INSOLVENCY LAW UPDATES AUGUST 2021[1]

INDEX

CASE NAMES

SUBJECT INDEX

CASES

CASE NAMES

DE JONGH ONTWIKKELINGS (PTY) LTD AND ANOTHER v KILOTECH INVESTMENTS (PTY) LTD AND OTHERS 2021 (4) SA 492 (GP)

FIRST NATIONAL NOMINEES (PTY) LTD AND OTHERS v CAPITAL APPRECIATION LTD AND ANOTHER 2021 (4) SA 516 (GJ)

Johannes v Christensen N.O. and Others (CIV APP FB 13/2019) [2021] ZANWHC 26 (19 August 2021)

Masango and Others v DNA Ammoniak Dienste CC and Others (28444/2021) [2021] ZAGPPHC 536 (19 August 2021)

Massyn v De Villiers NO and others [2021] 3 All SA 578 (WCC)

Mercantile Bank (A Division of Capitec Bank Limited) v Ross (2020/19791) [2021] ZAGPJHC 149 (13 August 2021)

MGG PRODUCTIONS (PTY) LTD v RAMODIKE NO AND OTHERS 2021 (4) SA 543 (GJ)

NDPP v Sharma and Others (2427/2021) [2021] ZAFSHC 172 (11 August 2021)

NUMSA AND ANOTHER v SOUTH AFRICAN AIRWAYS SOC LTD AND OTHERS 2021 (4) SA 575 (LC)

Van Zyl v Auto Commodities (Pty) Ltd [2021] 3 All SA 395 (SCA)

Watson NO v Ngonyama and another [2021] 3 All SA 412 (SCA)

---

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

SUBJECT INDEX

Business rescue – Effect of termination on surety's obligations – Section 154(2) of the Companies Act 71 of 2008 does no more than preclude creditors from pursuing claims against the company after the business rescue plan has been implemented – The liability of a surety for a debt is not extinguished. Van Zyl v Auto Commodities (Pty) Ltd [2021] 3 All SA 395 (SCA)

Business rescue — Moratorium on legal proceedings against company — Employment-related claims against company in business rescue — Whether Labour Court having jurisdiction — Companies Act 71 of 2008, s 133. NUMSA AND ANOTHER v SOUTH AFRICAN AIRWAYS SOC LTD AND OTHERS 2021 (4) SA 575 (LC)

Business rescue-directors-functions- directors remain directors -they operate under the authority of the business rescue practitioners. If Mr Hellens' proposition is correct, it would mean that the directors may perform certain governance functions without the authorisation, consent, instruction or direction of the business rescue practitioners. This would undermine the whole business rescue scheme and would give rise to an undesirable parallel management of a company. It would effectively mean that the directors may hold meetings and resolve to institute or defend legal proceedings without the intervention or knowledge of the business rescue practitioners. This cannot be correct. NDPP v Sharma and Others (2427/2021) [2021] ZAFSHC 172 (11 August 2021)

Business rescue-legal proceedings- There is no reason in law or logic why the converse should also not hold true: the company may not commence, defend or proceed with legal proceedings without the consent of the business rescue practitioner. NDPP v Sharma and Others (2427/2021) [2021] ZAFSHC 172 (11 August 2021)

Business rescue-setting aside resolution to commence- no longer financially distressed, and that good cause exists to terminate the business rescue proceedings-director passed away and left huge policies- Mr Keevy objected to this said "hopelessly insolvent" yet could not prove it-Landbank supported the setting aside of the resolution Masango and Others v DNA Ammoniak Dienste CC and Others (28444/2021) [2021] ZAGPPHC 536 (19 August 2021)

Company law– Donation of shares to achieve Broad-based Black Economic Empowerment objectives – Application for restoration of shares based on alleged misrepresentation as to Broad-based Black Economic Empowerment shareholding of entity to whom shares were donated – Where entity receiving donated shares was liquidated and liquidators were not joined in the proceedings, order for restoration of shares not capable of execution. Watson NO v Ngonyama and another [2021] 3 All SA 412 (SCA)

Company — Shares and shareholders — Shareholders — Appraisal rights of dissenting shareholders — Consideration of share buy-back proposal under s 48(8)*(b)* of Companies Act (company acquiring more than 5% of its own issued

shares or any particular class thereof) FIRST NATIONAL NOMINEES (PTY) LTD AND OTHERS v CAPITAL APPRECIATION LTD AND ANOTHER 2021 (4) SA 516 (GJ)

Debts due to company in liquidation-bona fide defence recognized-remitted to trial Johannes v Christensen N.O. and Others (CIV APP FB 13/2019) [2021] ZANWHC 26 (19 August 2021)

Liquidators– Extension of powers of liquidators – Section 386 of the Companies Act deals with the powers of liquidators and provides for a court, if it deems fit, to grant leave to a liquidator to do anything which the court may consider necessary for winding up the affairs of the company and distributing its assets. Massyn v De Villiers NO and others [2021] 3 All SA 578 (WCC)

Liquidators– Extension of powers of liquidators to include establishing enquiry into company's affairs, in terms of section 417 of Companies Act 61 of 1973 – Whether liquidators had established jurisdictional requirement that the company was unable to pay its debts in the course of being wound up – In absence of positive assertion that company was able to pay its debts at the material time, argument based on lack of jurisdictional requirement found to be without merit. Massyn v De Villiers NO and others [2021] 3 All SA 578 (WCC)

Sequestration application- Mr Ross as surety and co-principal debtor; the defence that Mr Ross should have been released from liability as surety because of the bank's repudiation or breach of the agreement when it interfered with his duties; the circumstances of the disposal of the property; advantage to creditors; and the application by Mr Ross for a referral for oral evidence; A provisional order of sequestration of the respondent's estate is granted. Mercantile Bank (A Division of Capitec Bank Limited) v Ross (2020/19791) [2021] ZAGPJHC 149 (13 August 2021)

Set-off — Pre-sequestration set-off — Disregard of at instance of trustee — Ambit of enabling provision — Meaning of proviso that set-off was not 'in the ordinary course of business' — Interpretation of Insolvency Act 24 of 1936, s 46. MGG PRODUCTIONS (PTY) LTD v RAMODIKE NO AND OTHERS 2021 (4) SA 543 (GJ)

Unlawful alienations and preferences — Collusive disposition — Collusive disposition of property to related company leaving insolvent company with less value on its books at time of liquidation — Prejudicial to creditors — Disposition impeachable under s 31(1) of Insolvency Act 24 of 1936. DE JONGH ONTWIKKELINGS (PTY) LTD AND ANOTHER v KILOTECH INVESTMENTS (PTY) LTD AND OTHERS 2021 (4) SA 492 (GP)

Unlawful alienations and preferences — Disposition without value — Concepts of 'illusory' and 'adequate' value discussed — Abandoning right to part payment of purchase price in favour of related company — Impeachable transaction under s 26(1) and s 31(1) of Insolvency Act 24 of 1936. DE JONGH ONTWIKKELINGS (PTY) LTD AND ANOTHER v KILOTECH INVESTMENTS (PTY) LTD AND OTHERS 2021 (4) SA 492 (GP)

CASES

NDPP v Sharma and Others (2427/2021) [2021] ZAFSHC 172 (11 August 2021)

Business rescue-directors-functions- It is correct that the directors remain directors but, importantly, they operate under the authority of the business rescue practitioners. If Mr Hellens' proposition is correct, it would mean that the directors may perform certain governance functions without the authorisation, consent, instruction or direction of the business rescue practitioners. This would undermine the whole business rescue scheme and would give rise to an undesirable parallel management of a company. It would effectively mean that the directors may hold meetings and resolve to institute or defend legal proceedings without the intervention or knowledge of the business rescue practitioners. This cannot be correct.

