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Mercantile Bank v Ross [2021] JOL 51000 (GJ)

Sequestration application-against surety

Mercantile Bank advanced money to a company, QD Cellular, with the respondent binding himself as surety and co-principal debtor in favour of the bank in terms of various suretyship agreements. QD Cellular’s business failed and it could not service its loan accounts with Mercantile Bank. Demand was made to the respondent to

make payment in terms of his suretyship obligations, of the amount owed. The respondent stated that he should have been released from his liability as surety in terms of agreement, and that had it not been for the bank's repudiation, or breach of the agreement, the indebtedness would not have arisen.

Weiner, J explaining what constitutes repudiation [para 18]; and the principle relating to the release of a surety as a result of prejudice caused to him by the actions of the creditor [para 19].

Court also confirming that disposal of immovable property to the prejudice of his creditors, at a time when he was insolvent, was an act of insolvency on respondent's part as contemplated in section 8(c) of the Insolvency Act. Provisional sequestration order granted.

Rainbow Farms (Pty) Limited v Master of the High Court, Pretoria and Others (43935/2019) [2021] ZAGPPHC 593 (14 September 2021)

Liquidation accounts-objections against- the fourth liquidation and distribution which is purported to rectify mistakes in the third liquidation and distribution.

This is a review application against the fourth liquidation and distribution account (hereinafter referred to as the fourth liquidation and distribution) drafted by the third respondent in her capacity as the final appointed liquidator in the insolvent estate of the second respondent. The fourth liquidation and distribution was drafted and laid for inspection and was objected to and this objection, which was dismissed by the first respondent, forms the basis of this application.

THE FACTUAL BACKGROUND

The insolvent company conducted business as a producer of broiler chickens for slaughter and sale on two separate premises. The third respondent was appointed on the 6th May 2015 as the liquidator. During 2002, the applicant instituted application proceedings against the insolvent company under case number 10423/02 for payment of money due to it for chicken feed supplied.

5. These proceedings were terminated in favour of the applicant for R131 82 498.19 together with interest at 15.5% from date of judgment to final payment thereof.

6. The applicant instituted another action against the insolvent company for monies owing for the period March 2002 until June 2002. This action is still pending.

7. From the third liquidation and distribution account applicant was awarded approximately R19 million instead of R60 million. Applicant applied to the master for a formal inquiry in terms of sections 417 and 418 of the Companies Act to carry out this investigation.

8. The reconciliation was finalised however the applicant applied for payment based on the third liquidation and distribution account.

ISSUES

11. The applicant approached this court to review the fourth liquidation and distribution drafted by the third respondent in her capacity as the final appointed liquidator in the insolvent estate of the second respondent.

12. In a nutshell the applicant is of the view that the first respondent is wrong in dismissing its objection to the fourth liquidation and distribution which is purported to rectify mistakes in the third liquidation and distribution.

. The applicant contends that the first respondent's ruling was incorrect and invalid because, based on the third respondent's repeated allegations of fraud and serious irregularities in the third liquidation and distribution it was not legally competent to simply prepare a further account to address the alleged irregularities.

14. According to the applicant the third respondent was required to apply to this court to have the third liquidation and distribution re-opened and or set aside.

15. In justification of the fourth liquidation and distribution respondents contend that any liquidation and distribution account, not yet titled the “Final Liquidation and Distribution Account” whether confirmed by the master or not, is capable of amendment and revision up until the final liquidation and distribution account as contemplated in section 408 of the Companies Act.

16. Respondents submit further that until the final liquidation and distribution accounts declared final and up until dissolution of the company in terms of section 416, the liquidator can and must from time to time and as instructed by the master entitled to lodge a further account.

THE LAW

17. Throughout the proceedings and in the papers before more reference is made to sections 403, 407 and 408.

Section 403 (1) (b) reads as follow: -

“*(b) If the final account lodged under paragraph (a) is not a final account, the liquidator shall from time to time and as the Master may direct, but at least once in every period of six months (unless he receives an extension of time), frame and lodge with the Master a further account and plan of distribution: Provided that the Master may at any time and in any case where the liquidator has funds in hand, which ought in the opinion of the Master to be distributed or applied*

towards the payment of debts, direct the liquidator, in writing to frame and lodge with him an account and plan of distribution in respect of such funds within a period specified."

18. Section 408 reads as follows: -

"***408 Confirmation of account***

When an account has lain open for inspection as prescribed in section 406 and-

(a) no objection has been lodged; or

(b) an objection has been lodged and the account has been amended in accordance with the direction of the Master and has again lain open for inspection, if necessary, as in section 407 (4) (b) prescribed, and no application has been made to the Court within the prescribed time to set aside the Master's decision; or

(c) an objection has been lodged but has been withdrawn or has not been sustained and the objector has not applied to the Court within the prescribed time,

the Master shall confirm the account and his confirmation shall have the effect of a final judgment, save as against such persons as may be permitted by the Court to re-open the account after such confirmation but before the liquidator commences with the distribution."

19. In First Rand Bank Limited and Others v Magistrate Germiston and others **(2004) 2 ALL SA 629** (W) at page 639 the court held as follows:

"*(6.5) What this decision means is that if, at any time before payment is made in terms of a final liquidation and distribution account, facts can be placed before the Master that would decreased a proved creditors claim, it follows that his representative, the Magistrate can hold an inquiry if there are grounds to believe that there are such "additional facts". It matters not that this may result in the proved creditor who has been paid part of its claim being reflected as a debtor in s subsequent account.'*

(6.6) I accordingly find that the confirmation of the first liquidation and distribution account and the payment made in terms thereof (all of which happened in October 2002) does not preclude an inquiry into FirstRand Bank's claim"

20. The law regarding interpretation has been stated by Wallis JA in *Natal Joint Municipal Pension v Endumeni Municipality* **2012 (4) SA 593** (SCA), par 18, as follows:

"*Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon this coming into existence. Whatever the nature of the document, consideration must be given to the language used in light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production, where more than one meaning is possible each possibility must be weighted in light of all these factors. The process is objective not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusiness-like results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or business-like for the words actually*

used. To do so in regard to a statue or statutory instrument is to cross divide between interpretation and legislation. In a contractual context it is to make a contract for the parties other than the one infact made. The 'inevitable point of departure is the language of the provision itself', read in context and having regard to the purpose of the provision and the background to the preparation and production of the document".

21. In my view the proper interpretation of sections 403 and 408 of the Companies Act and the judgment in the First Bank Limited referred to above any liquidation and distribution account, not yet declared final liquidation and distribution account is capable of amendment and revision until the final account.

22. Thus therefore it is my view that there is nothing in law that precludes the liquidator from presenting the fourth liquidation and distribution accounts and correct mistakes in the previous accounts.

23. I make the following order

23.1 The application is dismissed with costs, including costs of two counsel.

Murray NO v Ramphele (25067/2020) [2021] ZAGPPHC 615 (27 September 2021)

Sequestration application- provisional order of sequestration has lapsed, no final order can issue. The argument on this score is that, because the *rule nisi* was returnable on the 2nd of August 2021, but the matter was only called for argument on my roll on the morning of the 4th of August 2021- opposed motion roll is a continuous

roll Rule 27(4) of the Uniform Rules of Court permits a discharged *rule nisi* to be revived

Sequestration application- constitutional approach- take into account the provisions of section 36(1)(e) of the Constitution of the Republic of South Africa-debt -"less restrictive means to achieve the purpose".-court not persuaded

On the 13th of June 2021 the respondent's estate was placed under provisional sequestration in the hands of the Master and a *rule nisi* was issued calling upon interested parties to show cause, if any, why a final order of sequestration ought not to be granted, the return date being the 2nd of August 2021.

