to appeal the order of Davis J setting aside the resolution placing MFM in voluntary liquidation. Davis J dismissed the application for leave to appeal on 1 June 2021. During the hearing hereof Counsel for the Applicant stated that the Applicant has petitioned the Supreme Court of Appeal and that outcome was

still pending. I was urged to ignore this evidence as it lacked supporting material.

[6] At a properly constituted meeting of 3 June 2021, the Board of Directors of Keysha endorsed the decision of 12 April 2021 to place MFM in voluntary winding-up. On 7 June 2021, the Applicant became aware of the resolution to place MFM in business rescue. In response to receipt of news of the placement of MFM on business rescue, the Applicant launched these urgent proceedings on 10 June 2021 seeking relief as described above.

The first issue for determination is whether or not the application was urgent. This becomes of interest to this Court because firstly, the Applicant was granted permission to remove the application from the urgent roll of the 29th of June 2021 and to re-enroll it at his convenience. Secondly, by majority vote the creditors of MFM have decided to grant indulgence for the meeting to decide on the business rescue plan to 31 August 2021. The second issue for determination is the validity of the business rescue resolution of 29 May 2021 especially having regard to the allegation that at the time when it was taken the compulsory liquidation application was extant.

ASSERTIONS OF THE APPLICANT ON URGENCY

[8] When the application first served before this Court on 29 June 2021, the Applicant had by then acquired knowledge that the directors of Keysha had adopted a resolution for the placement of MFM in business rescue. News of the placement of MFM came to his attention on 7 June 2021 and three days thereafter he launched this urgent application. In terms of **Section 150(5)** read with Section 151 of the 2008 **Companies Act a** meeting of creditors ought to be held within 35 days to vote on the business plan prepared by Chittenden.

[9] Thus, by the time the matter came before this Court the Applicant thought that a meeting for the adoption of the business rescue plan was to be held on 5 July 2021. Labouring under this impression, it was evident to him that he would not obtain substantial redress in due course if he elected to bring this application under the normal motion court proceedings. See, *East Rock Trading 7 (Pty) Ltd and Another v Eagle Valley Granite (Pty) Ltd and Others* **(11/33767) [2011] ZAGPJHC 196 (23 September 2011)**. This soon changed when Counsel for Roux and Van Oosthuizen advised that Chittenden would not do so as he was not in possession of documents that would assist him to prepare the business rescue plan. The documents were still in the possession of Rampatla and Van Den Heever.

[10] It became clear that the meeting to vote on the business rescue plan would not proceed on 5 July 2021 and that as such, Chittenden would seek a postponement from the creditors. This fact coupled with the Applicant's omission to serve the application on the employees of MFM persuaded this Court to allow the Applicant to remove the application from the roll but held him liable for the costs of the postponement. So, clearly on the facts stated above the application was urgent as the Applicant had limited time within which to bring the matter before court. Had it not been for lack of service upon the employees, I would have allowed the application to proceed as an urgent matter.

[11] The Applicant subsequently attended to the outstanding issues and enrolled the application on the urgent roll of the 13th of July 2021. He argued that he will still not obtain substantial redress were he to enrol this application in the ordinary motion court. The meeting of the creditors of MFM having been postponed to the 31st of August 2021 and the first available opposed motion date being the 26th of October 2021, it is inexorable to conclude that he will not obtain substantial redress in due course because by the time he is heard on the 26th of October 2021 the meeting would have been held possibly validating the business rescue plan thereby rendering the outcome of the application vain.

ASSERTIONS OF ROUX AND VAN OOSTHUIZEN ON URGENCY

[12] On the application being urgent on the first time it came to court, 29 June 2021, Roux and Van Oosthuizen asserted that the Applicant had confessed that he had known MFM to have been financially struggling as early as the latter part of 2020. The claim that the application was urgent some ten to eleven months later was rather staggering. Similarly, Roux and Oosthuizen persist with their argument of lack of urgency even with the date of 13 July 2021 notwithstanding their acceptance that the first available opposed motion court date is on 26 October 2021 and that as a result the horses would have bolted when the date of opposed motion court finally arrives on 26 October 2021.

EVALUATION

[13] I am somewhat at loss why Roux and Van Oosthuizen stretch as far as the latter part of 2020 to determine whether or not the application that served before this Court on 29 June 2021 was urgent. Insofar as I am concerned that period is neither here nor there. The clock on urgency started ticking on 7 June 2021, the moment the Applicant acquired knowledge of the fact of the adoption of the resolution placing MFM on business rescue and the date on which the meeting of creditors were likely to vote on the business plan. Having regard to the time within which the Applicant launched this application, 10 June 2021, and the date of the meeting of the creditors, it can hardly be said that the urgency was self-created. Accordingly, the application was urgent when it served before this Court on 29 June 2021.

[14] Turning to the question of urgency for the date of 13 July 2021. Once it is established that the first available date for opposed motion court is the 26th of October 2021 and that the meeting of the creditors to vote on the business plan is set for 31 August 2021, it is unproductive to argue that this application should wait until 26 October 2021. That said, it is probably necessary to state that the urgency is not as usual as any other urgent matter but it should nonetheless be considered as such because of the peculiar circumstances around it. For what it is worth, perhaps I should spell it out that the Applicant will not receive substantial redress in due course.

ASSERTIONS OF THE APPLICANT ON THE VALIDITY OF THE RESOLUTION

[15] The Applicant's approach in this regard is that the resolution to place MFM in business rescue adopted in terms of Section 129(1) of the 2008 **Companies Act by** Roux and Van Oosthuizen on 29 May 2021 is invalid because of the provisions of **Section 129(2)(a)** of the same Act, which I will cite in full and discuss later below. Briefly, the section prohibits the adoption of a resolution placing a company in business rescue in circumstances where liquidation proceedings have been initiated. When the resolution was adopted by Roux and Van Oosthuizen on 29 May 2021 the Applicant had on 6 May 2021 already initiated proceedings to liquidate MFM. Accordingly, concluded the Applicant, the resolution that ushered in business rescue on 31 May 2021 is unlawful and ought to be set aside.

ASSERTIONS OF ROUX AND VAN OOSTHUIZEN ON THE VALIDITY OF RESOLUTION

[16] It was argued on behalf of Roux and Van Oosthuizen that the liquidation proceedings initiated by the Applicant on 6 May 2021 were conversion liquidation proceedings brought in terms of the old Companies Act, 61 of 1973. Inherent in Davis J's order of 28 May 2021 setting aside the voluntary status of MFM that was brought about by the resolution of 12 April 2021 was the incapacitation of the conversion application.

[17] This meant somehow that the compulsory liquidation application pending before this Court could not go ahead and that the Applicant will have to start the process all over again. Roux and Van Oosthuizen's justification for this was that the voluntary liquidation and the compulsory liquidation were intricately linked such that one cannot set aside the first one without any consequences on the second. Surprisingly, Roux and Van Oosthuizen conceded that the order of Davis J could not have set aside the compulsory liquidation application pending before this Court.

[18] Roux and Van Oosthuizen were elaborate in showing that submission of the resolution on 31 May 2021 to the Commission meant filing as defined in the 2008 Companies Act. Here the argument was that by the time the Applicant noted his appeal the business rescue had taken effect already. The Applicant had mentioned during argument in court that he has appealed the order of Davis J dismissing his appeal. This could not be taken into consideration as relevant documents that would serve as supporting material was not before court.

LEGAL FRAMEWORK

RELEVANT LEGISLATIVE PROVISIONS

[19] The parties have made numerous references to various statutory provisions. As a result, it could be useful to cite a few of those and perhaps look at case authority to determine what other courts have made of those provisions. The starting point should be Section 130(1)(a) of the 2008 Companies Act which is the Section under which this application has been brought. It provides that:

"*130. Objections to company resolution. —*

(1) Subject to subsection (2), at any time after the adoption of a resolution in terms of section 129, until the adoption of a business rescue plan in terms of section 152, an affected person may apply to a court for an order—

(a) setting aside the resolution, on the grounds that—

(i) there is no reasonable basis for believing that the company is financially distressed;

(ii) there is no reasonable prospect for rescuing the company; or

(iii) the company has failed to satisfy the procedural requirement set out in section 129".

[20] Section 129(1) allows the adoption of a resolution to place a company in business rescue where a Board of that company believes that reasonable grounds listed in Section 129(1)(a) or (b) exist. Section 129(2)(a), on the other hand, prohibits a Board from doing so where liquidation proceedings have been initiated. The two scenarios are cited below in the sequence discussed in this paragraph.

"*129. Company resolution to begin business rescue proceedings. —*

(1) Subject to subsection (2) (a), the board of a company may resolve that the company voluntarily begin business rescue proceedings and place the company under supervision, if the board has reasonable grounds to believe that—

(a) the company is financially distressed; and

(b) there appears to be a reasonable prospect of rescuing the company.

(2) A resolution contemplated in subsection (1)—

(a) may not be adopted if liquidation proceedings have been initiated by or against the company; and

(b) has no force or effect until it has been filed."

[21] Section 150(5) provides that:

"*(5) The business rescue plan must be published by the company within 25 business days after the date on which the practitioner was appointed, or such longer time as may be allowed by—*

(a) the court, on application by the company; or

(b) the holders of a majority of the creditors' voting interests."

[22] Section 151 is headed: Meeting to determine future of company. Subsection (1) thereof provides that: "Within 10 business days after publishing a business rescue plan in terms of section 150, the practitioner must convene and preside over a meeting of creditors and any other holders of a voting interest, called for the purpose of considering the plan."