Business rescue-legal proceedings- There is no reason in law or logic why the converse should also not hold true: the company may not commence, defend or proceed with legal proceedings without the consent of the business rescue practitioner.

[1] This judgment concerns a point *in limine*. The applicant contended that the directors of the third defendant and their attorneys do not have *locus standi* to oppose a provisional order (order), issued by this court on 2 June 2021, in terms of section 26 of the Prevention of Organised Crime Act (POCA).

[2] The directors of the third defendant resolved that it begin voluntary business rescue proceedings and that the company be placed under supervision in terms of section 129 (1) of the Companies Act.

[3] On 18 February 2018 the fourth and fifth defendants were appointed as business rescue practitioners of the third defendant.

[3] The relationship between the business rescue practitioners on the one hand and the directors and shareholders of the third respondent on the other was not peaceable. It was, and seemingly still is, characterised by acrimony and dissent. I say this because the conflict between them is still wending its way through the courts.

[4] During November 2018 Ms Chetali Gupta, a shareholder of the third defendant, applied for the removal of the fourth and fifth respondents as business rescue practitioners of the third respondent. A full court of the Gauteng High Court, Pretoria granted the application.

[5] Dissatisfied with that decision, the business rescue practitioners appealed to the Supreme Court of Appeal. The appeal was upheld, on 9 December 2020, and the business rescue practitioners were effectively reinstated.

[6] On 9 January 2021 Ms Gupta applied to the Constitutional Court to appeal against the Supreme Court of Appeal's decision. Since that application was out of time – it was lodged more than 15 days after the order of the Supreme Court of Appeal – she simultaneously applied for condonation for filing it late. These applications have not yet been determined by the Constitutional Court.

[7] Amidst those legal fights, the applicant obtained the provisional order which, in turn, gave rise to this legal fight.

[8] On 15 June 2021 BDK Attorneys (BDK), purportedly acting on behalf of the third defendant, served a notice of intention to oppose the confirmation of the *rule nisi* on the State Attorney. On 16 June 2021 BDK filed an answering affidavit deposed to by Ms Ronica Ragavan, a director of the third defendant.

[9] In the purported answering affidavit, she declared that she is authorised to represent the third respondent in these proceedings and to depose to the answering affidavit on its behalf. The applicant has not replied to the purported answering affidavit because it is of the view that its deponent has no authority to oppose the application.

It is correct that the directors remain directors but, importantly, they operate under the authority of the business rescue practitioners. If Mr Hellens' proposition is correct, it would mean that the directors may perform certain governance functions without the authorisation, consent, instruction or direction of the business rescue practitioners. This would undermine the whole business rescue scheme and would give rise to an undesirable parallel management of a company. It would effectively mean that the directors may hold meetings and resolve to institute or defend legal proceedings without the intervention or knowledge of the business rescue practitioners. This cannot be correct.

[30] Instituting or defending legal proceedings has financial implications. Costs orders against a financially distressed company may have far-reaching implications for the implementation of a business rescue plan and may result in the company not achieving a better return for its creditors or shareholders. This, on its own, is more than enough reason why the business rescue practitioners must be centrally involved when litigation on behalf of the company in business rescue is embarked upon.

[31] With regard to criminal proceedings, section 133(1)(d) makes plain that criminal proceedings against the company or its officers may be commenced or proceeded with during business rescue proceedings. In terms of section 133(1)(a) during business rescue proceedings, no legal proceedings may be commenced or proceeded with against the company except with the written consent of the business rescue petitioner. There is no reason in law or logic why the converse should also not hold true: the company may not commence, defend or proceed with legal proceedings without the consent of the business rescue practitioner.

[32] I therefore conclude that the company had no right to authorise BDK to oppose proceedings on its behalf, without the authority of the business rescue practitioners. Therefore, BDK had no proper mandate to appear on behalf of the third defendant. The company's decision is void for lack of approval by the business rescue practitioners.

[33] The applicant did not ask for a costs order. I am also of the view that no costs order ought to be made.

[34] I therefore make the following order:

1. BDK Attorneys do not have authority to act on behalf of the third defendant in these proceedings.

2. The directors and or shareholders of the third defendant have no standing to oppose these proceedings without the approval of the business rescue practitioners.

Masango and Others v DNA Ammoniak Dienste CC and Others (28444/2021) [2021] ZAGPPHC 536 (19 August 2021)

Business rescue-setting aside resolution to commence- no longer financially distressed, and that good cause exists to terminate the business rescue proceedings-director passed away and left huge policies- Mr Keevy objected to this said "hopelessly insolvent" yet could not prove it-Landbank supported the setting aside of the resolution

[1] This came before me as an urgent application in terms of which the Applicants seek an order that the resolution adopted by the members of the First Respondent on 6 December 2019 to commence business rescue proceedings in terms of s 129 of the Companies Act 71 of 2008 be set aside in terms of s 130(1)(a) and in terms of which, furthermore, they sought an order that the business rescue proceedings of the First Respondent be terminated in terms of s 132(2)(a)(i) of the Companies Act 71 of 2008.

[2] When the Applicants launched this matter on 20 July 2021, they did not ask for an order for costs because they did not anticipate that the matter would be defended. Now that the matter is defended by the First and Second Intervening Parties, the Applicants seek an order of costs against them.

[3] **THE PARTIES**

[3.1] The Applicants are all major males and general workers in the permanent employ of the First Respondent with their residential addresses situated at portion 53 of the Farm Witklipbank, Delmas.

[3.2] The First Respondent is DNA Ammoniak Dienste CC (under business rescue), a close corporation duly incorporated and registered as such in terms of the Close Corporations Act 69 of 1984 with its registered place situated as HS Van Coller & Kie Delchip Building, 19 4th Street, Delmas.

[3.3] The Second Respondent, Attie Schlechter, is a major male business rescue practitioner and an attorney cited in this matter in his representative capacity as the appointed business rescue practitioner of the First Respondent practising as such under the name of Copper Lake Business Rescue CC and AS Incorporated Attorneys with business address situated at 26 Pretorius Avenue, Lyttleton Manor, Pretoria.

[3.4] The Third Respondent in this matter is the Companies and Intellectual Properties Commission with its principle place of business at the DTI Campus, Block F, 77 Meintjies Street, Sunnyside, Pretoria.

[4] This application is opposed by the First and Second Intervening Parties (the trustees) in their

capacities as the joint insolvent trustees in the joint estate of the late Daniel Frederik Broekman Senior (the deceased) and his surviving spouse Annette Broekman (Mrs Broekman).