The applicant now moves for a final order of sequestration and to that end has filed an affidavit of service confirming that the prescripts of the provisional order of sequestration have been complied with.

Counsel for the respondent takes no issue with the affidavit of service, nor does he contend that the applicant has failed to make out a case for a final winding up order. Rather respondent's counsel submits that two legal issues are dispositive of this application. As to the first legal issue, respondent's counsel argues that, because the provisional order of sequestration has lapsed, no final order can issue. The argument on this score is that, because the *rule nisi* was returnable on the 2nd of August 2021, but the matter was only called for argument on my roll on the morning of the 4th of August 2021, the provisional order lapsed. There is accordingly nothing left to adjudicate (the first issue).

As to the second legal issue, the respondent's counsel argues that, even if I should find that the *rule nisi* has not lapsed, I ought then, adopting a Constitutional approach that eschews sequestration instead of execution and recovery of outstanding monies, to exercise the discretion (postulated in section 12 of the Insolvency Act) in the respondent's favour (i.e. I ought to refuse the final order for sequestration sought by the applicant).

<u>THE FIRST ISSUE</u>

6. It is common cause that:

    6.1 the *rule nisi* was returnable on the 2nd of August 2021;

6.2 this application (for a final order of sequestration) was duly enrolled for the 2nd of August 2021;

6.3 it was duly allocated to my opposed roll;

6.4 in regulating my opposed roll I determined the matter would be heard at 10:00am on Wednesday the 4th of August 2021 and accordingly so allocated the matter;

6.5 it was on that basis that argument only commenced at 10:00am on Wednesday the 4th of August 2021.

7. In accordance with the practice manual applicable to this division, all matters are enrolled for the first day of the week in which the matter is to be heard,**[2]** the senior Judge allocating matters to Judges sitting in the Opposed Court at least 10 days in advance, and each particular Judge then preparing his/her own roll for the week in which the work is to be distributed. The opposed motion roll is a continuous roll that endures from 10:00am on the Monday of the particular week until 16:00pm on the Friday of that week. As is often the case with opposed motions, a matter may commence on one day and only conclude on the next day and, when that happens, opposed motion Courts do not postpone the matter to the following day but simply adjourn until the next day. So too, matters that are enrolled for the Monday of any particular week, but are allocated to any other day of that week, do not get postponed to that day, but simply stand down until the allocated date and time in that week. So too, *in casu*, the matter was on my roll and before me on the 2nd of August 2021 but, in accordance with the published roll, then stood down until Wednesday at 10:00am. In those circumstances I neither discharged the rule on Monday at 10:00am, nor did the period of the validity of the rule expire. That is because the matter was not only properly enrolled, it was before me on the 2nd of August 2021 but then stood down for argument.

9. In arriving at this conclusion, I am fortified by two unreported judgements, similar in effect. The first is the judgement in *Davenport John William v Platfields Limited.* Klaaren AJ was required to decide whether a provisional order of liquidation had lapsed on the morning of the 27th of May 2016 in circumstances where Modida J had given an order in the morning removing the matter from the roll with costs but had issued an order in the afternoon directing that the matter was postponed to the

22nd day of July 2016 and reserving costs. The court file reflected (in consequence of the afternoon order) a deletion of the earlier words of the morning order stating "matter removed from the roll".

10. Klaaren AJ, in dealing with the argument that the rule had lapsed in the morning when the initial order was made, said that:

> "*[20] The action of the Court on 27 May 2016 might be looked at in two lights: in the first, it was one continuous judicial action; in the second, it was two separate judicial actions, an initial order and then a reconsidered order. I prefer seeing the action of the Court in the first light. The judicial consideration continued from morning through the afternoon. As it sometimes does, the judicial process proceeded in steps forwards and backwards. The action of the Court on the day of 27 May 2016 was to postpone the matter to 22 July 2016."*

11. The second judgement is that of Modiba J in *The Body Corporate of Santa Fe v Bassonia Four 07 CC* A provisional winding up order, returnable on the 6th of August 2018, had served before Ismail J but the matter was not on the roll. Ismail J stood the matter down until the 8th of August 2018 to allow Santa Fe's attorney to file an affidavit explaining why the matter was not on the roll. On the latter date (8 August 2018), having accepted the explanation proffered, the *rule nisi* was then extended. On the extended return day Bassonia contended before Modiba J that the extended *rule nisi* was a nullity because, when the matter had not been on the roll of the 6th of August and Santa Fe was in default of appearance, the *rule nisi* had then lapsed. Accordingly, so the argument went, its extension thereafter became a nullity.

12. Modiba J found that when Ismail J had stood the matter down on the 6th of August to the 8th of August, the rule had not lapsed and thus the extension of the rule on the 8th of August 2018 was valid.

13. In like fashion, in this matter, the provisional order was before me from the start of my roll on the 2nd of August 2021 and remained so until argument was disposed of on Wednesday the 4th of August 2021, all of this as part of "one continuous judicial action".

14. In any event, to the extent that the rule had in fact lapsed because I had not allocated the matter to my roll on the 2nd of August, but rather to the 4th of August 2021, at the point at which I heard argument and reserved judgement, the matter was plainly still *res integra*.

15. Rule 27(4) of the Uniform Rules of Court permits a discharged *rule nisi* to be revived. Fleming J said, concerning the discretion to revive the rule, that what would be critical would be to determine the effect that revival of the rule would have, suggesting that it would be proper to exercise such a discretion if the rule was revived while the matters were still essentially *res integra*.**[11]**

16. In the Davenport matter**[12]**, Klaaren AJ said:

> "*[19] … In this case, even on the argument that the rule did lapse in the morning, in the afternoon, the matter was still open for decision and res integra. The relevant time period here was measured in hours not weeks…."*

and:

> "*[23] Even if I am wrong in my view of the action as one continuous judicial action, in the view of the matter as two separate judicial actions, for the reasons above in discussing T.V. Services and Bachir, the Court still had the necessary jurisdiction in the afternoon in a matter that was still res integra to make its order of postponement*."

17. So too, in this matter, as at the time of hearing argument on the matter, being a mere two days later as part of a continuous opposed motion roll, the matter in my view remained *res integra*. To the extent that it is necessary to pertinently revive the rule in those circumstances in order to render this judgement effective, I exercise that discretion. I take into account that there was no fault on the part of the applicant who had been directed to only appear at 10:00am on Wednesday the 4th of August 2021, and also that no other interested party requested electronic access to my court in regard to this matter, whether on the Monday, Tuesday or Wednesday of that week.

18. The second issue I am called upon to decide was articulated by respondent's counsel on the basis that, whilst the respondent did not contend that section 8 of the Insolvency Act (including section 8(b)) was unconstitutional, and accepted that the

Sherriffs' return relating to the execution of the writ of execution, fell within the ambit thereof (i.e. that the provisions of section 8(b) were met in the circumstances), it was nevertheless argued that I should adopt a Constitutional approach to the exercise of my discretion and, doing so, ought to refuse the order sought.