[23] To the extent that controversy exists on the validity of the resolution adopted in terms of Section 129(1), the meaning of 'initiate' as mentioned in Section 129(2) may require clarification regardless of the common cause stance of the parties on what the meaning of the word is as used in the Section. Clarity on the meaning of the word is vital because depending on the meaning attributed to it, business rescue proceedings will prevail over liquidation proceedings or the latter will over the former. To put this to rest, in Tjeka Training Matters (Pty) ltd v KPPM Construction (Pty) Ltd and Others **2019 (6) SA 185** (GJ) the court, dealing with compulsory liquidation application and after considering a number of decisions, had the following to say about the word:

"*[22] Accordingly, in my view:*

22.1 The liquidation proceedings contemplated in section 129(2) of the 2008 Act must be served on the company, not merely issued to meet the requirements of the section."

The court reached the above after concluding that for a liquidation application to trump over a resolution placing a company in business rescue liquidation

proceedings must have been initiated which means that such application must have been served.

EVALUATION

[24] The central question concerning this matter is the validity of the resolution to place MFM in business rescue. Roux and Van Oosthuizen leaned heavily on the conversion application for the liquidation of MFM by the Applicant and the supposed inextricable relationship between the voluntary and the compulsory liquidation applications. The intricacy of the relationship between the two applications, together dubbed, 'conversion application' is contrived and imaginary.

[25] The above became palpable upon Roux and Van Oosthuizen admitting that the order of Davis J could not have affected the validity of the compulsory liquidation proceedings currently pending before this Court. The pertinent part of Davis J's order reads "*The voluntary liquidation of Mjejane Farm Management (Pty) Ltd and all winding up proceedings in respect thereof, initiated by a resolution dated 12 April 2021 and registered at 15 April 2021, are hereby set aside."*

[26] Their admission is right because the order of Davis J is clear that it does not seek to legislate on matters that fall outside of the jurisdiction of the North Gauteng Division. That leaves the compulsory liquidation application pending before this Court intact. That tramples over the notion that the two liquidation applications, the voluntary and compulsory, are intricately connected such that the setting aside of the voluntary liquidation would necessarily affect the compulsory somehow.

[27] If it is acknowledged, as Roux and Van Oosthuizen do, that the effect of Davis J's order reversed the voluntary status of MFM such as to render it void, it must also be recognised that the only surviving liquidation application is the compulsory one pending before this Court. The disentanglement of what has been referred to as a conversion application leaves the compulsory liquidation application that was initiated by service of the founding papers on MFM on 6 May 2021 extant. It is thus manifest that the compulsory liquidation application preceded the resolution placing MFM in business rescue on 29 May 2021.

[28] The resolution was as such, taken in contravention of Section 129(2)(a) to which I have referred *supra*. The compulsory liquidation application in this case must prevail over the business rescue. In view of the provisions of Section 129(2)(a) of the 2008 Companies Act, a court was never expected to weigh up which of the two would be more appropriate in a particular set of circumstances. The conclusion of this Court means that it is gratuitous to deal with all matters that occurred post the 29th of May 2021.

[29] Among these, was the question of what came first between the leave to appeal and the filing of the resolution placing MFM in business rescue and

whether or not the Applicant has appealed the order of Davis J that he dismissed on 1 June 2021. Additionally, it is also superfluous to traverse the questions that arise in terms of Section 130(1)(a)(i) and (ii) because I have already found that MFM has failed to adhere to the procedural requirements of Section 129.

[30] A further and necessary corollary of Davis J's order, which has been accepted by both parties to this dispute, is the reversal of the voluntary status of MFM. It ought to be a matter of course that Prayer 4 of the Notice of Motion seeking this Court to declare that MFM is in voluntary liquidation cannot be granted. The true situation now is that MFM is not in any form of liquidation but proceedings to have it declared insolvent are pending before this Court.

COSTS

[31] Finally, I turn to the issue of costs. I note that the Applicant has asked for costs on the scale as between attorney and client. I do not think there can be any justification for such costs, certainly not on the basis levied by the Applicant. I believe that Roux and Van Oosthuizen were not necessarily mindful of the unlawfulness of the business rescue resolution that they adopted on 29 May 2021. As such, the appropriate scale in these circumstances should be the normal party and party.

CONCLUSION

[32] Given the above background, the application in terms of Section 130(1)(a) of the 2008 Companies Act succeeds and I make the following order:

1. The Applicant's non-compliance with the Uniform Rules relating to forms, time periods and service is condoned and the matter is heard as one of urgency in terms of Uniform Rule 6(12);

2. The resolution taken by Roux and Van Oosthuizen to place the First Respondent in business rescue in terms of **Section 129(1)** of the **Companies Act, 71 of 2008** is set aside in terms of **Section 130(1)(a)** of the **Companies Act 71 of 2008**;

3. Pursuant to the order granted in terms of prayer 2 *supra*, it is declared that the business rescue of MFM has ended in terms of **Section 132(2)(a)(i)** of the **Companies Act 71 of 2008**;

4. The Commission is directed to remove or cancel the business rescue status of MFM from its records such that it accords with prayer 3 *supra;*

Roux and Van Oosthuizen are directed to pay the costs of this application, jointly and severally.

Meier v Meier (15781/2015) [2021] ZAGPPHC 456 (6 July 2021)
Sequestration application-divorce-arrear maintenance-granted

[1] The parties, respectively referred to as Mr and Mrs Meier, each launched an application against the other. On 9 February 2021, an order was granted that the respective applications be heard together.

[2] In the matter under case number 15781/2015, Mr Meier claims an order for the suspension of a warrant of execution issued by Mrs Meier and in the matter under case number 76643/2019 Mrs Meier claims for the provisional sequestration of Mr Meier's estate. The subject matter of both applications is arrear maintenance.

Background

[3] The parties were previously married to each other, which marriage was dissolved by an order of this court dated 23 May 2018.

[4] In terms of the order the claims in respect of maintenance and accrual were postponed to 29 October 2018. The order further stipulated that, pending the finalisation of the aforesaid issues, the rule 43 order dated 31 March 2017 shall remain in force and effect.

[5] In terms of the rule 43 order of 31 March 2017, Mr Meier had to pay maintenance to Mrs Meier in an amount of R 42 500, 00.

[6] The parties agreed to refer the outstanding issues for arbitration. Advocate Pelser SC was appointed as arbitrator and a pre-trial meeting was held on 3 August 2018 before Mr Pelser.

[7] Prior to the pre-trial, the parties reached an agreement in respect of the outstanding issues in dispute. In terms of the agreement the arrear maintenance payable by Mr Meier to Mrs Meier was R 300 700, 00.

[47] Having regard to the assets in Mr Meier's estate that were not seriously disputed by him, I am satisfied that there is reason to believe that it will be to the advantage of creditors if his estate is provisionally sequestrated.

[48] Mr Meier is a qualified architect and practices as such. It is not clear on the papers which portion of his income is derived from his position as a director of TJ Architects (Pty) Ltd and/or from his profession as an architect. The fact remains that Mr Meier will be in a position to earn an income, even if his estate is provisionally sequestrated.

[49] Mr Davis, furthermore, submits that Mrs Meier should avail herself of alternative remedies to collect the outstanding amount of maintenance, by either approaching the Maintenance Court, instituting contempt proceedings or to execute against Mr Meier's known assets. It does not appear from the facts that these remedies had or will assist Mrs Meier's in the enforcement of the judgment obtained by her in respect of arrear maintenance.

[50] Lastly, Mr Davis emphasised with reference to case law that this court, even if all the other requirements for a provisional sequestration order have been met, still has a discretion, which discretion must be exercised judicially and in accordance with the facts of each matter, to refuse the application.

[51] In *FirstRand Bank Limited v Evans* **2011 (4) SA 597** KZD at 27 the court held that:

"…[If] *the conditions prescribed for the grant of a provisional order of sequestration are satisfied then, in the absence of some special circumstances, the Court should ordinarily grant the order. It is for the Respondent to establish the special circumstances that warrants the exercise of the Court's discretion in his or her favour."*

[52] Mr Meier submitted that the special circumstances are:

[52.1] Mrs Meier has instituted the application for some ulterior purpose, i.e. to enforce payment of a claim for maintenance that is genuinely disputed on *bona fide* and reasonable grounds and not to benefit his creditors; and

[52.2] the *nulla bona* return is older than six months.

[53] Firstly, it became clear during the hearing of the matter that the amount of arrears at the time warrant was issued, is not in dispute.

[54] Secondly and although the *nulla bona* was older than six months, at the time of the hearing of the matter, the arrear amount was still outstanding. In the result, nothing turns on the time period since the *nulla bona* return was issued.

[55] In the premises, Mr Meier has failed to convince me that "*special circumstances"* mitigating against the granting of a provisional sequestration exist.

[56] Both parties have placed new facts before court in the respective further affidavits filed by them. I do not deem the facts relevant for purposes of the granting of a provisional sequestration application. The facts may become relevant when a final order of sequestration is considered.

Order

[57] In the premises, I grant the following order:

1. The application under case number 15781/2015 is dismissed with costs.

2.

2.1 The application for the provisional sequestration of the respondent's estate under case number 76643/2019 is granted.

2.2 A rule *nisi* is issued returnable on 8 October 2021 on which date the respondent should furnish reasons why the order should not be made final.

2.3 Costs of the application to be costs in the sequestration.

Vilcor Enterprises CC v Burnett (24222/2021) [2021] ZAGPPHC 442 (8 July 2021)

Sequestration application-based on possible section 29 voidable transactions-order granted

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

The parties

[3] The applicant is Vilcor Enterprises CC and the respondent is Ms Kylee Burnett.