BACKGROUND FACTS

[5] The First Respondent is a commercial farming entity which conducts such business from one immovable property which it owns as well as on three other immovable properties which are owned by two of the members of the First Respondent. The First Respondent's major client is McCains which purchases most of the yearly crops harvested by the First Respondent in its business activities. The First Respondent is a family business, and the members were the deceased") who held 30% member's interest, his wife and surviving spouse, Mrs Broekman, who also holds 30% member's interest in the First Respondent. The remaining members of the family business are Daniel Frederik Broekman, (Daniel) and his sister, Ms Almé Broekman, (Alme) who each holds 20% member's interest respectively. Daniel and Almé are both the children of the deceased and Mrs Broekman.

[6] The Applicants are permanent employees of the First Respondent and are employed as general farm workers. As indicated above, the primary objective of this application is to have the resolution which commenced the business rescue proceedings of the First Respondent set aside in terms of s 130(1)(a) of the Companies Act 71 of 2008 ("the Act"). This section provides that any affected person may apply to Court to have the resolution set aside. As the employees of the First Respondent, the Applicants are affected persons as envisaged and defined in s 128(1)(a)(iii) of the Act. Accordingly, the Applicants have the requisite *locus standi* to approach the Court for the relief sought.

[7] The farming activities of the First Respondent were mainly the responsibilities of both the deceased and Daniel. The deceased normally took responsibility of the business affairs but slowly introduced Daniel to that portion of the business.

[8] Mrs Broekman was, and still is, mainly responsible for the administration of the business activities. Almé was mostly a silent member of the close corporation and never participated in the business activities. The deceased and Mrs Broekman were married in community of property to each other. They signed sureties in their personal capacities on behalf of the First Respondent and therefore, all the creditors of the deceased and Mrs Broekman and the First Respondent are the same creditors.

In his answering affidavit Mr Keevy informs the Court that the First Respondent is "*hopelessly insolvent"* and that if the First Respondent's business rescue

proceedings be terminated, all the debts would become due and payable, and the creditors would be able to act against the First Respondent. In the first place, Mr Keevy is not the business rescue practitioner of the First Respondent. Therefore, nothing empowers or authorises him to make this statement on behalf of the First Respondent. This is a statement that should have been made by the Second Respondent. Secondly, and more importantly, Mr Keevy has attached no documentary proof to this affidavit to substantiate his statement that the First Respondent is "*hopelessly insolvent*". It is difficult to accept Mr Gibson's argument that Mr Keevy considered the financial position of the First Respondent and determined that the First Respondent could not be saved without referring to a document containing his determination. Mr Keevy filed no document in support of his determination. Informing creditors and employees of the status of the First Respondent does not mean that it can simply be done by word of mouth. It is not sufficient for Mr Keevy to make a sweeping statement that the First Respondent *is "hopelessly insolvent".*

[59] It is the Applicant's case that the First Intervening Party has not disclosed all the material facts to this Court in the opposing affidavit. According to the Applicants, the Intervening Parties have placed before Court a distorted version on record or elected to ignore the relevant and important factors in their opposing affidavit, which are known to them. The Intervening Parties have, to confuse this Court regarding the factual position of the creditors of the First Respondent and the assets, been selective with regards to the factors deposed to or answered by them. The trustees were at all material times aware of the following facts:

[59.1] the value of the immovable and movable assets of the deceased and surviving spouse;

[59.2] the value of the immovable and movable assets of the First Respondent;

[59.3] the value of life insurance policies paid after the passing of the deceased;

[59.4] that the payment of the life insurance policies from the insurers changed the status of the insolvent estate from the insolvent circumstances to solvent circumstances;

[59.5] the fact that the creditors in the deceased estates and the insolvent estate of late DF Broekman and surviving spouse, and the First Respondents are the same;

[59.6] the deponent also made no averments to give reasons why the **Insolvency Act processes** will be to the best advantage of the creditors and beneficiaries of the deceased estate, considering all the facts;

[59.7] the creditors of the First Respondent and the deceased and surviving spouse …

[60] **SUPPORT FOR THE APPLICATION BY SOME OF THE CREDITORS OF THE FIRST RESPONDENT**

[60.1.1] Mr Keevy and the Second Respondent failed to have regard to the fact that some of the creditors of the First Respondent are supportive of this application. For instance, the Applicants' attorneys have received a letter of support for this current application from Odendaal & Kruger Attorneys, the attorneys of GDD Diesel Verspreiders, a creditor of the First Respondent. In the said letter, attached to the replying affidavit as RA4, the said attorneys state, firstly, that they have perused the application and have taken note of the allegations made regarding the conduct of the Second Respondent and Mr Keevy and state, in that regard, that such conduct is deplorable.

[60.1.2] Furthermore, they state that:

> "*We trust that the application will be successful as it has become quite ridiculous trying to explain to our client, a creditor, why they have not been paid, notwithstanding the factual it appears that sufficient cash is on hand to do so.*"

Furthermore, the Applicants' attorneys have received an email from Van Coller and Co, the accountant of the First Respondent and creditors thereof, wherein they state that:

"*We also confirm that we support you in the application.*"

A copy of the said email is attached to the replying affidavit as 'RA5'.

[60.2] In a further email received from Landbank, one of the First Respondent's largest creditors, it is stated that they also support this application and have no objection thereto. A copy of their email is attached to the replying affidavit as 'RA6'.

[61] Mr Keevy and the Second Respondent appear to speak on behalf of the creditors without considering the wishes of the creditors or some of them. On the other hand, nothing has been placed by both Mr Keevy or the Second Respondent or both to demonstrate to this Court that the First Respondent is "*hopelessly insolvent*" and would not be able to pay its debts.

[62] There is an argument put forward by Mr Gibson that the Applicants are required to place before Court the financial statements of the First Respondent which show that the First Respondent is solvent. In support of his argument, he has referred the Court to **Agri Operations Ltd v Hamba Fleet (Pty) Ltd 2017 JDR 0558 (SCA)**. This judgment dealt primarily with the issue whether the Respondent should be liquidated or wound-up or not upon the application of an unpaid creditor. *In casu*, the First Respondent is already under business rescue proceedings.

[63] In my view, it is not always necessary to place before Court the financial statements of the company to show that it is solvent. It is sufficient to place before Court the admissible evidence to show that the First Respondent is solvent. In my view, the Applicants have done so. Neither Mr Keevy nor the Second Respondent has disputed the facts set out by the Applicants in their evidence, in particular, in paragraph [42] of this judgment.

It is common cause between the parties that no business rescue plan has been adopted and consequently the Applicants are not precluded from **s 130(1)(a)** from setting aside the resolution adopted by the First Respondent on 6 December 2019.

[65] In terms of **s 128(1)(f)** financial distress has been defined as follows:

"*In reference to a particular company at any particular time, means that –*

(i) it appears to be reasonably unlikely that the company will be able to pay all of its debts as they fall due and payable within the immediately ensuing 6 months; or

(ii) it appears to be reasonably likely that the company will become insolvent within the immediately ensuing 6 months."

[66] In his heads of argument Adv Botes (SC) has referred this Court to Henochsberg on **Companies Act 71 of 2008**, where it is stipulated that when considering whether a company is financially distressed, the following should be considered:

"… *whether the debt of creditors is or can be subordinated, whether creditors are willing to extend their credit and whether there is additional funding available, externally or internally."*

When considering the determination that a company is financially distressed, the abovementioned factors are to be considered objectively.