19. The constitutional approach, so the argument went, required that I take into account the provisions of section 36(1)(e) of the Constitution of the Republic of South Africa.**[13]** In doing so counsel argued that I should also take account of the fact that:

19.1 the respondent is the registered owner of the property at Erf 665 Mafikeng (the "Mafikeng property"), the value whereof exceeds the debt, and that the applicant was entitled to execute against that property; and

19.2 the order relied upon by the applicant was one that permitted execution against both the respondent and Adv Dauds.

20. The argument accordingly proceeded that knowing that there were less restrictive options available to the applicant, namely executing either against Adv Dauds or the Mafikeng property or both, I ought accordingly to exercise the discretion against the grant of a final order of sequestration as. That is because the applicant ought to have executed against the property and/or Dauds, that being the "less restrictive means to achieve the purpose".

21. I am not persuaded that this second issue is meritorious. In the first instance this application is not about extinguishing the indebtedness of the respondent. It is about the sequestration of his estate to the benefit of his creditors. That is its purpose.

22. In terms of the argument advanced I am required to accept that execution against the Mafikeng property was the appropriate route to follow and that the applicant ought not to have elected instead to proceed with a sequestration application. That assumption, however, is not supported by any facts in the application papers. That is because the issue was first raised in argument.

23. The argument also proceeds from a base that does not challenge the act of insolvency relied upon. The legislature has, however, provided that the act of

insolvency itself (as opposed to actual insolvency) is a sufficient ground for the purpose of obtaining a sequestration order. For this reason, the estate of a debtor may be sequestrated even though it is technically solvent.**[14]**

24. The respondent nowhere in his answering affidavit addresses his financial position. Accordingly, this Court is left entirely in the dark as to the true position of his estate**[15]**. It could well be that the debts of the respondent, together with the debt owed to the applicant exceed the value of the Mafikeng property in which event the interests of creditors of the estate are better protected by his sequestration**[16]**.

25. What is more, the argument only takes into account the respondent's position. It ignores the rights afforded to the applicant, including the right to proceed with a sequestration application against the respondent who has committed an act of insolvency.

26. The argument to the effect that the applicant ought to have executed against Dauds suffers from similar shortcomings in my view. There is also no suggestion made that any execution against Dauds would have yielded a positive outcome. In circumstance where the liability is joint and several the applicant was perfectly entitled to proceed to execution against only one of two debtors. The application papers do not explore the basis for the decision on the applicant's part on this score because, again, the issue is raised in argument for the first time.

27. In the final analysis I am also guided by the fact that I ought not to exercise my discretion in favour of the respondent unless there are special circumstances which justify the withholding of a final order, and it is for the respondent to establish those circumstances. In the matter of *Millward v Glaser***[17]**, Roper J said the following in this regard**[18]**, namely:

> "*The discretion of the Court is however not to be exercised lightly, and where an act of insolvency has been proved the onus upon the debtor who wishes to avoid sequestration is a heavy one (De Waard v Andrew & Thienhaus Ltd.; Polunsky & CO. v. Beiles & Others). I agree with respect with the observation of Broom, J., in Port Shepstone Fresh Meat & Fish CO. (Pty.), Ltd. v. Schultz (supra), that where the petitioning creditor has proved an act of insolvency and reasons to believe that sequestration will be to the advantage of creditors, "very special considerations" are necessary to disentitle him to his order*."

28. In the result, I grant an order in the following terms:

28.1 The Estate of the Respondent is placed under final sequestration.

28.2 The costs of this application are to be costs in the sequestration.

TE Connectivity Solutions GMBH v TIS Invest (Pty) Ltd (2019/28318) [2021] ZAGPJHC 415 (10 September 2021)

Winding-up application-postponement-court must be reluctant-creditors could be prejudiced

Winding-up application- concept of commercial insolvency as a ground for winding up a company is eminently practical and commercially sensible

[1] The applicant, TE Connectivity Solutions GmbH ('TEC'), sought the winding-up of the respondent TIS Invest (Pty) Ltd ('TIS') on the basis that TIS is indebted to the applicant in the amount of €1 127 174.59, together with interest thereon. It bases the application on the fact that TIS is unable to pay its debts and is, in terms of s 345(1)(a) of the Companies Act 61 of 1973 (the '1973 Act'), commercially insolvent.[1]

[14] It is trite that before granting a postponement and an extension in a provisional winding-up application, the reasons therefor must be properly scrutinised, in order to protect the creditors who are prevented by the provisional winding-up order from enforcing their claims. It is necessary for the court to protect such creditors against the costs of legal fees, administration costs and other financial disadvantages which may occur if an extension were granted.[2]

[15] From the recent financial statements referred to in the Report, TIS has a retained income position of minus R6 804 002.54. It has no funds available; thus a

costs order will not alleviate the prejudice caused to the body of creditors if the postponement were to be granted.

[16] In regard to the necessity for a postponement to deal with the Report, TIS has annexed a myriad of financial statements which it says were provided to it by the provisional liquidators. TIS contended that such documentation shows that it is in a solvent financial position and should not be liquidated. As will appear below, TIS has dealt extensively with the findings in the Report and a postponement will not assist them in taking the matter further.

[17] TEC submitted that TIS is hopelessly insolvent and a postponement cannot alter this factual position. It will only result in further administration costs being incurred, with the result that there will be a lower dividend for the body of creditors.

[18] Creditors have been waiting for over two years for TIS to be wound up for their benefit; if the business has value, this must be realised by way of a sale of the business by the liquidators and for the benefit of the creditors who are owed R49 336 614.60.

[19] Thus the applicant for postponement was refused.

Legislative background

[20] Commercially insolvent companies are wound-up in terms of Chapter XIV of the 1973 Act by virtue of Item 9 of Schedule 5 of the Companies Act 71 of 2008 (the '2008 Act'). In terms of s 344 of the 1973 Act, the winding-up of a company may be sought on a number of bases, including that it is unable to pay its debts (s 344(f)) and that it is just and equitable to do so (s 344(h)).

[21] In terms of s 346(1)(b) of the 1973 Act, the winding-up of a company may be sought by a creditor, including a contingent or prospective creditor. The debt need only consist of a nominal amount. Where the respondent's indebtedness has, prima facie, been established, the onus is on such respondent to show that this indebtedness is disputed on bona fide and reasonable grounds.[3]

[22] In Absa Bank Limited v Rhebokskloof (Pty) Ltd,[4] which passage was cited with approval by the SCA in Murray NO and Others v African Global Holdings (Pty) Ltd,[5] it was held that:

'…The concept of commercial insolvency as a ground for winding up a company is eminently practical and commercially sensible. The primary question which a Court is called upon to answer in deciding whether or not a company carrying on business should be wound up as commercially insolvent is whether or not it has liquid assets or readily realisable assets available to meet its liabilities as they fall due to be met in the ordinary course of business and thereafter to be in a position to carry on normal trading - in other words, can the company meet current demands on it and remain buoyant? It matters not that the company's assets, fairly valued, far exceed its liabilities: once the Court finds that it cannot do this, it follows that it is entitled to, and should, hold that the company is unable to pay its debts within the meaning of s 345(1)(c) as read with s 344(f) of the Companies Act 61 of 1973 and is accordingly liable to be wound up.'