Background

[4] During 2013 the applicant instituted an action against the respondent in this division under case number 58581/13 for payment in terms of a building agreement concluded between the parties for the building of the immovable property of the respondent in the Wild Teak development.

[5] The respondent defended the action. The issues in the action were separated in terms of Uniform Rule 33(1). The separated issues were heard and the court ruled in

favour of the applicant. The respondent was ordered to pay the applicant's costs. The action is still pending.

[6] Costs were taxed in the amount of R826 331,60. The applicant managed to collect an amount of R454 516,20 from the respondent's funds which were held by her erstwhile attorneys of record, Natalie Visagie Inc. This amount reduced the total amount taxed of R826 331,60 to an amount of R371 815,40.

[7] On or about 8 December 2020 the applicant caused a writ of execution to be issued out of this Court. The writ was re-issued on 15 February 2021 and executed on 12 April 2021.

[8] On 12 April 2021 the applicant's attorney, Mr Stuart, received a telephone call from Advocate Ogunrombi who advised him that he was acting on behalf of a certain third party who allegedly owned the movable properties at the respondent's residence. The details of the said third party were not disclosed to Mr Stuart. Advocate Ogunrombi requested that the movables only be attached and not be removed to enable him to furnish Mr Stuart with proof that they were no longer being owned by the respondent. Mr Stuart did not receive the proof of payment.

he attachment and removal of the movable goods were concluded on 13 April 2021 and a sale in execution was scheduled to take place on 19 May 2021.

[11] On 12 May 2021, Mr Yakopi of Zintle Nkhulu Inc contacted Mr Stuart telephonically. Mr Yakopi informed Mr Stuart that he was acting on behalf of Mr Westernberg, a foreign national of the Netherlands. Mr Westernberg purchased the respondent's immovable property together with the movable properties contained therein. Mr Yakopi subsequently sent Mr Stuart an email confirming their telephone conversation together with proof that the immovable property was transferred into the name of Mr Westernberg on 16 April 2021. The immovable property was sold for an amount of R1 128 000,00. Furthermore, a copy of the deed of sale was also attached in terms whereof Mr Westernberg purchased the movable properties of the respondent for the amount of R214 684,00.

[12] Mr Yakopi threatened the applicant with an urgent application to interdict the sheriff from proceeding with the sale in execution of the movable properties under attachment and/or to claim their return.

[13] The sale of the properties by the respondent to Mr Westernberg prompted the applicant to bring an urgent application for the sequestration of the respondent's estate.

Urgency

[14] The applicant contends that it only became aware of the identity of Mr Westernberg on 12 May 2021 when Mr Yakopi furnished Mr Stuart with a copy of the deed of sale. This was the first day it became aware of the sale of the immovable property.

[15] In terms of **section 29(1)** of the **Insolvency Act, 24 of 1936** as amended ("*the Act*"), the aforesaid dispositions of property by the respondent were done prior to the sequestration of her estate and this may have the effect of preferring one of her creditors above another.

[16] If the dispositions had such effect and were made within six months before the date of sequestration, and immediately after they were made the liabilities of the insolvent exceeded the value of her assets, the court may set them aside.

[17] The disposition of the movable properties allegedly took place on 22 January 2021. Any order of sequestration granted after 21 July 2021 would deprive the trustees of the insolvent estate of the remedy afforded to them in terms of **section 29** of the Act.

[18] The applicant is not able to approach the court in the normal cause as no motion court dates are available before 21 July 2021.

[19] There is also an urgent need to stop the respondent from disposing any other properties.

[20] The court is also requested to adjudicate the matter on an urgent basis to prevent the *concursus creditorum* from suffering any further prejudice.

[21] The respondent denies that the application is urgent. She claims that where the court finds that there is urgency, the urgency is self-created. It was submitted that the applicant was aware that the movable properties were sold and owned by someone else as early as 12 April 2021. The applicant did nothing until on 17 May 2021 when it launched the application. The applicant has not explained why it took 34 days to launch this application when it had knowledge that the movable properties had been disposed of.

[22] The applicant conceded that its attorney received information about the sale of the movable properties that belonged to the respondent on 12 April 2021. However, the details as to who purchased or owned the movable properties and/or the person's attorneys of record at the time, were not disclosed to its attorney, Mr Stuart. It was only on 12 May 2021 that full details about the sale and the ownership of the movable properties were provided to its attorney. The information also included the fact that the immovable property was also sold to Mr Westernberg. It could not have approached the court for relief with sketchy information.

[23] I accordingly ruled that the matter was urgent.

Applicable legal principles

[24] An application in an application for the provisional sequestration of a respondent needs to satisfy the court on a *prima facie* basis that:

24.1 It has a claim against the respondent;

24.2 The respondent has committed an act of insolvency or is in fact insolvent; and

24.3 There is reason to believe that it will be to the advantage of the creditors if the estate of the respondent is sequestrated**[1]**.

[25] De Waal AJ in *Standard Bank of South Africa Ltd v Sauer and Another**[2]***, remarked as follows:

"*4. Given that sequestration applications deal with the status of a person, the bar for obtaining a provisional order is set somewhat higher than that which applies in applications for interim interdictory relief. The question of whether the requirements are met on a prima facie basis is determined by assessing whether the balance of probabilities on the affidavits favour the applicant's case**[3]**. The test can be traced back to the well-known judgment of Corbett JA (as he then was) in Kalil v Decotex (Pty) Ltd & Another* **1988 (1) SA 943** *(A). In that matter, Corbett JA held that a court can hardly decide an application for provisional winding up of a company without reference to the respondent's rebutting evidence. Corbett JA then explained that the term 'prima facie case' means that the balance of probabilities on all the affidavits should favour the granting of the application for provisional liquidation (or sequestration)**[4]**.*

*Applications for the referral of the matter to oral evidence will only be granted in exceptional circumstances in these applications because the granting of the relief does no lasting injustice to the respondent as she will on the return day generally be given an opportunity to present oral evidence on disputes issues**[5]**.*

*5. As far as the first requirement is concerned, i.e. whether the applicant has a claim against the respondent, the SCA added in Kalil that an application for liquidation should not be resorted to in an attempt to enforce a claim which is bona fide disputed. In respect of this requirement, the onus on the respondent is not to show that she is not indebted to the applicant but she must merely show that the indebtedness is disputed on bona fide and reasonable grounds**[6]**. This is known as the Badenhorst rule**[7]**. In short, an application for provisional sequestration should not be used as a means of putting pressure on the respondent to pay a debt which is bona fide disputed."*

The applicant's claim

[26] Two questions arise. The first is whether the applicant has established its claim on a *prima facie* basis, i.e. whether the balance of probability on the affidavits is in its favour. Should this question be answered in the affirmative, the second question is whether the applicant's claim has been shown by the respondent to be *bona fide* disputed on reasonable grounds, in which case sequestration proceedings would be regarded as inappropriate**[8]**.

[27] The applicant alleges that the respondent is indebted to it in the sum of R371 815,40 excluding additional costs of the writ and the sheriff. The respondent contends that amount allegedly being owed by her to the applicant is vague. It does not sufficiently inform her how much she owes to the applicant. She claims that the fact that the applicant has attached, removed and sold the movable properties from her house at an auction on 19 May 2021 raises questions that pertain to the amount allegedly owed to the applicant. It is submitted that the amount realised at an auction cannot be validly set off against the amount of the debt that the applicant holds against her. The movable properties which were sold at an auction did not belong to her. They were unlawfully seized and sold. The owner of the properties has sued the applicant for the recovery of the amount for the value of the goods which was R214 684,00. Should the amount realised at the auction for the sale of the movable properties be set off against the debt of the applicant, how much is it, and how was it calculated considering the other costs attendant thereto.

[28] The respondent asserts that the applicant has launched this application to put pressure on her to pay a debt which is *bona fide* and reasonably disputed. The applicant pretends to be acting in the interest of the *concursus creditorum* while in actual fact it is interested in debt collection for itself.

[29] The above allegations are denied by the applicant in the replying affidavit. It is asserted that a taxed bill of costs represents a liquidated claim that has been fixed. It was submitted that the respondent does not seriously dispute the amount owing. She merely claims that she is not certain as to whether the amount realised at the auction on 19 May 2021 ought to be deducted from the amount owing by her. Despite this uncertainty the amount owing is capable of easy and speedy proof. Should the movable properties not belong to her, the amount due and owing to the applicant remains R371 815,40. Should the goods have belonged to her, the amount due and owing to the applicant is R365 793,84 (R371 815,40 – R6 021,56).

[30] The applicant has attached the judgment in its favour against the respondent to its founding papers, the taxed bill of costs together with proof of payment from the respondent's erstwhile attorneys, Natalie Visagie Inc in the amount of R454 516,20 which reduced the taxed amount to the amount of R371 875,40. I agree with the applicant that a taxed bill of costs represents a liquidated claim that has been fixed.

[31] The applicant's attorney of record, Mr Stuart filed a supplementary affidavit, to which the sheriff's return was attached, explaining what happened to the proceeds of the sale of the movable goods attached, and removed from the respondent's residence on 12 April 2021.

[32] It was submitted in the respondent's heads of argument that there is no explanation why the attorney could supplement an affidavit of a litigant. The supplementary affidavit should not be admitted. I do not agree. The applicant's attorney has been instructed to represent the applicant in the matter. He has personal knowledge of what happened to the proceeds of the sale as advised by the sheriff. All what the affidavit seeks to do is to attach the sheriff's return to confirm what has already been averred in the replying affidavit. There is no prejudice to the respondent. I admitted the supplementary affidavit in the interests of justice.