[67] I have carefully considered all the contentions urged in support of the relief sought. I consider that there are sufficient reasons to make a finding that the First Respondent is now no longer financially distressed, and that good cause exists to terminate the business rescue proceedings.

[68] Now, in the light of the order I contemplate making in respect of the application, I do not deem it necessary to deal with the application of the intervening parties. Apart from their participation in this application in which they lack the necessary authority to intervene and to oppose this application, they have attracted an order of costs against themselves.

[69] The application is therefore granted, and the following order is hereby made:

[69.1] **The resolution adopted by the members of the First Respondent on 6 December 2019 to commence business rescue proceedings in terms of section 129 of the Companies Act 71 of 2008, is hereby set aside in terms of section 130(1)(a) of the Companies Act.**

[69.2] The business rescue proceedings of the First Respondent are hereby terminated in terms of section 132(2)(a)(i) of the Companies Act 71 of 2008.

[69.3] **The Intervening parties and the second Respondent are hereby ordered to pay the costs of this application de bonis propiis, the one paying the other or others to be absolved;**

Johannes v Christensen N.O. and Others (CIV APP FB 13/2019) [2021] ZANWHC 26 (19 August 2021)

Debts due to company in liquidation-bona fide defence recognized-remitted to trial

[1] The appellant **Mr. Jacobus Johannes Pretorius** was employed by Intertrans Oil SA (Pty) Ltd (fourth respondent), [Intertrans] which was a family owned business in that his parents were the shareholders and directors, from the year 2000 until his resignation on 25 January 2014. During the time of his employment, monies were from time to time loaned and advanced to him. At the time of his resignation he was indebted to Intertrans in an amount of R426 003.90 as reflected in the general ledger. Intertrans experienced financial difficulties and was placed under voluntary business rescue on 25 August 2016 in terms of **section 129** (1) of the **Companies Act 71 of 2008**. On 25 November 2016 Intertrans was placed under provisional liquidation and on 06 February 2017 it was placed in final liquidation. The first to the third respondents were appointed as joint liquidators (liquidators). Having detected the aforementioned amount of R426 003.90 on the appellant's loan account at Intertrans as a debt owed by the appellant, the liquidators demanded payment thereof on 03 November 2017. When payment was not forthcoming, they launched an application for payment thereof. An order was granted in their favour. The appellant unsuccessfully applied for leave to appeal from the court *a quo*. Dissatisfied about leave being refused by the court *a quo*, the appellant petitioned the Supreme Court of Appeal (SCA) for leave to appeal. Leave to appeal was granted to the Full Court of this Division; hence this appeal.

[2] The appeal is premised mainly on three grounds to wit:

(a) whether the debt had prescribed; (b) whether there was a compromise agreement entered into between the appellant and Intertrans to the effect that the debt was written off; (c) whether there exists a genuine and *bona fide* dispute of fact between the parties to the extent that this matter could not be resolved on papers and had to be referred either to oral evidence or trial.

Bona fide defence

[3] Insofar as prescription is concerned, the court *a quo* stated the following in paragraph [11] of its judgment:

> "*[11] At the insolvency hearing the Respondent specifically stated that "**so daar was nooit 'n spesfieke tyd aan gekoppel nie**" loosely translated "so there was never a specific time linked". The fourth Applicant was a family company where the directors and shareholders were the parents of the Respondent. It was not disputed that the loans were advanced to fund the Respondent's personal expenses and served no business purpose. **At the time the fourth Applicant was wound up no demand was ever made by the directors from the Respondent. It is clear from the above that the company never intended the loans to be payable immediately after they were advanced to the Respondent**. This fits hand in glove with the circumstances referred to in the Trinity case supra which is the exception to the general rule of a debt being due immediately upon conclusion of the contract. **The parties in this instance did not intend the debt to be due until demand was made. As a result, prescription did not begin to run from when the loans were advanced but only from the time the liquidators made demand on 3 November 2017. Therefore the claim of the Applicants has not prescribed.** As a result of this finding, it is unnecessary to deal with other aspects of prescription raised in this matter."*

(emphasis added)

Reference to the Trinity case in the judgment of the court *a quo*, is reference to the case of **Trinity Asset Management (Pty) Limited v Grindstone Investments 132 (Pty) Ltd** **2018 (1) SA 94** (CC).

[4] It is common cause that from the general ledger of Intertrans, there were amounts loaned and advanced to the appellant from 02 July 2012. This happened from time to time and some payments were also made. The period concerned in the general ledger loan account is until 15 May 2014. The appellant contends that these were commercial loans and not family loans or advances on the basis of never-never repayment. As such it is contended by the appellant that his employee loan account became due and payable on each of the respective transactional dates and that prescription began to run on each individual claim the day that the debt arose. According to him his last debt occurred on 10 February 2014 even though he resigned on 25 January 2014. Therefore, so it was further contended, the claims had clearly prescribed before demand was made by the liquidators on 04 November 2017 and before this application was launched.

[5] The Appellant relies on the principle that unless otherwise specified in the underlying agreement, a debt becomes due and payable there and then (immediately") and prescription begins to run immediately on conclusion of the contract. In other words, the Appellant argues that one should not look at the Respondents' demand on 4 November 2017 as the starting point from which prescription began to run but from the date that the individual loans were advanced. Reliance for this proposition is based on what is stated in paragraph [47] of the **Trinity** judgment, which states:

> "*[47] In sum, the relevant principles may, in my view, be restated as follows. A contractual debt becomes due as per the terms of that contract. When no due date is specified, the debt is generally due immediately on conclusion of the contract. However, the parties may intend that the creditor be entitled to determine the time for performance, and that the debt becomes due only when demand has been made as agreed. Where there is such a clear and unequivocal intention, the demand will be a condition precedent to claimability, a necessary part of the creditor's cause of action, and prescription will begin to run only from demand. This, in my view, is not an incident of the creditor being allowed to unilaterally delay the onset of prescription. It is the parties, jointly and by agreement seriously entered into, determining when and under what circumstances or conditions a debt shall become due."*

This is the correct legal principle to be applied.

(i) The appeal is upheld.

(ii) The order of the court *a quo* dated 06 September 2018 is set aside.

(iii) The matter is remitted to the court *a quo* for hearing of oral evidence <u>alternatively</u> to refer the matter for trial.

(iv) The fourth respondent is ordered to pay the costs of the appeal, which shall include the costs in the applications for leave to appeal both in the court a quo and the Supreme Court of Appeal (SCA).

Mercantile Bank (A Division of Capitec Bank Limited) v Ross (2020/19791) [2021] ZAGPJHC 149 (13 August 2021)

Sequestration application- Mr Ross as surety and co-principal debtor; the defence that Mr Ross should have been released from liability as surety because of the bank's repudiation or breach of the agreement when it interfered with his duties; the circumstances of the disposal of the property; advantage to creditors; and the

application by Mr Ross for a referral for oral evidence; A provisional order of sequestration of the respondent's estate is granted.

The bank applies for the sequestration of Mr Ross' estate, initially relying on his failure to pay over R32 million owed to it. The bank then relied on an act of insolvency in that he disposed of his immovable property to the prejudice of his creditors when he was insolvent.