[23] Section 345(1)(a) provides that creditors who have little or no knowledge of a company's financial affairs, may apply for its winding-up based on an allegation that the company is commercially insolvent, by delivering a demand to the respondent company's registered address; if the respondent company fails or neglects to pay, secure or compound for the indebtedness, it is deemed to be commercially insolvent. In Body Corporate of Fish Eagle v Group Twelve Investments Pty Ltd,[6] the court held that:

'The deeming provision of s 345(1)(a) of the Companies Act creates a rebuttable presumption to the effect that the respondent is unable to pay its debts ... If the respondent admits a debt over R100, even though the respondent's indebtedness is less than the amount the applicant demanded in terms of s 345(1)(a) of the Companies Act, then on the respondent's own version, the applicant is entitled to succeed in its liquidation application and the conclusion of law is that the respondent is unable to pay its debts.'

[24] In Murray NO,[7] reference is made to Boschpoort Ondernemings (Pty) Ltd v Absa Bank Ltd,[8] where the Supreme Court of Appeal ('SCA') stated that:

'For decades our law has recognised two forms of insolvency: factual insolvency (where a company's liabilities exceed its assets) and commercial insolvency (a position in which a company is in such a state of illiquidity that it is unable to pay its debts, even though its assets may exceed its liabilities).'

[25] In general, an unpaid creditor has a right, ex debito justitiae, to a winding-up order against the respondent company that has not discharged the debt owing to the creditor. In Afgri Operations Limited v Hamba Fleet (Pty) Ltd the SCA noted that, '…the of a court to refuse to grant a winding-up order where an unpaid creditor applies therefor is a "very narrow one" that is rarely exercised and in special or unusual circumstances only.'[9]

[44] In my view, the concessions made by Ms Motaung in the business rescue application that TEC is a creditor of TIS and that TIS is commercially insolvent, nullifies the belated attempt to dispute the orders and the deliveries. Such concessions invalidate the submissions by TIS that the defences raised are genuine or bona fide.

[45] In dealing with the Report, TIS seeks to show that TEC is solvent and should not be would up. TEC challenges the conclusions arrived at by TIS. TEC contended that the retained income position of TIS as at 14 July 2021 amounted to minus R6 804 002.54; it has been trading at a loss for a sustained period of time, thus demonstrating commercial insolvency. TEC contended further that TIS is relying on the post-liquidation financial position, which does not present an accurate picture of its ongoing financial situation. In this regard, TEC points out that:

(a) TIS is currently trading under the protection of a moratorium against any legal proceedings; it therefore does not have the pressure of having to pay its creditors. Because TIS is in provisional liquidation, it has managed to build up cash reserves of approximately R2 million as there is no immediate pressure to pay suppliers. Some suppliers have agreed to pay TIS once they get paid.

(b) The expenses listed in the profit and loss report do not accurately portray what TIS would ordinarily be paying for its expenses had it not been placed under provisional liquidation. For example, a lower rental was negotiated between the provisional liquidators and the landlord of the premises from which TIS is operating.

(c) In addition, the provisional liquidators have negotiated preferential payment terms with contractors such as Vodacom. Thus, TIS will be paid quicker than they would under normal payment terms. Therefore, TIS’s liquidity appears to have improved – but these preferential payment terms will only exist for as long as TIS remains in provisional liquidation and is trading under the control of the provisional liquidators.

(d) Other costs such as interest on liabilities, costs of the liquidation, costs incurred for the repair of the building premises (which TIS has recently vacated) have not been accounted for in the profit and loss account.

[46] Thus, it is submitted that the financial position described by the acting CEO of TIS, Mavis Leoma Motaung ('Ms Motaung'), in her founding affidavit and the facts alleged in the postponement application, in relation to the Report are inaccurate; the majority of the documents relied upon relate to the post-liquidation trading period of TIS, and do not take into consideration the solvency position of TIS pre-liquidation.

[47] In my view, TEC has shown that it is a creditor of TIS; the debt is not disputed on bona fide or reasonable grounds; TIS is trading in insolvent circumstances and is both factually and commercially insolvent; and assets of TIS have been diverted to the prejudice of TIS's creditors, including TEC.

Accordingly, the following order is made:

1. The respondent is placed under final winding-up in the hands of the Master of the High Court.

2. The costs of this application are to be costs in the winding-up.

Strategic Partners Group (Pty) Ltd and Others v The Liquidators of Ilima Group (Pty) Ltd and Others (34026/18) [2021] ZAGPJHC 403 (13 September 2021)

Interrogations- sections 414 and 415 of the old Companies Act - In issuing the relevant subpoenas, the second respondent would ordinarily have made a call as to the relevance and materiality of the information sought during the course of those proceedings. The papers filed in the present proceedings do not suggest otherwise.

Ilima Group (Pty) Ltd (hereafter referred to as the 'company in liquidation') was compulsorily wound up by order of court. Thereafter, the Master of the High Court appointed 3 joint liquidators to wind up its affairs. Those 3 liquidators are referred to collectively as the first respondent. The company in liquidation is the owner of a 11.784% shareholding in the first applicant (hereafter referred to as 'SPG').

The second applicant is a shareholder, the third and fourth respondents are directors, whilst the fifth respondent is the auditor of SPG. The liquidators were required in the course of winding up the affairs of the company in liquidation to value and dispose of the shareholding owned by it. They took steps to ascertain the value of the shareholding by way of seeking access to the financial affairs of SPG. The liquidators

used the provisions of sections 414 and 415 of the old Companies Act (Act No. 71 of 1973) to commence proceedings before the Second Respondent and to have persons subpoenaed to attend the proceedings to provide information which the liquidators believed would be necessary to properly value the shareholding of the company in liquidation. The persons subpoenaed to attend the proceedings included *inter alia,* representatives of the first applicant and the third to fifth applicants. Not only was their evidence required but they were required to produce various categories of documents in the course of those proceedings. These persons are persons who naturally have knowledge about the affairs of SPG and who also through the production of documents could reveal information pertaining to the shareholding in question. The liquidators realized that any shareholders agreement was relevant to the valuation of the shareholding. In November 2013, they called for production of SPG's shareholders agreement and also indicated that they required an independent valuation of the company in liquidation's shareholding in SPG (hereinafter intermittently referred to as 'the shares' or 'the shareholding'). SPG sought to make use of the shareholders agreement to achieve a forced sale of the shares and took steps under the shareholders agreement to obtain a valuation of the shareholding so that it could implement the rights it believed it held. In due course a valuation of the shares was obtained from Mazars. The liquidators disputed the valuation as well as the enforceability of the shareholders agreement as not all shareholders had signed it. Thereafter, two further valuations were procured, one by the liquidators (the Zeelie Valuation) and another by SPG (the Price Waterhouse Coopers 'PWC' valuation). These are referred to in more detail below. Suffice it to say at this juncture that the Zeelie valuation was disputed by SPG whilst the PWC valuation was disputed by the liquidators.

Litigation ensued between the parties and in due course the dispute concerning the validity of the shareholders agreement was resolved by findings made by the Court. In a judgment delivered on 17 August 2018, Unterhalter J found that no valid and binding shareholders agreement had been concluded between the shareholders of SPG.