[33] Whether or not the movable goods will be set off against the debt of the applicant, is immaterial. There is not much difference in terms of the amounts. The fact of the matter is that this does not extinguish the debt due and payable to the applicant. The debt exceeds an amount R100,00 as envisaged in **section 9(1)** of the Act.

[34] In my view, on a balance of probabilities, the applicant has established its claim against the respondent and the respondent has not demonstrated a *bona fide* dispute on reasonable grounds.

Insolvency

[35] The applicant alleges that the respondent committed acts of insolvency as contemplated in **section 8(b)** of the Act when (a) she informed the sheriff that she was unable to satisfy the applicant's warrant and (b) the sheriff was unable to find movable properties to satisfy the warrant. Furthermore, as contemplated in **section 8(c)** of the Act when she disposed of her property which has and could have the effect of prejudicing her creditors or of preferring one creditor above another. It is averred that the respondent is deemed to be unable to pay her debts and is therefore liable to be sequestrated. The applicant contends that the value of the movable properties allegedly sold to Mr Westernberg is not sufficient to satisfy its claim against the respondent. It denies that the alleged sale of the movable properties between the respondent and Mr Westernberg took place, alternatively, that their market value was as stated in the deed of sale.

[36] With regard to factual insolvency, the applicant contends that the respondent does no longer own any immovable, movable or disposable property. Since January 2021, the respondent claims to have received the amount of R1 342 684,00 from Mr Westernberg. However, she does not have any money to pay its debt.

[37] The respondent denies the allegations. She claims that she can pay her debts as and when they fall due. She blames her erstwhile legal representative for not communicating the legal process leading up to judgment to her. The last she knew of the matter was that there was an application for leave to appeal the judgment against her. From there she never heard from her erstwhile attorney until the sheriff attended to her residence with a writ of execution to attach and remove the movable properties. She has not received a proper notice of taxation and/or a notice to execute the movable properties.

[38] She asserts that she is employed and earns a salary of R54 500,00 per month and has two other creditors with whom she is in good standing. One of her creditors, Nedbank, has offered her more credit. She contends that she would be able to negotiate an adequate amount of instalments to liquidate the capital debt owed to the applicant. The applicant refuses to engage her on making arrangements for the proper satisfaction of the debt due (even though it remains vague to her). She claims that if the applicant was open to arranging a liquidated amount of instalment payment, she would be able to pay her debts as and when they fall due. She denies having received the amount for the sale of the immovable property from Mr Westernberg. She contends that the amount was received in trust by the transferring attorney.

[39] In its replying affidavit, the applicant denies that the respondent is solvent. It is contended that the respondent's salary is not sufficient to pay the total debt in a single payment. She has not settled its claim nor attempted to do so. She has admitted that she cannot pay the applicant's claim or any portion thereof and that she does not own any assets.

[40] In *De Waard v Andrew and Thienaus Ltd**[9]***, Innes CJ remarked as follows:

"… *Speaking for myself, I always look with great suspicion upon, and examine very narrowly, the position of a debtor who says, 'I am sorry that I cannot pay my creditor, but my assets far exceed my liabilities'. To my mind the best proof of solvency is that a man should pay his debts; and therefore I always examine in a critical spirit the case of a man who does not pay what he owes.*"

[41] **Section 8** of the Act reads as follows:

"*Acts of insolvency*

A debtor commits an act of insolvency –

(a) …

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

(c) If he makes or attempts to make any disposition of any of his property which has or would have the effect of prejudicing his creditors or preferring one creditor above another."

[42] The respondent could not satisfy the amount that was demanded from her when the sheriff executed the writ at her residence. She disposed of her property which has or could have the effect of prejudicing her creditors or of preferring one creditor above another. I am satisfied under the circumstances that the respondent has committed acts of insolvency as envisaged in **section 8(b)** and (c) of the Act.

Advantage to creditors

[43] The applicant contends that upon the order for the sequestration of the respondent being made, the affairs of the respondent can be investigated by a trustee to establish what assets, voidable preferences or dispositions without value exist to the advantage of creditors. Further that should the sale of the respondent's immovable property be set aside, that will be to the benefit of the *concursus creditorum*.

[44] The applicant has attached a valuation report which shows that there is equity in the immovable property as the property has a municipal valuation of R2 000 000,00. It is submitted that this amount far exceeds the amount previously due to the respondent's bondholder and a trustee will be able to ensure that the respondent's property is realised for its true value, and that the proceeds are distributed *pro rata* amongst the respondent's creditors.

[45] It is submitted that the trustee can also investigate the circumstances giving rise to the alleged sale of the respondent's movable goods and determine whether monies were actually exchanged or, as the applicant suspects, the sale was merely a simulated transaction to avoid execution proceedings taking place. Furthermore, the trustee will be able to investigate what happened to the balance of the amount of R1 342 684,00 allegedly received from Mr Westernberg after the bondholder had been paid, alternatively, whether further amounts changed hands between the respondent and Mr Westernberg.

[46] The applicant asserts that despite having liquidated her assets, the respondent does not intend to pay her creditors. It is only through the sequestration of her estate that her *concursus creditorum* can expect to obtain redress.

[47] The respondent reiterates that besides the applicant, she has other two creditors with whom she is in good standing. She will remain in good standing with them as she has the ability and will to make payments as and when they fall due. She claims that the respondent refuses to engage in a proper and mature fashion with a view to liquidate the debt in monthly instalments until final payment.

[48] She denies that the sequestration of her estate will be to the advantage of creditors. It is submitted that the sequestration of the respondent's estate will only benefit the applicant.

[49] The *onus* of establishing advantage to creditors remains on the sequestrating creditor throughout, even where it is clear that the debtor has committed an act of insolvency**[10]**. In certain earlier cases (e.g. *Wilkins v Pieterse*), the view was taken that once an act of insolvency (i.e. any act) is proved, the court will require convincing reasons to persuade it that sequestration will not be to the advantage of creditors. However, more recently, the courts have held that the commission of an act of insolvency is not necessarily material to the question of advantage to creditors. Certain acts of insolvency by their nature, tend to indicate advantage to creditors – for instance, a disposition of property which prejudices or prefers one creditor above another – but other acts, e.g., a *nulla bona* return, do not (see, e.g. *Lotzof v Raubenheimer**[11]***).

[50] Sequestration will only be to the advantage of creditors if it will result in a greater dividend to them than would otherwise be the case – e.g., through the setting aside of impeachable transactions, or the exposure of concealed assets – or if it will prevent an unfair division of the proceeds of the assets or some creditors being preferred to others**[12]**.

[51] In *Gardee v Dhanmanta Holdings & Others**[13]***, a debtor's only creditor applied to sequestrate his estate on the basis of a *nulla bona* return. The court held that the creditor had to satisfy it that there was reason to believe that, after the costs of sequestration had been paid, he would recover an amount that was not negligible. Furthermore, he had to demonstrate some reasonable expectation that the amount would exceed the likely proceeds of ordinary execution. As he had given no information other than that he had obtained a *nulla bona* return, he had failed to show that sequestration would be to his advantage (see also *Mamacos v Davids**[14]***).

[52] The court does not have to be satisfied that sequestration will benefit creditors financially, merely that there is reason to believe that it will:

"*The facts put before the court must satisfy it that there is a reasonable prospect – not necessarily a likelihood, but a prospect which is not too remote – that some pecuniary benefit will result to creditors**[15]***."

[53] The respondent claims that she does not longer own any movable or immovable property. It was not disputed that the sale of her immovable property had the effect of settling the amount due to her previous bondholder. From her own version, the respondent contended that she pays her other creditors while she failed and/or neglected to pay the applicant's debt.

[54] The applicant's evidence relating to the valuation of the immovable property has not been rebutted. The applicant submits that should the sale of the respondent's immovable property be set aside, that will be to the advantage of creditors as the municipal valuation of R2 000 000,00 exceeds the value of the bond previously registered over the property which was R1 304 000,00. Furthermore, that the sequestration of the respondent's estate will ensure that the immovable property and

any other movable property she may possess, is realised for its true value and the proceeds thereof are distributed *pro rata* amongst the respondent's creditors.

[55] In my view, the acts of insolvency committed by the respondent indicate an advantage to creditors. I am satisfied that there is a reasonable prospect that some pecuniary benefit will result to the creditors. Under the circumstances, the applicant has discharged its *onus* of establishing that the sequestration of the respondent's estate will be to the benefit of the creditors.

Conclusion

[56] It therefore follows that a proper case has been made out for a provisional order of sequestration.

Costs

[57] The respondent sought costs *de bonis propriis* against the applicant's attorney of record for launching the application.

[58] Mr J Vorster made submissions against the costs order sought against the applicant's attorney by the respondent.

[59] I have found in favour of the applicant in this application. The issue of the *de bonis propriis* costs order against the applicant's attorney sought by the respondent does not arise. I am therefore not inclined to grant further costs in this application save for the costs in the sequestration.

[60] Consequently, an order is made in terms of the draft order marked "X".

Nzwalo Investments (Pty) Ltd v Infoguardian (Pty) Ltd (6950/2020) [2021] ZAGPJHC 95 (23 July 2021):

1 The applicant ("Nzwalo") seeks the winding-up of the respondent ("Infoguardian") on the basis that Infoguardian is unable to pay its debts within the meaning of section 345 (1) (c) of the Companies Act 61 of 1973 ("the Act").

2 The application was originally opposed. Answering affidavits and heads of argument were filed for both parties. Counsel for both parties submitted a joint practice note after the matter was placed on my roll.