Weiner J discusses how the bank lent money to QD cellular with repayments of the debts secured by cession of its book debts and with Mr Ross as surety and co-principal debtor; the defence that Mr Ross should have been released from liability as surety because of the bank's repudiation or breach of the agreement when it interfered with his duties; the circumstances of the disposal of the property; advantage to creditors; and the application by Mr Ross for a referral for oral evidence.
A provisional order of sequestration of the respondent's estate is granted.

[1] The applicant applied for the sequestration of the respondent's estate. The applicant initially relied on the fact that the respondent failed to pay the sum of R32 807 774.41 owed to it. The applicant delivered a letter of demand. In response, the respondent denied his indebtedness. The applicant contended that such failure to pay amounted to an act of insolvency in terms of s 8(g) of the Insolvency Act 24 of 1936 (the 'Act').[1] It abandoned reliance on this section and relied on the fact that the respondent had committed an act of insolvency in terms of s 8(c) of the Act,[2] in that he disposed of his immovable property (the Gallo Manor property) to the prejudice of his creditors, at a time when he was insolvent. The applicant also alleged that the respondent was factually insolvent.

[2] Section 9 of the Act details the requirements for a sequestration order. It is not disputed by the respondent that all of the formal requirements set out in s 9 have been complied with by the applicant. In addition, the respondent admitted that he has no employees, and therefore there was no need to comply with s 9(4A)(a)(i)-(ii) of the Act, which relates to service on trade unions and employees.

[3] The application for sequestration is based on the respondent being indebted to the applicant in the sum of not less than R100, as contemplated in s 9(1) of the Act, and that the respondent committed an act of insolvency, and/or is factually insolvent as contemplated in s 9(3)(a)(v) of the Act.[3]

Background

[4] It is not disputed that the applicant lent and advanced monies to a company styled QD Cellular (Pty) Ltd ('QD Cellular') throughout the period of 2007 to 2017. Repayment of the debts of QD Cellular was secured by a cession of its book debts, various notarial bonds and suretyship undertakings by three parties, one of whom is the respondent. The respondent bound himself as surety and co-principal debtor unto and in favour of the applicant in terms of various suretyship agreements concluded over time.

[5] In July 2019 the applicant was advised that, due to severe financial strain, the business of QD Cellular was no longer sustainable and that it could no longer service its loan accounts with the applicant. There is no dispute between the parties that the

business of QD Cellular failed and that an amount of R32 807 774.41 was owed to the applicant. The applicant submitted that:

(a) In terms of an Authority and Appointment agreement (the 'Agreement') concluded in August 2019, the parties agreed that the notarial bonds registered and held in favour of the applicant would be perfected, and that the respondent would be appointed to recover the book debts of QD Cellular and dispose of its cellular stock.

(b) The Agreement provided that the respondent would be released from his liability as surety, if a sum of R12 million was recovered from the sale of the stock and recovery of the book debts.

(c) The R12 million recovery mark was not reached and the respondent remains liable to the applicant for the balance of the debts of QD Cellular.

[6] As a result, demand was made to the respondent to make payment of the amount in terms of his suretyship obligations. The respondent denied liability and referred to the Agreement. He contended that in terms of the Agreement, he was appointed by the applicant to act as their agent in order to dispose of the movable assets and collect the Trade Debtors of the company. He stated that:

> 'Clause 10 of this agreement states that should the Bank realize a net R12 million from the disposal of the stock and collection of the debtors, it would release me from my obligation under a suretyship for the indebtedness of the Company to the Bank. I have not been made aware by the Bank as to how much has been realized and collected to date against the R12 million target and what the balance outstanding on Trade Debtors is that still has to be collected by the Bank to be applied against the target'.

DE JONGH ONTWIKKELINGS (PTY) LTD AND ANOTHER v KILOTECH INVESTMENTS (PTY) LTD AND OTHERS 2021 (4) SA 492 (GP)

Insolvency — Unlawful alienations and preferences — Disposition without value — Concepts of 'illusory' and 'adequate' value discussed — Abandoning right to part payment of purchase price in favour of related company — Impeachable transaction under s 26(1) and s 31(1) of Insolvency Act 24 of 1936.

Insolvency — Unlawful alienations and preferences — Collusive disposition — Collusive disposition of property to related company leaving insolvent company with less value on its books at time of liquidation — Prejudicial to creditors — Disposition impeachable under s 31(1) of Insolvency Act 24 of 1936.

The applicant company, DJO, was in the process of being finally wound up. Its liquidator claimed that a series of property transactions concluded by the company before its winding-up amounted to an unlawful alienation or preference liable to be set aside under various provisions of the Insolvency Act 24 of 1936. DJO was controlled by one Mr D, who also controlled the first defendant, Kilotech. These entities and Mr D made use of the same banker (the bank).
The court held that the impugned transactions resulted in DJO being 'dispossessed' of R1,9 million of a R5,5 million claim. In simplified terms, DJO had disposed of a claim of R5,5 million to Kilotech and contrived to receive R3,6 million in return, thanks to an arrangement with the bank. In effect Mr D had used the sale of the

property as an instrument to transfer that which should have gone to DJO, to Kilotech. This clearly amounted to a 'disposition' for the purposes of s 26 of the Act. (See [6.1.2].) But counsel for the defendants, relying on precedent, argued that s 26 was aimed at dispositions for *no value*, not dispositions for *inadequate value* like the present. The court proceeded to investigate, in the context of s 26(1), the concepts of 'value', 'adequate value' and 'illusory' (or 'nominal') value, and extracted the following principles from the authorities (see [6.3.9]):

- where the disposition consisted in the furnishing of a guarantee or suretyship, the value given might be intangible, indeterminate, but would not for that reason necessarily amount to no value;
- if some value was given, it would constitute no value if it was illusory or nominal;
- if reliance was placed on illusory or nominal value, or the entire absence of it, then the facts had to be pleaded if s 26 was being relied on;
- in all cases the relevant facts had to be taken into consideration.

The court found that in the present case the disposition of R1,9 million was sufficiently pleaded (see [6.13.11]). DJO had disposed of a claim of R5,5 million and the discharge of its obligations in the amount of R3,6 million was supposed to create the illusion that the claim of R5,5 million had been satisfied thereby. Since the disposition was illusory to the extent of constituting 'no value' for the balance, the liquidator was entitled to the recovery of this amount under s 26(1) (see [6.3.12] – [6.3.13]).

The court then had to decide whether the disposition in addition offended s 29 (gave preference to a creditor), s 30 (was made with the intention of giving preference to a creditor), or s 31 (constituted collusion to the detriment of a creditor). It found that the effect of the transactions was not only to limit the bank's exposure to Mr D's companies but also to decrease DJO's indebtedness to the bank without a similar pro rata decrease of its indebtedness to its other creditors, thereby preferring the bank, which under the arrangement received alternate security from a company other than the insolvent company. But this preference was a mere ancillary effect of the disposition in favour of Kilotech, which was not to a creditor of DJO, and was therefore not impeachable under s 29(1) of the Act (see [6.4.1]). Nor was it impeachable under s 30(1): there had been no intention to favour the bank as creditor (see [6.4.2]).