On 8 June 2020, after the judgment of Unterhalter J had been delivered, notice was given of a Special General Meeting of the shareholders of SPG for purposes of passing

a resolution to abrogate SPG's Memorandum and Articles of Association in their entirety and to replace them with a Memorandum of Incorporation ('MOI'). The terms of the MOI provided, *inter alia,* for a forced sale of the SPG shares at a value determined at a retrospective date, being the date on which a forced sale event, as defined therein, occurred.

The liquidators had concerns, *inter alia*, that that the proposed MOI would effectively restrict access to certain information and/or documentation of SPG and that the forced sale provisions therein imposed a restriction on the manner in which the liquidators could seek to realise the shares, moreover, without regard for the present day value thereof. The liquidators voted against the adoption of the proposed resolution. Despite their opposition, the resolution was adopted by majority vote on 30 June 2020.

The liquidators formed the view that the adoption of the new MOI, given the absence of a valid shareholders agreement providing for a forced sale mechanism, was a stratagem employed by the majority to achieve what they could not accomplish under the purported shareholders agreement and that its provisions providing for a forced sale of the shares at a value determined at a retrospective date was oppressive and unfairly prejudicial to the creditors of the company in liquidation.

The question which would naturally have arisen in the proceedings before the second respondent was whether or not the liquidators were entitled to demand production of documents with a view to valuing the shareholding, bearing in mind that the validity of the shareholders agreement, upon which SPG had relied, was vehemently in dispute. In issuing the relevant subpoenas, the second respondent would ordinarily have made a call as to the relevance and materiality of the information sought during the course of those proceedings. The papers filed in the present proceedings do not suggest otherwise.

12. In this regard, the relief sought in the main application is for a declarator that '*the liquidators of Ilima Group (Pty) Ltd (in liquidation), a shareholder in Strategic Partners Group (Pty) Ltd, are entitled to no more documents from any of the*

applicants other than those documents which fit into the categories of documents described in the following statutes:- (a) **sections 26** *and* **31** *of the* **Companies Act, 2008***, alternatively, (b) section 113 of the Companies Act of 1973'* together with an order for costs against those respondents who oppose the application. Only the First Respondent opposed the main application. Neither the first nor the second respondent participated in the proceedings.

13. The liquidators opposed the main application and also filed a counter application in which, apart from seeking the dismissal of the main application, they seek, *inter alia,* a variety of declarators directed towards seeking rulings on the status of clause 27 of the new MOI as well as the status of the documents sought at proceedings before the second respondent and further in these proceedings.

14. For the sake of completion, the relief sought in the counter-application, includes the following:

14.1. An order that the main application be dismissed with costs, such costs to include the costs of two counsel;

14.2. A declarator that in terms of section 163(2)(h) of the Companies Act, 71 of 2008 ('the 2008 Act'), the provisions of clause 27 of the Memorandum of Incorporation of SPG, as approved at the General Meeting of shareholders of SPG on 30 June 2020, do not apply to the shareholding or sale of such shareholding held by Ilima Group (Pty) Ltd (in liquidation) ('Ilima') in SPG;

14.3. A declarator that the documents and records sought by the first respondent at insolvency enquiry proceedings held at the Krugersdorp Magistrates Court on 23 March 2018 and 15 June 2018 respectively, fall within the category of documents to which the first respondent is legally

entitled to in terms of sections 414 and 415 of the old **Companies Act) and** are to be provided to the first respondent;

14.4. An order that the fifth applicant provide the documents, listed in annexure 'B1.3' to the Notice of Counter-Application, to the first respondent;

14.5. An order that the first to fourth applicants provide the documents, listed in annexure 'C' to the Notice of Counter-Application, to the first respondent;

14.6. An order that the first to fifth applicants pay the costs of the counter-application on an attorney and client scale, such costs to include the costs of two counsel.

Issues for determination

15. The legal issue arising for consideration in the main application is whether a shareholder in liquidation (represented by its liquidators) is entitled to only the limited rights of access to information and documents as are afforded to an ordinary shareholder under the provisions of the new **Companies Act or** whether, by virtue of the provisions of **ss414** and **415** of the old **Companies Act, the** liquidators are entitled to wider access to information and documents for purposes of administering the insolvent estate of the shareholder in liquidation.

16. The issue for determination in the counter-application is whether or not the first respondent has established an entitlement to the declaratory relief sought, including the relief sought in terms of **s163(h)** of the new **Companies Act, and** whether the order so sought is just and equitable in the circumstances of this matter.

This notwithstanding, the first applicant went ahead and singularly mandated Mazars Corporate Finance (Pty) Ltd ('Mazars') to attend to the valuation of SPG shareholding.**[9]** On 27 May 2014, Mazars completed their valuation, which was furnished to the liquidators on 23 June 2014. Mazars concluded that the value of 100% of the shares in SPG was between R62 million and R74 million, as at 31 March 2014, which value was said to be 'subject to material uncertainties as discussed in more detail below.' **[10]**

28. In a letter addressed by the third applicant to SPG on 23 June 2014 (a copy of which was forwarded to the liquidators) it was made clear that SPG was seeking to facilitate the sale of the company in liquidation's shares in SPG through the forced sale mechanisms provided for in clauses 24 & 25 of the SPG shareholders agreement.**[11]** The letter recorded, *inter alia*, that SPG would commence with the implementation of the sale of the relevant shares at a price of R5.4 million in accordance with clauses 15.2 and 15.4 of the shareholders agreement, as required in clause 25 thereof. It was specifically recorded that SPG's shares were unlisted and were subject to pre-emptive requirements in favour of other SPG shareholders, which limited the tradability thereof. In this letter, the third applicant indicated that, in the light of the various restrictions, the board of directors of SPG considered the fair market value of the company in liquidation's shares to be approximately R5.4 million, after applying a 20% discount to the value calculated by Mazars, given existing restrictions on the encumbering of the shares.**[12]**

29. On 14 November 2014, the liquidators rejected the Mazars valuation, *inter alia*, on the basis that the shareholders agreement was not signed by all the shareholders of SPG.**[13]** In paragraph 13 of their letter, the liquidators made plain their stance that the company in liquidation was not legally bound to sell its shares in SPG on a forced sale basis nor were they bound by the Mazars valuation, which had purportedly been conducted in accordance with the provisions of the disputed shareholders agreement. The liquidators however indicated that they were nonetheless prepared to negotiate with SPG, its shareholders and outsiders for the sale of the company in liquidation's shares in SPG.

The Insolvency Inquiry

51. It is perhaps apposite at this juncture to contextualize certain subpoenas that were issued in the course of a lawfully convened insolvency inquiry**[31]** that is currently underway in terms of ss 414 and 415 of the old **Companies Act.**

52. According to the liquidators, in order to enable them to perform a proper valuation of SPG for purposes of determining the value of the company in liquidation's shareholding in SPG, they decided to institute an insolvency inquiry in terms of the provisions of **s414** as read with **s415** of the old **Companies Act before** a magistrate (second respondent) in the Krugersdorp Magistrate Court. To this end, six subpoenas were issued against SPG officials during the period 2015**[32]** to April 2016 for the production of information and documents, as required at various times, for purposes of investigating the affairs and property of the company in liquidation.