3 However, Infoguardian's legal representatives then withdrew, and Infoguardian was left unrepresented. Nzwalo's attorneys contacted Infoguardian shortly before the hearing to confirm that the matter would proceed, but no-one ultimately appeared for Infoguardian at the hearing.

4 The matter accordingly proceeded unopposed, but Mr. Hollander, who appeared for Nzwalo, nonetheless carefully presented the case, and dealt fairly with the issues raised in Infoguardian's answering affidavit.

5 On a conspectus of the papers, I am not satisfied that section 364A of the Act has been complied with, and I will postpone the application to permit that to happen. I briefly set out my reasons for reaching this conclusion below.

6 The matter originally came before Francis-Subbiah AJ, on 30 June 2020. Francis-Subbiah AJ granted a provisional winding-up order. All those with a legitimate interest in the winding-up of Infoguardian were called upon to advance reasons why the winding-up order should not be made final on 30 September 2020. On 30 September 2020, the return day of the provisional order was extended to 30 November 2020. It seems that on that date, the papers had not been made available to the presiding Judge seized with the matter, and the matter was not entertained. The return date was not extended further.

Section 346A (1) (b) of the Act reads as follows –

> (1) A copy of a winding-up order must be served on-
>
> (a) . . . .
>
> (b) the employees of the company by affixing a copy of the application to any notice board to which the employees have access inside the debtor's premises, or if there is no access to the premises by the employees, by affixing a copy to the front gate, where applicable, failing which to the front door of the premises from which the debtor conducted any business at the time of the presentation of the application;
>
> (c) . . .

8 At first blush, this provision contains an anomaly, in that the opening phrase of section refers to the service of the order, but the body of section 346A (1) (b) refers to the application. Whatever the cause of the anomaly, the least the section requires is that both the application papers and any provisional winding-up order must be served in the manner specified. These requirements are peremptory (*Hendricks NO v Cape Kingdom (Pty) Ltd* **2010 (5) SA 274** (WCC), paras 31 and 50).

9 Mr. Hollander accepted that the provisional order had not been served in the manner required by section 346A (1) (b). Francis-Subbiah AJ's order had been served on Infoguardian's erstwhile attorney, who had agreed to send the order on to Infoguardian's employees.

10 This is plainly unsatisfactory. It is inconsistent with the Act, and it fails to have regard to the fact that, in these proceedings, Infoguardian's employees have a fundamentally different set of interests to Infoguardian itself. In those circumstances, service on Infoguardian's attorney, whatever his undertakings, cannot be proper service, whether in terms of the Act, or otherwise.

11 Mr. Hollander very fairly conceded this. However, he argued that it may be appropriate to consider the provisional order as having the effect of a *rule nisi*, which lapsed when it was not extended on 30 November 2020. A *rule nisi* has a fixed period of validity. Once that period of validity has expired, the *rule* lapses (see *Fisher v Fisher* **1965 (4) SA 644** (W)). If the *rule nisi* has lapsed, there is nothing to be re-served on Infoguardian's employees, and the final winding-up application can be disposed of without further delay.

12 The problem in this case is that I do not think that Francis-Subbiah AJ's order can be read as having the effect of a *rule nisi*. In the first place, the order does not describe itself as a *rule nisi*. Secondly, there is nothing in the Act that suggests that provisional winding-up orders are *rules nisi* by nature. This is to be contrasted with section 11 of the Insolvency Act 24 of 1937, which clearly states that provisional sequestration orders are *rules nisi*. Thirdly, there is nothing in the language of Francis-Subbiah AJ's order itself that suggests that the provisional order will lapse in the event that the return day is not extended.

13 The concept of a *rule nisi* is to be distinguished from that of a provisional or interim order. A *rule nisi* is an order to show cause on a return day why a particular order should not be made. On its own, a *rule nisi* has no legal effect other than to put those to whom it is addressed on notice that specified relief will be sought on the return day.

14 An interim or provisional order is different. The order has specified legal consequences beyond mere notice of the prospect of final relief being granted.

15 Often a *rule nisi* and an interim interdict are issued in the same order at the same time, but that does not mean they are the same thing. When a *rule nisi* is coupled with an interim interdict, the order sought to be confirmed on the return day will have interim effect until the return day. If the return day passes then both the *rule* and the interdict expire.

16 But, unless a Court specifically directs that it should take the form of a *rule nisi*, it seems to me that a provisional winding-up order has a life of its own, underpinned by the Act, with legal consequences that do not depend on a court's willingness to extend them to a specified return day. The provisional order subsists until the final disposition, one way or the other, of the winding-up application.

17 The return day in Francis-Subbiah AJ's order was simply a date on which an application for the final winding-up order could have been considered in light of the submissions made by any person who responded to the provisional order. It was not intended to circumscribe the effect of the provisional order itself.

18 There is nothing that suggests that the provisional order would itself cease to have effect if the return day came and went without further action on the part of the court. It seems to me that such a consequence would be inherently undesirable, because it would mean that a company could be placed in and out of provisional winding-up simply because, as happened this case, a clerical error meant that the return day could not be extended.

19 Had the Act intended provisional winding-up orders to have such a tenuous existence, it would surely have provided specifically for provisional winding-up orders to take the form of *rules nisi*, as section 11 of the Insolvency Act 24 of 1937 does.

20 It follows that Francis-Subbiah AJ's order remains in effect, but the provision of the Act requiring its service on the respondent's employees has not been complied with. The only relief to be granted in those circumstances is to postpone the matter to permit Nzwalo to comply with section 346A (1) (b) of the Act.

21 In the circumstances, I make the following order –

21.1 The application is postponed to the opposed motion roll at 10am on 4 October 2021.

21.2 The applicant is directed to serve a copy this judgment and the order of Francis-Subbiah AJ on the respondent's employees in the manner provided for in 346A (1) (b) of the Companies Act 61 of 1973.

21.3 All persons with a legitimate interest are called upon to put forward their reasons why this court should not order the final winding-up of the respondent on 4 October 2021 at 10am, or as soon thereafter as counsel may be heard.

21.4 Costs are reserved.

Fuelex (Pty) Limited v SP Attorney Incorporated and Others (42546/2020) [2021] ZAGPJHC 103 (23 July 2021):

Applicationf for liquidation-provisional order not served –rule nisi extended.

[1]. In this opposed application by the applicant for the liquidation of the first respondent, I am required to adjudicate only the issue of costs. The applicant, after having proceeded with the application and after having received the first respondent's answering affidavit, now has a clear understanding of the true facts in the matter, which do not support the applicant's cause to have the first respondent liquidated. This, so the applicant contends, was as a result of the first respondent playing 'cat-and-mouse' prior to the applicant issuing the liquidation application, leaving the applicant no choice but to base its legal action on inferential reasoning.

[2]. In its replying affidavit dated the 17th of December 2020, the applicant gave a clear and unequivocal indication that it has no intention of prosecuting the application further. The liquidation application has accordingly for all intents and purposes been abandoned by the applicant, who is however not prepared to formally withdraw the application, as that would entail it having to tender the costs of the application. The applicant contends that the conduct of the first respondent was *mala fide* and unbecoming of a firm of attorneys and which conduct left the applicant with no alternative but to take the legal action it did. Therefore, because of these special circumstances, so the applicant submits, it should not be held liable for costs. In fact, so the argument on behalf of the applicant goes, the first respondent should pay the applicant's costs.

[3]. The first respondent, on the other hand, contends that the applicant had no business diving headfirst into an urgent application for the liquidation of the first respondent, before first establishing the facts. The first respondent has been successful in opposing the application for its liquidation and therefore, so the argument on behalf of the first respondent goes, applying the general rule, the applicant should be liable for the first respondent's costs.

[4]. The trigger for the liquidation application was an assumption by the applicant that the first respondent had misappropriated about R960 000 of the applicant's money, which it (the first respondent) had received from the second respondent in settlement of the latter's indebtedness to the applicant. This amount, so the applicant assumed, had been stolen by the first respondent, relying in that regard on a communication from the second respondent. With the benefit of hindsight, which, we know, is an exact science, it can safely be said that that that assumption was wrong. The applicant's attorneys therefore demanded payment of the settlement amount of the R960 000 odd by 14:00 on the 23rd of November 2020, failing which, so the demand went, the applicant would proceed with an urgent winding up application.

[5]. In its written response on the 25th November 2020 to the aforesaid demand, the first respondent gave a perfectly plausible explanation to the effect that at some point it (the first respondent) acted for both the applicant and the second respondent. The latter during April 2020 instructed them to make to the applicant a settlement offer, but before the offer could be made, the applicant terminated the first respondent's mandate. The first respondent therefore, on instruction from the second respondent, held on to the R960 000 and awaited further instructions from the second respondent.

Importantly, the claim by the first respondent that the matter had not been settled was corroborated by the objective documentary evidence, notably the fact that the supposed settlement agreement had not been signed by the applicant. As already indicated, the indications were that the first respondent's explanation was viable especially in view of the fact that no settlement agreement had been concluded in relation to the dispute between the applicant and the second respondent.

[6]. Strangely, the applicant, probably motivated by a deep-rooted suspicion of the first respondent and some serious conspiracy theories harboured by the applicant, fuelled by an erroneous claim by second respondent that the dispute had been settled between them, opted not to accept the first respondent's explanation. In fact, what the applicant then did was to 'jump the gun', as it was put by the first respondent in their papers, and to launch the urgent application for the liquidation of the first respondent. In my view, this cause was ill-advised and misguided. This is so simply because of the quantum leap that need to be taken by the applicant from the point of the suspicion that the first respondent had stolen the money – with no real objective facts to support the suspicion – to positive allegation that the first respondent owes the applicant the said sum as a basis for a liquidation of the first respondent.