The court pointed out that the disposition was, however, impeachable under s 31: DJO had before its liquidation, in collusion with Kilotech and Mr D, 'disposed of property' (the R5,5 million claim or at least the net amount of R1,9 million) in a manner which had the effect of prejudicing DJO's creditors. The fact that there was R1,9 million less in DJO's kitty at the time of the liquidation was clearly to the prejudice of its creditors (see [6.4.3]).

The court accordingly set aside the disposition of R1,9 million by DJO in favour of Kilotech and ordered the latter to pay the said amount to the second respondent in her capacity as the liquidator of DJO (see [7.1] and [8]).

FIRST NATIONAL NOMINEES (PTY) LTD AND OTHERS v CAPITAL APPRECIATION LTD AND ANOTHER 2021 (4) SA 516 (GJ)

Company — Shares and shareholders — Shareholders — Appraisal rights of dissenting shareholders — Consideration of share buy-back proposal under s 48(8)*(b)* of Companies Act (company acquiring more than 5% of its own issued shares or any particular class thereof) — Whether transaction, which made subject to requirements of ss 114 and 115 by s 48(8)*(b)*, triggering appraisal rights of dissenting

shareholders under s 164 — In terms of s 164(2)*(b)*, transactions contemplated in s 114 triggering appraisal rights — Consideration of distinction between 'scheme of arrangement' under s 114 whereby company acquires own shares and share acquisition under s 48 — Effect of s 48(8)*(b)* not to deem transaction involving reacquisition of shares in excess of 5% to be arrangement if by nature transaction not arrangement — However, legislature intending for all procedural conditions and rights set out in s 114 to apply, and this included condition set out in s 115(8) entitling shareholders to exercise appraisal rights in terms of s 164 — Companies Act 71 of 2008, ss 48(8)*(b)*, 114 and 164(2)*(b)*.

The present matter concerned the question whether the decision of a company board under s 48(2)*(a)* of the Companies Act 71 of 2008, that the company purchase its own shares, triggered the dissenting shareholders' appraisal rights under s 164, in circumstances in which such decision was one falling under s 48(8)*(b)*, involving as it did the acquisition by the company of more than 5% of the issued shares of a class of the company's shares. The facts giving rise to the present matter are as follows. The first respondent, Capital Appreciation Ltd (Capprec), was a public company listed on the main board of the Johannesburg Stock Exchange. The first respondent, First National Nominees (Pty) Ltd (Nominees), was a registered holder of shares in Capprec. On 29 July 2019 Capprec issued a circular to its shareholders, advising them that it would be repurchasing 245 000 000 of its shares held by specific shareholders, and that their approval in such regard would be sought in a forthcoming general meeting in the form of a special resolution in terms of s 115. The decision in question was one provided for under s 48(2)*(a)* of the Act. It was also one to which s 48(8)*(b)* applied, which accordingly made it 'subject to the requirements of sections 114 and 115' of the Act. Section 114, headed 'Proposals for scheme of arrangement', in ss (1) empowered a board to propose and implement 'any arrangement between the company and holders of any class of its securities by way of, among other things, . . . a re-acquisition by the company of its securities'. Section 114 set out various procedural requirements for such types of transactions and provided special rights and remedies to shareholders affected by such transactions. The circular in question specifically advised shareholders that the proposed 'buy-back' was subject to these ss 48 and 114, as well as s 164 of the Companies Act. Section 164 accorded a number of 'appraisal rights' to dissenting shareholders. Such rights were triggered where a company decided to meet to consider adopting a resolution to perform the acts set out in s 164(2)*(a)* and *(b)*. *Paragraph (b) referred to, inter, alia a transaction contemplated in, inter alia, s 114*. In the present case Nominees decided to avail itself of such rights. It objected to the adoption of the special resolution; and then attended the meeting and voted against the resolution. The buy-back transaction was nevertheless approved. So, acting in terms of ss 164(5) and (7) of the Act, Nominees issued a demand to Capprec that it pay the fair value of its shares. Capprec made an offer in terms of s 164(11) to acquire the shares. This Nominees rejected. Consequently, acting in terms of 164(15)*(c)*(iii)*(aa)*, Nominees brought an application in the High Court of South Africa, Gauteng Local Division, Johannesburg, asking for a determination by the court of the fair value of the shares it held in Capprec.

Capprec now opposed Nominees' exercise of its appraisal rights. It argued that there were present none of the circumstances set out in in s 164(2)*(a)* and *(b)* that triggered such rights. It argued, more specifically, that the proposed buy-back of

shares was not a transaction 'contemplated under s 114'. Section 114 envisioned 'a scheme of arrangement' between the company and the holders of any class of its shares in a manner contemplated in paras 114(1)*(a)* – *(f)*, in all of which instances there had to be the requirement of coercion; not consensual agreements between the company and the seller of shares such as in the present case. (See [9] – [10] and [18].) It added that, to the extent that s 48(8)*(b)* required that the transaction was subject to the requirements of ss 114 and 115, it was only a reference to the procedural requirements of ss 114 and 115. It did not deem a transaction which was not a scheme into a scheme. (See [19].)
Whether or not Nominees, in the circumstances pertaining to the transaction in question, was entitled to exercise the appraisal rights afforded to it in terms of s 164 of the Act, formed the focus of the court's attention (see [12]).
Held, that the objective of an arrangement in terms of s 114 was to affect the respective rights and obligations inter se of the company and its holders of securities in a manner which could not otherwise be conveniently achieved by independent agreement between the company and each holder of securities. The repurchase by agreement from a shareholder (such as in this case) was not such an arrangement. It did not legally bind any holder of securities whose agreement had not been obtained. (See [25].)
Held, further, that the effect of s 48(8)*(b) was not to deem* a transaction involving a reacquisition of securities in excess of 5% to be an arrangement, if, by nature, the transaction was not an arrangement as this term was interpreted in terms of the common law (see [27]). What s 48(8)*(b)* did was to impose on transactions falling within s 48(8)*(b) 'the requirements'* of ss 114 and 115 (see [29]). Nevertheless, by making reference to ss 114 and 115 as a whole, the legislature intended for all the procedural conditions and rights set out in ss 114 and 115 to apply, and this included the condition set out in s 115(8) of the Act entitling shareholders to exercise appraisal rights in terms of s 164 of the Act (see [30]). To hold otherwise would lead to an anomaly: minority shareholders would be entitled to appraisal rights protection if the board decided to effect a (substantial) reacquisition of the company's shares in terms of a scheme of arrangement, but not if it decided to do so in terms of s 48. This would not make any sense, especially given the rationale underpinning the additional requirements for share repurchases exceeding 5%, namely that such transactions merit additional protection because they potentially affected minority shareholders more radically, as they may amount to a restructuring of the shares of the company.
Held, in conclusion, that, regardless of whether (as a fact) the transaction which Capprec had sought to implement was a scheme of arrangement or not, it was a transaction which crossed the 5% share repurchase threshold contemplated in s 48(8)*(b)* of the Act, thereby invoking the requirements of the provisions of ss 114 and 115 of the Act, which in turn vested the applicants in this application with the right to obtain the judicial determination of fair value for their shares as contemplated in s 164 of the Act. (See [32].) Accordingly, order at [33] granted.
MGG PRODUCTIONS (PTY) LTD v RAMODIKE NO AND OTHERS 2021 (4) SA 543 (GJ)

Insolvency — Pre-sequestration set-off — Disregard of at instance of trustee — Ambit of enabling provision — Meaning of proviso that set-off was not 'in the ordinary course of business' — Interpretation of Insolvency Act 24 of 1936, s 46.