68. In *Bernstein,**[44]*** the Constitutional Court was again seized of a challenge to the constitutionality of ss 417 and 418 of the old **Companies Act. The** judgment of Ackerman J affords a comprehensive consideration of the nature and purpose of insolvency enquiries under the old **Companies Act. As** pointed out in *Swart* supra*, 'those observations hold equally true in respect of enquiries under* **ss 414**-**415***.'* The provisions under consideration were held to be compatible with the Interim Constitution. The Constitutional Court acknowledged that, subject to effective controls against their abusive use, the far-reaching effects of the said statutory provisions were justified in the public interest and accordingly have to be borne with stoicism by those upon whom they are properly brought to bear.

69. The liquidators were well within their rights to utilise the statutory mechanisms provided in the old **Companies Act in** causing subpoenas to be issued by the second respondent for the production of documents relevant to the company in liquidation and its affairs for the purpose of winding-up the said company and in dealing with the shares held by it in SPG. Whilst they have been criticized for failing

to utilise the provisions of **s 164** of the new **Companies Act to** procure a court determined fair market valuation of the company in liquidation's shares, and for failing to utilise the provisions of PAIA**[45]** to obtain production of documents, I have not been referred to nor am I aware of any authority that obliges a liquidator to do so to the exclusion of the provisions in the old **Companies Act. On** the contrary, it is pointed out in the general commentary on **s 164** of the new **Companies Act in** Henochsberg**[46]** that 'It should be noted that an alteration of the Memorandum of Incorporation *may also* be challenged by a member on the ground that it…unfairly disregards the interests of the shareholder in terms of **s 163**…'. (own emphasis) It has in any event not been established by the applicants that the relevant procedural requirements for the invocation of **s164** were met. In the light of the authorities quoted above and in the view I take of the matter, the interesting arguments presented by the applicants in their heads concerning the efficacy, practicality and preferability of the provisions of **s164** or PAIA need not detain me further.

70. The potential scope for an inquiry under **ss 414** and **415** is 'extremely wide'.**[47]** As is apparent from the provisions of **ss 414(2)** and **415**(1),**[48]** the only limitation upon the scope of the interrogation and so too, the seeking of documents, is that the Master or presiding officer (as the case may be) must disallow any question which is irrelevant and may disallow one which would prolong the interrogation unnecessarily.

71. In dealing with the argument that the mechanism for obtaining information and the discovery of records provided for in the old **Companies Act constitutes** an extraordinary mode of obtaining information, it was held in *Bernstein* that 'Inasmuch as the subject matter of the enquiry is the affairs of the company taken in the very widest sense, the examinee may be interrogated on a very wide range of matters and may be compelled to disclose any of his books or papers, however confidential or incriminating they might be. The mechanism is available, not only against the directors, officers, employees or agents of the failed the company and against those suspected of being responsible for its failure, but also against innocent third parties whose misfortune it is to know something

about the trade, dealings, affairs or property of the company.' (footnotes omitted) (emphasis added)

72. Further, in dealing with the argument that the mechanism of **sections 417** and **418** and its employment was one whereby innocent outsiders, who played no part in the management of the company or its demise, are, *inter alia,* forced to go to a place where they do not want to be; are forced to give evidence by their own oral testimony and by the production of documents; are forced to reveal confidential information that they want to keep private; are forced to produce their private books and documents that they want to keep confidential, the Constitutional Court in *Bernstein,* supra, had the following to say:

" ..directors, officers of the company generally, auditors of the company and certain outsiders, have a duty to assist a **section 417** enquiry achieve its objects. This duty has been voluntarily assumed by such persons entering into their respective relationships with the company. **Section 417(2)** permits interrogation concerning any matter referred to in **section 417(1).** The latter section refers to any director or officer of the company or person known or suspected to have in his possession any property of the company or believed to be indebted to the company, or any person whom the Master or the court deems capable of giving information concerning the trade, dealings, affairs or property of the company. In effect the section permits questions to be asked in connection with property, claims or the trade, dealings, affairs or property of the company. The scope of the interrogation in terms of section 417(2) of the Act must, however, be informed by the purpose of the enquiry. In so far as the purpose is concerned with the discovery of information which may be to the financial benefit of the the company and relates to the proper winding-up of the the company, as more fully analysed above, the scope of the questioning is limited to this purpose." (own emphasis)

73. The liquidators utilized the mechanism provided in ss 414 and 415 to obtain information required to independently assess and/or verify the value of the company in liquidation's shareholding in SPG, which, as is common cause or at least not in dispute on the papers, comprises a significant asset in the insolvent estate. As

the court in *Bernstein* recognised, it is the function of a liquidator or administrator to do his best for the creditors. I can see nothing improper in a liquidator seeking to obtain as much information as is reasonably required for purposes of assessing**,** on an informed basis,**[49]** the value of an asset forming part of the insolvent estate for purposes of liquidating same for the ultimate financial benefit of the *concursus creditorum*.

74. The PWC report appears to have raised more questions than answers, precipitating a need for further interrogation of the current value of SPG and in turn, the value of the company in liquidation's shares. As circumstances evolved, the question of the applicable date of the valuation became particularly contentious in the light of the judgment of Unterhalter J, which in turn gave rise to the need to determine the *current* or present-day value of SPG and that of the company in liquidation's shareholding in SPG.

93. For all the reasons given, I cannot find that the applicants have established an entitlement to the relief sought in the main application.

Section 163 *relief*

94. During oral argument presented at the hearing of the matter, counsel for the applicant submitted that the relief sought by the applicants in the main application has to a large extent become subsumed by the **s163** relief sought (by SPG) in the counter-application.

115. Given the protracted history surrounding the dispute concerning the fair value of the company in liquidation'**s** shares; the judgment of Unterhalter J that eventually decreed the shareholders agreement to be invalid, thereby vindicating the approach hitherto adopted by the liquidators; the timing of the amendment of the SPG MOI to bring into play what SPG wanted but failed to achieve through a non-existent shareholders agreement, in order to procure an alteration of pre-existing

conditions that were in place prior to the amended MOI (where no forced sale provisions existed and no restrictions were imposed on the sale of the shares in question to third parties (subject to shareholders' pre-emptive rights); the likely appreciation in the value of the company in liquidation's shareholding in SPG between the date of its liquidation and the date of the ultimate realisation of its shareholding, as demonstrated in the first respondent's papers, it is my view that the majority shareholders unfairly sought to achieve a result which the court, per Unterhalter J found not to subsist. In all these circumstances, I have no doubt as to the prejudicial effect of clause 27 of the new MOI and have no hesitation in finding that the introduction thereof has had a result that is unfairly prejudicial to the sale of the company in liquidation's shareholding.

116. In the result, I find that the first respondent has established its entitlement to the relief sought in the terms set out in its notice of counter-application, as set out in paragraph 14 above.