South African Reserve Bank v Leathern N.O and Others (854/2020) [2021] ZASCA 102 (20 July 2021)

Assets– funds in bank accounts blocked in terms of Regulation 22A and/or 22C of the Exchange Control Regulations – whether the requirements to set aside blocking order satisfied – whether such funds vested in an insolvent estate – whether sequestration order invalidates blocking order.

[1] On 15 June 2017 the appellant, the South African Reserve Bank (the Reserve Bank) issued a blocking order against two bank accounts of Mr Ahmed Dawood Bhorat, trading as R & R Traders and Brokers (R and R Traders) held with the fourth respondent, Grobank Limited (formerly the Bank of Athens). The accounts were blocked on suspicion that Mr Bhorat had used them in contravention of certain provisions of the Exchange Control Regulations (the regulations); promulgated in terms of s 9 of the Currency and Exchanges Act 9 of 1933 (the Act).**[1]** At the time, the funds standing to his credit in the two accounts were R13 132 887.98 and R1 868 995.05, respectively.

[2] Five days later, on 20 June 2017, Mr Bhorat's estate was provisionally sequestrated at the instance of the South African Revenue Services (SARS), pursuant to an unsatisfied judgment obtained against Mr Bhorat in March 2015 for outstanding tax liability of over R40 million. The first, second and third respondents were provisionally appointed co-trustees of Mr Bhorat's estate on 11 July 2017, and finally appointed on 24 October 2018, following confirmation of the provisional sequestration order on 5 March 2018.

[3] The trustees asserted that in terms of s 20(2)(*a*) of the Insolvency Act 24 of 1936 (the **Insolvency Act) the** funds formed part of Mr Bhorat's estate, and as such, vested in them as the trustees of his insolvent estate with effect from the date of Mr Bhorat's provisional sequestration, 20 June 2017. Accordingly, they demanded that the funds be paid over to them. The Reserve Bank declined for Grobank to do so, and contended that according to its investigations, the funds did not 'belong' to Mr Bhorat and accordingly did not accrue to his insolvent estate.

[4] Consequently, the trustees launched an application in the Gauteng Division of the High Court, Pretoria (the high court) seeking a declaratory order that the funds vested in them as the trustees of the insolvent estate of Mr Bhorat. Ancillary thereto, they sought an order lifting the 'blocking' order; and for Grobank to pay over the funds to them. The Reserve Bank opposed the application. Grobank did not oppose the

application, and has adopted the same stance in this appeal by filing a notice to abide the decision of this Court.

[5] The thrust of the trustees' application was that: (a) the Reserve Bank did not have reasonable grounds to block Mr Bhorat's accounts; (b) neither the regulations under which the accounts were blocked, nor the common law, exclude or exempt the funds from vesting in the insolvent estate; (c) the blocking of the accounts did not divest Mr Bhorat's insolvent estate of the ownership of the funds, nor did it grant the Reserve Bank a preferent right to the funds above the rights of the creditors in the insolvent estate. The trustees' assertions prevailed in the high court, which issued a declaratory order that the funds vested in Mr Bhorat's insolvent estate. The high court accordingly lifted the blocking order and ordered Grobank to immediately pay over the funds to the trustees. The Reserve Bank was also ordered to pay the costs of two counsel.

On appeal from: Gauteng Division of the High Court, Pretoria (Holland-Müter AJ sitting as court of first instance):

1 The appellant's application to adduce further evidence is dismissed with costs including the costs of two counsel.

2 The appeal is upheld with costs including the costs of two counsel.

3 The order of the high court is set aside and replaced with the following:

'The application is dismissed with costs including the costs of two counsel.'

Capitec Bank Holdings Limited and Another v Coral Lagoon Investments 194 (Pty) Ltd and Others (470/2020) [2021] ZASCA 99 (9 July 2021)

Company law- Sale of shares-Contract – approach to interpretation – good faith – consent as a requirement for the sale of shares – past conduct as a guide to interpretation – parol evidence rule – good faith at common law – independent source of contractual obligation – orders requiring the grant of consent

[1] The first appellant, Capitec Bank Holdings Limited (Capitec Holdings), the first respondent, Coral Lagoon Investments 194 (Pty) Ltd (Coral), and the second respondent, Ash Brook Investments 16 (Pty) Ltd (Ash Brook), in December 2006, concluded a subscription of shares and shareholders agreement (the subscription agreement). Pursuant to the subscription agreement, Coral subscribed for, and Capitec Holdings issued, 10 million ordinary shares to Coral. Coral, in turn, was required to allot and issue shares to Ash Brook so as to constitute Ash Brook as the only ordinary shareholder of Coral. This was done. The object of the subscription agreement was, as its recital explains, to permit Capitec Holding to increase its black shareholding, and thereby fulfil its black empowerment obligations.

[2] Regiments Capital (Pty) Ltd (Regiments Capital) held a 59.82% interest in Ash Brook. On 8 August 2019, Regiments Capital, and various parties related to it (the Regiments Parties), Coral and the third respondent, the Transnet Second Defined Benefit Fund (the Fund), entered into a settlement agreement. The settlement agreement required Regiments Capital and the Regiments Fund Managers to pay the Fund a settlement amount of R500 million, together with interest, in settlement of the Fund's claims against the Regiments Parties. Those claims arose from litigation instituted by the Fund against the Regiments Parties. The Fund alleged that the Regiments Parties had defrauded the Fund and sought to recover monies for the benefit of the Fund's members. The settlement amount was to be funded by the sale of 810 230 Capitec Holdings shares (the sale shares). The proceeds of the sale were to be used to discharge the settlement amount owing to the Fund, with the balance of the purchase price to be paid by the Fund to an account nominated by Coral.

[3] Among the suspensive conditions in the settlement agreement, clause 3.1.4 stipulated that 'the Capitec Consent having been duly obtained and executed'. The Capitec Consent was defined to mean 'the written agreement and consent of Capitec to the sale and purchase of the Sale Shares . . .'. This condition was stated to be for the sole benefit of the Regiments Parties and Coral.

[4] Coral and the Fund sought to obtain the consent of Capitec Holdings for the disposal of the sale shares by Coral. Correspondence between the parties ensued. The positions adopted by the parties will be considered in what follows. Capitec Holdings did not give its consent. On 2 September 2019, Coral and Ash Brook brought an urgent application in the Gauteng Division of the High Court, Johannesburg (the high court). They sought a declarator that the withholding by Capitec Holdings of its approval or consent for the disposal of the sale shares pursuant to the settlement agreement was unreasonable as contemplated in clause 13.7 of the subscription agreement and in breach of Capitec Holdings' duties of good faith in terms of clause 13.11 of the subscription agreement, alternatively, at common law. In addition, mandatory relief was sought, directing Capitec Holdings to give its approval or consent in terms of the settlement agreement. The Fund, cited as the third respondent in the application, brought a counter-application against Capitec Holdings for an order that Capitec Holdings had no right under the subscription agreement to prevent Coral from selling the sale shares to the Fund.

[5] The predicate of Coral and Ash Brook's application was that Capitec Holdings was obliged to consent to the sale by Coral of the sale shares to the Fund. The counter-application of the Fund proceeded from a different premise: the sale by Coral of the sale shares to the Fund does not require the consent of Capitec Holdings in terms of the subscription agreement. Capitec Holdings opposed both applications. However, in doing so, Capitec Holdings acknowledged that Coral could sell its shares to anyone without securing the consent of Capitec Holding. That did not mean that Coral's sale of the sale shares was without consequence. Capitec Holdings contended that if the purchaser of the sale shares was not a qualifying black person (in terms of the applicable legislation), then Capitec Holdings enjoyed the right to require Coral to acquire an equal number of Capitec Holdings shares, to replace the sale shares it had sold, in terms of clause 8.3 of the subscription agreement.

[6] Two minority shareholders of Ash Brook, the fourth respondent, Rorisang Basadi Investments (Pty) Ltd (Rorisang) and the fifth respondent, Lemoshanang Investments (Pty) Ltd (Lemoshanang), were given leave by the high court to intervene. They supported the application of Coral and Ash Brook and the relief claimed by them.

the Supreme Court of Appeal (SCA) handed down a judgment upholding the appeal against the Gauteng Division of the High Court, Johannesburg with costs, including the costs of two counsel.

The first appellant, Capitec Bank Holdings Limited (Capitec Holdings), the first respondent, Coral Lagoon Investments 194 (Pty) Ltd (Coral), and the second respondent, Ash Brook Investments 16 (Pty) Ltd (Ash Brook), in December 2006, concluded a subscription of shares and shareholders agreement (the subscription agreement). Pursuant to the subscription agreement, Coral subscribed for, and Capitec Holdings issued, 10 million ordinary shares to Coral. Coral, in turn, was required to allot and issue shares to Ash Brook so as to constitute Ash Brook as the only ordinary shareholder of Coral. This was done. The object of the subscription agreement was, as its recital explains, to permit Capitec Holding to increase its black shareholding, and thereby fulfil its black empowerment obligations.