The court was called on to review a decision by the Master to allow the liquidators of a company to disregard a set-off under s 46 of the Insolvency Act 24 of 1936 (the Act). Section 46, which had rarely been dealt with in reported cases, 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. The principal issue before court was whether the impugned set-off was 'not effected in the ordinary course of business'.

At the outset the court pointed out that it is unclear when s 46 is applicable or what mischief it is aimed at, especially since the original transactions were not impugnable dispositions (see [2] – [3]). It was, moreover, prejudicial to 10-cents-in-the-rand creditors, who would be left out of pocket due to interference by the state (the Master) in a set-off that had already taken place. It seemed to allow a potentially arbitrary and unconstitutional deprivation of property that could also be procedurally unfair (see [4]).

After dealing with the concept of set-off in the common law (see [11] – [15]) and comparing s 46 to provisions of the Act dealing with impeachable transactions (ss 26, 29, 30 and 31 — see [16] – [19]), the court addressed the question of the meaning to be assigned to the words 'ordinary course of business' in s 46 (see [25] – [32]). It held that it was worth investigating the use of those words in s 29 of the Act (dealing with voidable preferences). In the (more plentiful) reported cases concerning s 29, relevant factors were said to include whether the transaction was unique, unusual or anomalous; whether it resulted in a substantial disturbance in the distribution of the insolvent's assets; whether there had been any similar transactions between the parties; whether the size of the transaction was extraordinary; whether the debt was disputed; whether the debt was paid off in a roundabout way; and whether consideration was given for the reciprocal debt (see [32]). The court pointed out that, unlike s 29, s 46 does not mention either the intent to prefer one creditor over the other or prevailing insolvency as relevant factors (see [32.1] and [32.3]).

The court then dealt with the matter before it, in which set-off was invoked by agreement when the insolvent's trading terms changed from 90-day credit to cash on delivery, wiping the slate clean in the process. The court ruled that the set-off was effected in the ordinary course of business, remarking that to invoke s 46, more was required than to show that the creditor would, as a result of the set-off, not stand in the queue for payment. The agreements to stop doing business on credit and to set off debts were perfectly normal transactions. Other factors supporting the court's conclusion were that set-off was a normal form of payment in business dealings; that there had been an earlier set-off of debts between the parties; that there was no evidence that the set-off results in a substantial disturbance of the distribution of the assets of the insolvent; that there was no evidence of collusion to defraud creditors; that the set-off was effected in a roundabout way; and that there had been no sign of insolvency (and imminent liquidation) of the insolvent, only slow payment, a common occurrence in business. (See [15], [40].)

The court accordingly set aside the Master's decision to grant authority to the liquidators to disregard the set-off (see [42]).

NUMSA AND ANOTHER v SOUTH AFRICAN AIRWAYS SOC LTD AND OTHERS 2021 (4) SA 575 (LC)

Company — Business rescue — Moratorium on legal proceedings against company — Employment-related claims against company in business rescue — Whether Labour Court having jurisdiction — Companies Act 71 of 2008, s 133.

Labour law — Labour Court — Jurisdiction — Labour Court not having jurisdiction in employment-related claim against company in business rescue — Companies Act 71 of 2008, ch 6.

South African Airways (SOC) Ltd (SAA) was placed in business rescue in December 2019 and its operations mostly suspended at the end of September 2020. Most of its employees had not been paid since June 2020. A settlement agreement between the employer and employee representatives settled the wage dispute, 3599 employees out of a total of 4597 either individually or through their trade unions accepting the settlement offer. In this Labour Court application, those that did not (with their representative trade union, Numsa) demanded that the settlement payments also be made to them, without the compromising or waiving of any claim to the balance of their remuneration. They claimed a number of grounds upon which not doing so was unlawful (see [5].)
The main issue was whether the Labour Court had jurisdiction to entertain a claim to set aside allegedly preferential treatment of other employees by a company in business rescue.

Held

Given the Labour Court's limited statutory jurisdictional footprint, any claim that the business rescue practitioners had acted unlawfully as alleged, was not for the Labour Court to determine. Chapter 6 of the Companies Act 71 of 2008 made it clear that the supervision of business rescue proceedings fell within the jurisdiction of the High Court. The demarcation established by ch 6 recognised that business rescue proceedings affected the rights of a number of parties beyond the employment relationship, and in particular shareholders and other creditors. The High Court was best placed to balance the rights and interest of all the relevant parties in any application for leave to commence legal proceedings or enforcement action against a company in business rescue. Had the legislature intended that in an employment-related matter involving a company in business rescue the Labour Court was empowered to lift the moratorium by granting leave for the institution of proceedings, it would have been so empowered. (See [16] – [17].)

Van Zyl v Auto Commodities (Pty) Ltd [2021] 3 All SA 395 (SCA)

Corporate and Commercial – Company law – Business rescue – Effect of termination on surety's obligations – Section 154(2) of the Companies Act 71 of 2008 does no more than preclude creditors from pursuing claims against the company after the business rescue plan has been implemented – The liability of a surety for a debt is not extinguished.

As a prerequisite for its supplying a company ("BCM") with petroleum products on credit, the respondent ("Auto Commodities") required the appellant ("Mr Van Zyl") to bind himself as surety for BCM's resulting liabilities, which he did in July 2014. In December 2014, BCM was placed under business rescue. After adoption of a business rescue plan, Auto Commodities received two dividends. The business rescue terminated on 31 January 2017 as a result of its substantial implementation. On 21 July 2017, Auto Commodities issued summons against Mr Van Zyl for an amount in excess of R6 million, representing the shortfall regarding BCM's original

indebtedness. Its claim, based upon the deed of suretyship, was upheld in the High Court.

On appeal, the only issue remaining in dispute between the parties was whether Mr Van Zyl was liable under the deed of suretyship to pay the amount claimed by Auto Commodities. His contention was that, when BCM's business rescue was terminated, section 154(2) of the Companies Act 71 of 2008 (the "Act") released BCM from any further indebtedness to Auto Commodities. He submitted that that in turn released him from liability because suretyship is an accessory obligation.

Held – The business rescue plan contemplated a compromise between the debtor and one or more of its creditors, in which case there would be an unpaid balance for which the surety would remain liable. A liquidation would be one instance of such circumstances. Even if BCM as principal debtor was released from its obligations, Auto Commodities' rights under the suretyship were unaffected and, whether or not it supported the business rescue plan, it did not operate as an abandonment of its claim against Mr Van Zyl.