Costs

117. It is trite that an award of costs is a matter that falls within the discretion of the Court. A punitive costs order has been said to be an extra-ordinary one which may be imposed by reason of special considerations, arising either from the peculiar circumstances or the conduct of a party during the litigation.**[73]**

118. In *Plastic Converters*,**[74]** the court cautioned that the scale of attorney and client is one which should be reserved for cases where it can be found that a litigant conducted itself in a clear and indubitably vexatious and reprehensible matter. The term 'vexatious' was considered in the context of a punitive costs award in *Johannesburg City Council*,**[75]** where the court expressed the view that proceedings may be regarded as vexatious when a litigant puts the other side to unnecessary trouble and expense which it ought not to bear. The Constitutional Court affirmed this approach in *Public Protector v SARB*,**[76]** stating that a punitive

costs order is appropriate 'in circumstances where it would be unfair to expect a party to bear any of the costs occasioned by the litigation'**[77]** and is designed 'to mark the court's displeasure at a litigant's conduct, which includes vexatious conduct and conduct that amounts to an abuse of the process of court'.**[78]**

119. In this matter, I am persuaded that a punitive costs order is warranted. Without repeating what has already been stated, the fact remains that the applicants did not appear to consider it oppressive or an abuse by the liquidators of their duties when they submitted themselves at the insolvency inquiriy and furnished unconditional undertakings to supply the information or documents requested (thereby avoiding interrogation), only to later renege on such undertakings whilst generally continuing to obstruct the liquidators from discovering the true and current value of SPG, ultimately maintaining that the liquidators were not entitled to the information on indefensible grounds, thereby incurring costs which ought not to have been incurred.

120. For all the reasons given, the following order is granted:

ORDER

1. The main application is dismissed with costs, such costs to include the costs of two counsel.

2. The late filing of the answering affidavit in the main application is condoned.

3. The counter-application succeeds. In this regard:

    a. It is declared that in terms of section 163(2)(h) of the Companies Act, 71 of 2008 ('the 2008 Act'), the provisions of clause 27 of the

Memorandum of Incorporation of SPG, as approved at the General Meeting of shareholders of SPG on 30 June 2020, do not apply to the shareholding or sale of such shareholding held by The company in liquidation Group (Pty) Ltd (in liquidation) ('The company in liquidation') in SPG;

b. It is declared that the documents and records sought by the first respondent at 'insolvency enquiry' proceedings held at the Krugersdorp Magistrates Court on 23 March 2018 and 15 June 2018 respectively, fall within the category of documents to which the first respondent is legally entitled to in terms of sections 414 and 415 of the Companies Act, 1973, ('the 1973 Act') and are to be provided to the first respondent;

c. The fifth applicant is to provide the documents, listed in annexure 'B1.3' to the Notice of Counter-Application, to the first respondent;

d. The first to fourth applicants are to provide the documents, listed in annexure 'C' to the Notice of Counter-Application, to the first respondent;

e. The first to fifth applicants are to pay the costs of the counter-application on an attorney and client scale, such costs to include the costs of two counsel.

JL Excavators (Pty) Ltd v C Rock Mining (Pty) Ltd (9347/2020) [2021] ZAGPJHC 455 (22 September 2021)

Winding-up application- *alternatively,* judgment for payment of an amount - no difficulty in an applicant seeking judgment as an alternative to a winding-up, as long as the case for judgment is sustained

[1] In its notice of motion, the applicant sought a winding-up of the respondent, *alternatively,* judgment for payment of an amount of R394,052.37 together with interest at a rate of 10% *per annum a tempore morae.*

[2] At the hearing of the matter, the applicant indicated that it would not be persisting with its prayer for a winding-up order and would only be seeking judgment as prayed for in the alternative.

[3] The respondent argued, as a preliminary point, however, that it was not open to an applicant to seek judgment as an alternative to a winding-up order and that, for this reason, the application ought to be dismissed. The respondent was, however, unable to point me to any authority in support of these submissions and, understandably, did not press the issue.

[4] I can see no difficulty in an applicant seeking judgment as an alternative to a winding-up, as long as the case for judgment is sustained on the papers and the respondent has had an opportunity to deal with the claim for such relief. Indeed, it seems to me that the court, when faced with a winding-up application, if it were not satisfied that the requirements for a winding up had been met but was nonetheless satisfied that the debt relied upon was indeed due, owing and payable, could nonetheless grant judgment in the applicant's favour if it considered it just to do so.

[5] I find support for this conclusion in the wording of section 347(1) of the Companies Act 61 of 1973 (which remains of application by virtue of item 9, schedule 5 of the **Companies Act 71 of 2008**). The section provides that:

> "*The Court may grant or dismiss any application under* **section 346***, or adjourn the hearing thereof, conditionally or unconditionally, or make any interim order or any other order it may deem just, but the Court shall not refuse to make a winding-up order on the ground only that the assets of the company have been mortgaged to an amount equal to or in excess of those assets or that the company has no assets"* (my emphasis).

[6] I turn now to the merits of the application for payment.

[7] the applicant leased an excavator and two articulated dump trucks to the respondent for the period 15 March 2018 to 16 May 2018 in terms of an oral agreement. It complains that amounts owed by the respondent in terms of this agreement remain unpaid.

[8] The defence raised by the respondent is one of payment. But for such payment, the respondent accepts that an amount of R394,052.37 would otherwise be due and payable by the respondent to the applicant.

The respondent contends that the aforesaid amount was paid on its behalf by a third party, Palaeo Mining (Pty) Ltd ("Palaeo") out of funds of the respondent held by Palaeo on the respondent's behalf. This was apparently done for practical reasons to expedite the payment to the respondent, rather than transferring the amount from Palaeo first and then making payments from the respondent's own accounts.

[24] Judgment is accordingly granted against the respondent for:

[24.1] payment of the amount of R394,052.37;

[24.2] interest on the aforesaid amount *a tempore morae* until date of payment;

[24.3] the applicant's costs of the application.

Educated Risk Investments 54 (Pty) Ltd v The Master of the High Court, Johannesburg and Others (18358/2020) [2021] ZAGPJHC 461 (27 September 2021)

Liquidation accounts- re-opening of the second and final liquidation and distribution account ('the second L & D Account')- basis for this are faulty nemley the settlement agreements were concluded unlawfully

[1]. The litigation between the parties in this opposed application has had a long and a tedious history dating back to July 2004 when an agreement was concluded between the then shareholders of Farm Bothasfontein (Kyalami) (Pty) Limited ('Farm Bothasfontein') and the fifth respondent ('Nedbank') and the sixth respondent ('Imperial'), in terms of which the latter companies acquired sixty percent shareholding in Farm Bothasfontein. This company, which at that time was the owner of the

renowned Kyalami Race Track, has since been liquidated and it is the finalisation of that liquidation which is at the heart of the opposed applications before me presently.

[3]. In the main application, Educated Risk applies for the re-opening of the second and final liquidation and distribution account ('the second L & D Account') in respect of Farm Bothasfontein (In Liquidation) ('Farm Bothasfontein'). This account was duly confirmed by the Master of the High Court on 1 June 2020 in terms of section 408 of the Companies Act, Act 61 of 1973 ('the 1973 Companies Act'). Pursuant to such confirmation, the second, third and fourth respondents ('the liquidators') commenced with the distribution of dividends to the shareholders of Farm Bothasfontein in terms of the second L & D account, and payments were made to Nedbank and to Imperial. The liquidators also tendered payment to Educated Risk of the amount of the distribution due to it in terms of the said account.

[4]. Section 408 of the 1973 Companies Act provides that the Master's confirmation –

'... shall have the effect of a final judgment, save as against such persons as may be permitted by the Court to re-open the account after such confirmation but before the liquidator commences with the distribution.'

[5]. In view of s 408, so the respondents contend, the orders prayed for by the applicant, the effect of which would be to re-open the L & D Account, are not competent and therefore the main application must fail for this reason alone.