Regiments Capital (Pty) Ltd (Regiments Capital) held a 59.82% interest in Ash Brook. On 8 August 2019, Regiments Capital, and various parties related to it (the Regiments Parties), Coral and the third respondent, the Transnet Second Defined Benefit Fund

(the Fund), entered into a settlement agreement. The settlement agreement required Regiments Capital and the Regiments Fund Managers to pay the Fund a settlement amount of R500 million, together with interest, in settlement of the Fund's claims against the Regiments Parties. Those claims arose from litigation instituted by the Fund against the Regiments Parties. The Fund alleged that the Regiments Parties had defrauded the Fund and sought to recover monies for the benefit of the Fund's members. The settlement amount was to be funded by the sale of 810 230 Capitec Holdings shares (the sale shares). The proceeds of the sale were to be used to discharge the settlement amount owing to the Fund, with the balance of the purchase price to be paid by the Fund to an account nominated by Coral.

Coral and the Fund sought to obtain the consent of Capitec Holdings for the disposal of the sale shares by Coral. Capitec Holdings did not give its consent. On 2 September 2019, Coral and Ash Brook brought an urgent application in the Gauteng Division of the High Court, Johannesburg (the high court). They sought a declarator that the withholding by Capitec Holdings of its approval or consent for the disposal of the sale shares pursuant to the settlement agreement was unreasonable as contemplated in clause 13.7 of the subscription agreement and in breach of Capitec Holdings' duties of good faith in terms of clause 13.11 of the subscription agreement, alternatively, at common law. In addition, mandatory relief was sought, directing Capitec Holdings to give its approval or consent in terms of the settlement agreement. The Fund, cited as the third respondent in the application, brought a counter-application against Capitec Holdings for an order that Capitec Holdings had no right under the subscription agreement to prevent Coral from selling the sale shares to the Fund.

The applications were heard in the high court by Vally J. He found for Coral and Ash Brook and determined that Capitec Holding's refusal to consent to the sale of the sale shares was in breach of its contractual and common law duties of good faith and reasonableness and ordered Capitec Holdings to consent to the sale within two days of the grant of the order. Capitec Holdings was also ordered to pay the costs of Coral and Ash Brook, and the costs of the Fund and the two intervening parties, Rorisang and Lemoshanang. Vally J refused Capitec Holdings leave to appeal these orders. This Court however granted leave.

The main issue in this appeal was whether Capitec Holdings' consent was required before Coral could sell the sale shares to the Fund, and if it was, did Capitec Holdings owe duties of good faith and reasonableness to Coral, which Capitec Holdings breached in failing to consent to the sale? The high court found that Capitec Holdings' consent was required for the sale of shares to take place, and Capitec Holdings was in breach of its duties of good faith and reasonableness in failing to consent to the sale. As a result, the high court issued an order declaring that Capitec Holdings' refusal to consent to the sale was in breach of its contractual and common law duties of good faith. The high court, in addition, issued a mandamus requiring Capitec Holdings to grant its consent to the sale within two working days.

The SCA found that the text of clause 8.3 offered no indication that the consent of Capitec Holdings was required to permit Coral to sell the sale shares to the Fund. It held that the high court was in error in finding that the subscription agreement required the consent of Capitec Holdings in order for Coral to proceed with the sale to the Fund. It held that the high court proceeded from its assessment of the conduct of Capitec Holdings to its conclusion as to the contents of the subscription agreement. The analysis should have commenced with an interpretation of what the subscription agreement provided. The SCA was of the view that had the high court done so, the meaning of clause 8.3 would have become plain.

The SCA considered the recent decision of the Constitutional Court in *University of Johannesburg* as to the relationship between the admission of extrinsic evidence to determine the meaning of a contract and the parol evidence rule. The implication of the decision was to render the parol evidence rule a residual rule.

It was found that the manner in which the parties implemented the subscription agreement was relevant evidence as to what clause 8.3 meant. Extrinsic evidence was found to be admissible to understand the meaning of the words used in a written contract. The SCA reiterated the Constitutional Court affirmation about the fact that an expansive approach should be taken to the admissibility of extrinsic evidence of context and purpose, whether or not the words used in the contract were ambiguous, so as to determine what the parties to the contract intended.

Further, the SCA was of the view that that Capitec Holdings wished to enforce its rights in terms of the subscription agreement could not be held to be a breach of good faith. Nor could good faith be marshalled to require Capitec Holdings to give consent, when none was required of it. The SCA held that the *Beadica* judgment provided an authoritative interpretation of cases that explain the role that good faith

plays in the law of contract. It was therefore found that the high court's reasoning based upon good faith, and the respondents' submissions in support of that reasoning, could not survive the exposition in *Beadica*. The reasoning for this was that *Beadica* affirmed that while good faith underlined the law of contract and informed its substantive rules, good faith and fairness were not substantive, free-standing principles to which direct recourse may be had so as to interfere with contractual bargains or decline to enforce contracts.

The SCA held that ultimately, what Coral and Ash Brook were in reality seeking was a waiver by Capitec Holdings of its right to require Coral to repurchase the equivalent number of shares it wished to sell. Further, Capitec Holdings had no obligation to do so, and invocations of good faith could not alter that position. In the result the appeal was upheld with costs, including the costs of two counsel, paragraphs 4 – 8 of the order of the high court were set aside and replaced with the following: 'the application under case number 30899/2019 is dismissed; the applicants and the first and second Intervening Parties in case number 30899/2019 shall pay the costs of the first and second respondents, such costs to include the costs of two counsel, where employed'.

Trevo Capital Ltd and Others v Steinhoff International Holdings (Pty) Ltd and Others (2833/2021) [2021] ZAWCHC 123 (2 July 2021):

Compromise with creditors-section 155- sec 155 proposal seeking a declaratory order that two of the classes of creditors identified therein, namely, the Contractual claimants and the MPC claimants, do not constitute a '*class of creditors'* as envisaged by sec 155 of the Act and as such the compromise is not sanctionable by Court under sec 155(7)(b) of the Act. The present proceedings constitute, indirectly, a separate challenge to Steinhoff's sec 155 proposal.

[1] On 5 December 2017 the Steinhoff Group announced that its annual financial statements would be delayed and the following day its CEO, Mr Markus Jooste, resigned with immediate effect. What followed were revelations of large scale and longstanding irregularities in the financial statements of the Group which led to a massive decline in the value of its traded shares as well as acts of default in relation to major loan instruments. In the intervening years a process of debt restructuring was commenced within the Group which is ongoing and numerous legal claims were brought against Steinhoff companies by a variety of claimants whose shares had lost all but a fraction of their previous value.

[2] The applicants in the present matter are two such claimants. The first applicant, Trevo Capital Ltd (hereinafter 'Trevo'), instituted action against the first respondent (Steinhoff International Holdings (Pty) Ltd) (hereinafter 'SIHPL'), claiming in excess of R2bil, being a loss allegedly suffered as a result of SIHPL's alleged intentional, alternatively, negligent misstatements in its 2015 annual financial statements. The action is at an advanced stage but has not yet been certified as '*trial ready'*. Trevo's case is that, but for such statements, it would not have purchased shares by means of a forward sale which it concluded on or about in October 2015 with a related company.

[3] The second and third applicants, Hamilton BV and Hamilton 2 BV, (jointly referred to as 'Hamilton'), are foreign companies which between them allege that

they have taken assignment of more than 14 000 claims by investors against SIHPL and Steinhoff International Holdings NV (SIHNV), its Dutch subsidiary. Hamilton has instituted two claims against SIHPL in this Court in which they seek to recover losses allegedly suffered by the individual investors attributable to SIHPL's intentional, alternatively negligent, misstatements in its financial statements.

[4] SIHPL is a now private company. It was previously registered as a public company, Steinhoff International Holdings Ltd ('SIHL'), and listed on the JSE as the holding company of the Steinhoff Group of companies. In December 2015, pursuant to a scheme of arrangement in terms of sec 114 of the Companies Act, 71 of 2008 ('the Act'), SIHL's entire issued share capital was swapped for shares in Steinhoff NV ('SIHNV'), a company listed on both the JSE and the Frankfurt Stock Exchange. Investors who previously held shares in SIHL became shareholders in Steinhoff NV, the new holding company of the Steinhoff Group. The second respondent, Global Loan Agency Services (hereinafter 'GLAS'), is a limited company incorporated in terms of the laws of the United Kingdom and carries on business as a provider of financial administration services.

[5] The third respondents are the financial creditors of SIHPL as defined in a proposal by SIHNV and SIHPL (together 'Steinhoff') in terms of sec 115 of the Act to effect a compromise of their financial obligations with three classes of creditors identified therein, many of whose claims arise from the accounting irregularities referred to earlier. In July 2020 the broad terms of Steinhoff's proposed compromise with its creditors were set out in a '*term sheet'* on SIHNV's website. That term sheet was updated in October 2020 and has since been formally published by SIHPL pursuant to an order of this Court on 25 January 2021 making provision for publication of the proposal to creditors and all interested parties in terms of sec 155(2) of the Act. The proposal together with annexures runs to some 270 pages and was published on 23 March 2021. It involves the compromise of Steinhoff's financial obligations to three classes of creditors which were initially referred to in the term sheet as the CPU Creditors (FC or Financial Creditors class), Contractual claimants (CC class) and Market Purchase claimants (MPC class).

[6] In separate proceedings the applicants have challenged the sec 155 proposal seeking a declaratory order that two of the classes of creditors identified therein, namely, the Contractual claimants and the MPC claimants, do not constitute a '*class of creditors'* as envisaged by sec 155 of the Act and as such the compromise is not sanctionable by Court under sec 155(7)(b) of the Act. The present proceedings constitute, indirectly, a separate challenge to Steinhoff's sec 155 proposal.