The Court then addressed Mr Van Zyl's legal point as leave to appeal had been granted based on that point. The starting point for Mr Van Zyl's argument was section 154 of the Act, which is directed at the consequences of approval and implementation of the business rescue plan for the enforcement by creditors of any debt that existed prior to the business rescue process. It provides that the creditor will not be able to enforce the debt except to the extent provided for in the business rescue plan. The section did not support Mr Van Zyl's arguments that Auto Commodities could no longer enforce any debt which was owing to the creditor by BCM prior to the business rescue; that as a result of the approval and implementation of the business rescue plan, BCM did not owe anything to the creditor; and that the accessory suretyship obligation was discharged. An inability to enforce a debt is not necessarily an indication that the debt has been discharged. If the whole or a part of the debts of a company become unenforceable as a result of the adoption and implementation of a business rescue plan, the fact that some creditors may pursue the balance of their claims against sureties, who will have a right of recourse against the company, does not negate the purpose of business rescue. Section 154(2) does no more than preclude creditors from pursuing claims against the company after the business rescue plan has been implemented. It does not affect or extinguish the liability of a surety for the debt.

The appeal was dismissed with costs.

Watson NO v Ngonyama and another [2021] 3 All SA 412 (SCA)

Corporate and Commercial – Donation of shares to achieve Broad-based Black Economic Empowerment objectives – Application for restoration of shares based on alleged misrepresentation as to Broad-based Black Economic Empowerment shareholding of entity to whom shares were donated – Where entity receiving donated shares was liquidated and liquidators were not joined in the proceedings, order for restoration of shares not capable of execution.

A dispute concerning shares in a company ("Ntsimbintle") landed up in the High Court, where an order was issued ordering one of the respondents ("Watson") in the High Court proceedings to restore to the second respondent in the present proceedings ("Thundercat") certain shares in Ntsimbintle together with all dividends earned and

interest thereon. Watson had since died, and the appellant was the executor of his estate.

Watson, the first respondent ("Ngonyama") and a third party ("Macingwane") had entered into an agreement in terms of which they would each take up an equal shareholding in an investment company ("Nkonjane"). It was agreed that, to meet black and female empowerment objectives, a portion of their equity in Nkonjane would be transferred, in equal shares, to historically disadvantaged women and youth. The company through which the Broad-based Black Economic Empowerment ("BBBEE") objectives were to be achieved, "Bosasa Youth", would hold 25% of Nkonjane and would have at least 250 persons with BBBEE credentials, whom Watson had undertaken to identify as shareholders.

When the relationship between Watson, Macingwane and Ngonyama broke down completely, Watson indicated a desire to exit their Nkonjane arrangement. An offer to purchase the shares in Ntsimbintle was received, and although Ngonyama and Macingwane refused to sell, Bosasa Youth wanted the opposite. Bosasa Youth obtained an order for the winding-up of Nkonjane to facilitate the sale. Ngonyama alleged that it was only during the liquidation process that he discovered that there were in fact no BBBEE shareholders in Bosasa Youth. He insisted that the donation of the shares by him and Macingwane was premised on historically disadvantaged individuals benefiting from an investment opportunity. He stated that they were induced to make the donation on the strength of Watson's assurances concerning BBBEE shareholders and, had they known that in reality he intended to benefit himself and his family as it emerged, they would not have made the donation. Ngonyama considered himself entitled to cancel the donation and demand the return of the shares donated. That led to the High Court proceedings.

Held – A preliminary issue requiring attention was the liquidation of Bosasa Youth and the non-joinder of its liquidators in the present proceedings. The fact that Ngonyama's case had the potential to dilute Bosasa Youth's shareholding in Ntsimbintle meant that the liquidators had a direct and substantial interest in the proceedings. Their non-joinder was on its own, reason to set aside the High Court order and remit the matter for reconsideration.

Assessing the correctness of the High Court's conclusions, the present Court disagreed that there was a misrepresentation that induced the donation of the shares. Material doubt existed as to whether, at the time of the donation, Watson had made any fraudulent misrepresentation. Ngonyama's own version of the agreement in relation to BBBEE shareholding, and the verification thereof, was inconsistent and vague.

The High Court was however, correct in ruling that an agreement (the "Fluxmans agreement") relied upon by Bosasa Youth was not a compromise but a share substitution agreement. A compromise or *transactio* is a contract whose purpose is to prevent or to put an end to existing litigation, while the Fluxmans agreement was concluded to deal with the deadlock between the shareholders concerning the sale of their shares and was unconnected to the dispute about the BBBEE shareholding.

Most importantly, as argued by the appellant, the High Court order was not executable. The Court agreed that the withdrawing of the case against Bosasa Youth and then not joining the liquidators meant that the order would not be binding on them.

The appeal was upheld.

Massyn v De Villiers NO and others [2021] 3 All SA 578 (WCC)

Corporate and Commercial – Insolvency – Extension of powers of liquidators to include establishing enquiry into company's affairs, in terms of section 417 of Companies Act 61 of 1973 – Whether liquidators had established jurisdictional requirement that the company was unable to pay its debts in the course of being wound up – In absence of positive assertion that company was able to pay its debts at the material time, argument based on lack of jurisdictional requirement found to be without merit.

Corporate and Commercial – Insolvency – Extension of powers of liquidators – Section 386 of the Companies Act deals with the powers of liquidators and provides for a court, if it deems fit, to grant leave to a liquidator to do anything which the court may consider necessary for winding up the affairs of the company and distributing its assets.

The applicant was one of two directors in a company which was finally liquidated on 9 November 2020. The company had conducted business as a fund manager trading in foreign currencies. Three investors/creditors, who had invested more than R20m, had sought the company's liquidation when it was unable to honour their withdrawal request – made after investigations revealed that the company's business activities were fraudulent and in contravention of financial services legislation.

As provisional liquidators of the company, the second and third respondents had obtained an order extending their powers to include establishing an enquiry into the affairs of the company in terms of section 417 of the Companies Act 61 of 1973, appointing the first respondent (Mr de Villiers) as commissioner and authorising him to summon persons to be examined at the enquiry. The enquiry was adjourned pending the outcome of the present application for rescission of the order which established the enquiry and extended the powers of the respondents. In the alternative, the removal of Mr de Villiers as commissioner and setting aside of the subpoenas issued by him, was sought.

In support of the application, it was contended that the liquidators had failed to establish a jurisdictional requirement, namely, that the company was unable to pay its debts in the course of being wound up. A related argument was that no section 417 enquiry could be established before the company had been placed in final liquidation, it being common cause that the impugned order was made while the company was in provisional liquidation.

Held – To claim that the jurisdictional fact of the company's inability to pay its debts had not been established, the applicant had to go further and at the very least assert that the company was able to pay its debts at the material time. However, at no stage prior to the granting of either the provisional or the final liquidation order was it ever asserted on behalf of the company that it was able to pay its debts. The order could therefore not be set aside on that basis.

The applicant also averred that the liquidators had sought and been given powers without making out a case therefor. Section 386 of the Companies Act deals with the powers of liquidators and provides for a court, if it deems fit, to grant leave to a liquidator to do anything which the court may consider necessary for winding up the affairs of the company and distributing its assets. The court found that the provisional liquidators had established a case that all the powers they sought were necessary for

them in their role as provisional liquidators, save for the power to sell movable assets and to agree to any reasonable offer of composition.

Turning to the alternative relief, the court considered the allegations of bias levelled against Mr de Villiers. It concluded that the conduct referred to could never justify a reasonable apprehension of bias on the part of the commissioner by the applicant or someone in his position.

Apart from the two minor amendments to the impugned order, the application was dismissed with costs.

END-FOR NOW