Serious irregularities in financial statements of Steinhoff International (SIHPL) led to a massive decline in the value of its shares. Numerous claims were brought against Steinhoff companies by claimants, such as the applicants, whose shares had lost value. Most of the claims originated in a guarantee by SIHPL of a convertible bond issued to financial creditors and a subsequent contingent payment undertaking (CPU) replacing the guarantee.

The applicants sought a declarator that the guarantee and the CPU constituted the provision of financial assistance by SIHPL to a related company as contemplated in section 45(2) of the Companies Act 71 of 2008.

Bozalek J confirmed the applicants' standing [para 40] and discussed the applicability of the proper plaintiff rule against recovery of reflective loss [para 36].

Considering the applicability of section 45 to foreign companies, the court examined the Act's definitions of "company" and "corporation"; and discussed the approach to statutory interpretation and the presumption against superfluity.

The court concluded that the CPU constituted the provision of financial assistance by SIHPL and the declaratory relief to that effect was granted, while interdictory relief sought was refused.

Trevo Capital Ltd v Steinhoff International Holdings (Pty) Ltd [2021] JOL 50841 (WCC)

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FIRSTRAND BANK LTD v MASTER OF THE HIGH COURT, PRETORIA AND OTHERS 2021 (4) SA 115 (SCA)

Insolvency — Creditors — Secured creditors — Liability for contribution to costs of liquidation where free residue insufficient to cover — Where relying solely on their security and petitioning creditor not proving claim — Insolvency Act 24 of 1936, ss 14(3), 89(2) and 106*(a)*.

Insolvency — Creditors — Petitioning creditor — Liability for contribution to costs of liquidation where free residue insufficient to cover — Where secured creditors relying solely on security and petitioning creditor not proving claim — Insolvency Act 24 of 1936, ss 14(3), 89(2) and 106*(a)*.

The second respondent, a body corporate, was the petitioning creditor (for arrear levies) in the sequestration of the owner of a sectional title unit within the scheme it administered. No concurrent creditors proved any claims. The free residue in the estate having been insufficient to cover the estate's administration costs, the third

and fourth respondents, trustees of the insolvent estate, levied a contribution for the shortfall against two secured creditors — who relied solely on the proceeds of the property which constituted their security. One of these was the appellant bank (FRB), the other the fifth respondent, Nedbank. The body corporate did not prove a claim. Instead, to collect the arrear levies, it relied on the statutory obligation to settle arrear levies as prerequisite for the registration of transfer, after the properties constituting FRB and Nedbank's security were sold in execution (see [6]).

When the first respondent, the Master, would not entertain FRB's objection to the contribution raised, it took the Master's decision to include such contribution in the estate accounts on review in the High Court. The present case concerned FRB's appeal (to the Supreme Court of Appeal) against the High Court's order, which had held FRB (and Nedbank) pro rata liable for the contribution together with the petitioning creditor.

In determining the liability for a contribution when the petitioning creditor has not proved a claim and the secured creditors have relied solely on their security, the correct interpretation of the following sections of the Act were at issue —

- s 89(2) of the Insolvency Act 24 of 1936 (the Act), that where creditors rely for the satisfaction of their claim solely on the proceeds of the property which constitutes their security, they shall not be liable for any costs of sequestration other than the costs specified in s 89(1), and other than costs for which they may be liable under paras *(a)* and *(b)* of the proviso to s 106;
- s 106*(a)*, that, if *all* the creditors *who have proved claims* against the estate are secured creditors, who would not have ranked upon the surplus of the free residue if there were any, they shall be liable to make good the whole of the deficiency, each in proportion to the amount of his claim; and
- s 14(3), that, in the event of a contribution by creditors under [s 106], the petitioning creditor, '*whether or not he has proved a claim against the* estate . . . shall be liable to contribute not less than he would have had to contribute if he had proved the claim stated in his petition'.

Held

The proviso in s 106*(a)* meant that only if all creditors relied solely on their security — ie there were no concurrent portions to their claims — would they be liable for the whole deficiency, each in proportion to their claim. (See [37] and [38].)

Section 14(3) sought to avoid a situation where a creditor would petition for the sequestration of the estate and not prove a claim, only for other creditors 'to pick up the costs'. In terms of s 14(3) the petitioning creditor would always have to contribute; the section contained no exceptions. The petitioning creditor was placed in the same position as it would have been had it proved its claim. Section 106, while not deeming the petitioning creditor to have proved a claim, read together with ss 14(3) and 89(2), properly construed, meant that the provisions of s 106 applied to the petitioning creditor 'whether or not [it] has proved a claim'. It should be treated in the same manner as a creditor who had proved its claim. (See [38], [40] and [43].)

When there was no free residue, or it was insufficient, the first port of call would therefore be to look to the petitioning creditor to contribute, along with concurrent creditors who have proved their claims, and secured creditors who would have ranked upon the surplus of the free residue. Only if there were no other proved and concurrent creditors (including the petitioning creditor) able to contribute, would the secured creditors who relied solely upon their security be called upon to pay (s 106*(a)* read with s 89(2)). It was clear that in this case the body corporate, as the petitioning creditor, was solely liable to pay the costs of sequestration as the other

two creditors (FRB and Nedbank) were secured creditors who relied solely on their security. The appeal would accordingly succeed.

BESTER NO AND OTHERS v CTS TRAILERS (PTY) LTD AND ANOTHER 2021 (4) SA 167 (WCC)

Insolvency — The Master — Decisions — Decision to approve request to disregard set-off — Effect — Not mere formality — Binding until set aside — Insolvency Act 24 of 1936, s 46.

Insolvency — Pre-sequestration set-off — Disregard of at instance of trustee — Master's decision to approve not mere formality and binding until set aside — Insolvency Act 24 of 1936, s 46.

Company — Winding-up — Liquidator — Debt recovery — Disregard of set-off occurring within six months of liquidation — Master's certificate — Effect — Not mere formality — Binding until set aside — Insolvency Act 24 of 1936, s 46.

Section 46 of the Insolvency Act 24 of 1936 provides that the Master may approve a decision by a trustee (or liquidator in the case of a company) to disregard a set-off that occurred within six months before the sequestration and which did not take place in the ordinary course of business.
In the present case before the Cape Town High Court the liquidators (the first to third applicants) claimed from the first respondent an amount representing the latter's indebtedness to the fourth applicant (the company in liquidation). A dispute arose as to the effect of a previous purported set-off of a debt of R1,9 million owed by the fourth applicant to the first respondent. The liquidators submitted that they had requested the Master to disregard the set-off because it did not take place in the ordinary course of business; and that such request had been approved, such that there had been no discharge of the first respondent's debt to the amount of R1,9 million. Counsel for the first respondent argued, however, that set-off had indeed occurred in the ordinary course of business and that the Master's decision disregarding the set-off therefore had no legal effect.
The court ruled that even if first respondent's argument that set-off had occurred, had merit, it faced a fatal obstacle: the liquidators were entitled to disregard set-off because of the effect of s 46, which applied as a consequence of the Master's decision, and this position would obtain until and unless a successful review was brought (see [27]). In arriving at this conclusion, the court rejected the first respondent's argument that there was no need to take the Master's decision on review given that it was merely a part of the liquidators' cause of action and had no legal effect: it was no mere formality and had a clear and profound legal effect in that a set-off could be invalidated (see [23] – [25]). Therefore, the first respondent would be directed to pay the applicants the R1,9 million (see [48]).
The first respondent was granted leave to appeal — see *Bester NO and Others v CTS Trailers (Pty) Ltd and Another (Leave to Appeal)* 2021 (4) SA 180 (WCC).

BESTER NO AND OTHERS v CTS TRAILERS (PTY) LTD AND ANOTHER (LEAVE TO APPEAL) 2021 (4) SA 180 (WCC)

Insolvency — The Master — Decisions — Decision to approve request to disregard set-off — Effect — Proper construction of s 46 of Insolvency Act 24 of 1936 — Supreme Court of Appeal to provide guidance — Leave to appeal to *SCA* granted.

Insolvency — Pre-sequestration set-off — Disregard of at instance of trustee — Construction of enabling provision — Supreme Court of Appeal to provide guidance — Insolvency Act 24 of 1936, s 46.

Company — Winding-up — Liquidator — Debt recovery — Disregard of set-off occurring within six months of liquidation — Master's certificate — Effect — Proper construction of s 46 of Insolvency Act 24 of 1936 — Supreme Court of Appeal to provide guidance — Leave to appeal to SCA granted.

Section 46 of the Insolvency Act 24 of 1936 provides that the Master may approve a decision by a trustee (liquidator in the case of a company) to disregard a set-off that occurred within six months before the sequestration and which did not take place in the ordinary course of business. The issue in the present application for leave to appeal was whether s 46 contained three distinct requirements: (i) set-off within six months before sequestration; (ii) not in the ordinary course of business; and (iii) the Master's approval (certificate).
Counsel for the first respondent argued that the court had in the main judgment misconstrued s 46 by disregarding the first two requirements and conflating all three into the decision of the Master. He contended that the authority of the Master's certificate applied only once the first two requirements had been independently established. The court, he said, should have considered whether the six-month period was met (which was common cause) and then whether the set-off had taken place in the ordinary course of business (which was hotly disputed), at which point it could have turned to the effect of the Master's certificate. (See [17] – [18], [24].) The court's own view was that it had to start the evaluation from what was required for s 46 to be invoked, namely the Master's certificate, and then follow up by asking what its effect was (see [14]).
The court, observing, however, that there was a dearth of authority on the proper interpretation of rule 46 and that counsel's interpretation was not implausible, ruled that guidance on this from the Supreme Court of Appeal was required and granted leave to appeal (see [29]).

END-FOR NOW