[6]. In *Wispeco (Pty) Ltd v Herrigel NO and Another**[1]*** the principle applicable after payment of a dividend was stated as follows:

'It is perfectly clear from the wording of the section that, if in fact a dividend had been paid under the account, the Court would have no power to reopen the account.'

[7]. In the present matter, as already indicated, the Master confirmed the second L & D account on 1 June 2020 and the distribution in terms thereof had commenced on 5 June 2020 in that two payments of R3 435 227.23 each were made to Nedbank and to Imperial on the said date.

[8]. I therefore find myself in agreement with the submission made on behalf of the Liquidators and Nedbank and Imperial. The Court has no power to reopen the account. The wording of the section is peremptory and, in my view, once the

distribution had commenced, the confirmation, which has the effect of a final judgment, stands. For this reason alone, the main application should be dismissed.

In sum, Educated Risk applies for an order setting aside the second L & D account as it is aggrieved by the fact that Nedbank and Imperial received distributions on the basis of their sixty percent shareholding in the liquidated company. This sixty percent shareholding, so Educated Risk contends, was acquired unlawfully during 2004 by Nedbank and Imperial and in contravention of section 38 of the 1973 Companies Act, in that the company had financed the purchase of its own shares. The difficulty with the case of Educated Risk is that the dispute relating to s 38 was settled and compromised between all of the interested parties, including Educated Risk, on 14 November 2018, when a settlement agreement was made an Order of this Court by Van der Linde J under case number 19943/2016. Under this case number Educated Risk and its related entities and persons had counter-applied for an order that the acquisition of the sixty percent shareholding in Farm Bothasfontein be set aside. As already indicated, that claim by Educated Risk was compromised as part and parcel of the settlement agreement, which was made an Order of Court on 14 November 2018.

[10]. Therefore, as matters stand, Educated Risk is not entitled to the relief claimed in the main application. No purpose would be served by ordering a re-opening of the second and final L & D Account even if there is merit in the technical issues raised by Educated Risk, such as the fact that there has not been proper compliance with the formalities relating to the advertising and publication of the said account. This is so because the second and final L & D Account was in accordance with the factual and legal position at the time, taking into account the aforementioned settlement agreement.

[11]. In order to overcome this hurdle, Educated Risk instituted action out of this Court on 19 March 2021 under case number 14038/2021 against all of the interested parties, including the respondents in this application. In the said action, Educated Risk and its aligned entities and persons claim, rather belatedly and some twenty-eight months after the fact, a setting aside of the settlement reached between the

parties in November 2018 and a rescission of the Court Orders making the settlement agreements orders of this Court.

[12]. The success of the main application is dependent on the prospects of success of the aforementioned action, which, in essence, is based on the fact that, according to Educated Risk, the settlement agreements were concluded unlawfully. The unlawfulness of the agreements, which were made Orders of Court by Van der Linde J, stems from the fact, so I understand the case for Educated Risk, that there was an unlawful Contingency Fee Agreement in place between Educated Risk and its attorneys at the time, namely Schindlers Attorneys. Nedbank and Imperial are of the view that there are no prospects of success for this action. I agree. How can it be that the attorney and client agreement between Educated Risk and Schindlers Attorneys can have an effect on the validity of the agreement with Nedbank and Imperial? I ask this question rhetorically.

[13]. The point is that Educated Risk cannot overcome an insurmountable hurdle, that being **section 157** of the **Insolvency Act, Act** 24 of 1936 (‘the **Insolvency Act&rsquo**;), which provides that nothing done under that Act shall be invalid by reason of a formal defect or irregularity, unless a substantial injustice has thereby been done. In this matter, it cannot possibly be said that a substantial injustice had been done by the confirmation of the second L & D Account by the Master as it accorded with the prevailing factual and legal position at the time. In my view, Educated Risk has failed to demonstrate any such substantial injustice.

[14]. Moreover, Educated Risk bears the further onus of having to show the Court that there is merit in the reopening of the account, since a Court will not reopen an account if it cannot be shown that the applicant has some prospect of success of having the account varied or corrected. The main application cannot succeed because no such prospect has been established.

[15]. The express provisions of a settlement agreement concluded on 14 November 2018, which was made an order of Court on the same day, and in terms of which Educated Risk had finally and unconditionally abandoned the Section 38

issue, counts against Educated Risk. I am of the view that the action has no merit whatsoever. The Section 38 issue is not capable of being revived.

[16]. The main application therefore stands to be dismissed and the applicant's other interlocutory applications should suffer the same fate. In that regard, the application for leave to file a supplementary replying affidavit should be dismissed for the simple reason that, even if I have regard to the issues raised by the applicant in the supplementary affidavit, the main application is still doomed. Therefore, that application – which, in any event, has not been properly motivated by Educated Risk – should be dismissed as should the application for the stay of the main application. There is no point in staying an application which should fail however one views same.

[17]. Moreover, as correctly argued by Mr Botha SC, who appeared for Nedbank and Imperial together with Mr Kromhout, as a general rule Educated Risk cannot and should not be allowed to make out a case in its replying papers if one is not made out in its founding affidavit. Even more so, in an application a case cannot be made out by an applicant at some future date, many years after the final adjudication of its action. Moreover, in my view, that action, in any event, has no prospects of success as it faces an insurmountable hurdle in that the issue raised therein has been settled and compromised.

[18]. In sum, the cause of action of Educated Risk in the main application is incomplete on its own version. It is trite that in motion proceedings, you cannot make out a case other than in your founding papers. Even more so, an applicant cannot issue an application whilst its cause of action is still being developed, which is exactly what Educated Risk is doing *in casu*. For this reason, the main application stands to be dismissed as does the other applications by Educated Risk.

[19]. I am also satisfied that Educated Risk should, in terms of the general rule that a successful party should be awarded costs, pay the costs of the second to sixth respondents in respect of the applications.

[20]. The next question is whether a punitive costs order should be granted against Educated Risk, as submitted by Mr Botha, as well as by Mr Smit, who appeared on behalf of the Liquidators. It is trite that the rationale for a punitive attorney and client costs order is more than mere punishment of the losing party. Tindall JA explained it as follows in *Nel v Waterberg Landbouwers v Ko-operatiewe Vereeniging*[2]:

'[t]he true explanation of awards of attorney and client costs not expressly authorised by Statute seems to be that, by reason of special consideration arising either from the circumstances which give rise to the action or from the conduct of the losing party, the court in a particular case considers it just, by means of such an order, to ensure more effectually than it can do by means of a judgment for party and party costs that the successful party will not be out of pocket in respect of the expense caused to him by the litigation.'

[21]. And see further: *Swartbooi v Brink*[3]. The issue of costs is a matter for the discretion of a trial court. Smalberger JA elaborated on the nature of this discretion as follows (in the context of an agreement between parties that attorney client costs be paid) in *Intercontinental Exports (Pty) Ltd v Fowles*[4] at para 25:

'The court's discretion is a wide, unfettered and equitable one. It is a facet of the court's control over the proceedings before it. It is to be exercised judicially with due regard to all relevant consideration. These would include the nature of the litigation being conducted before it and the conduct before it and the conduct of the parties (or their representatives). A court may wish, in certain circumstances, to deprive a party of costs, or a portion thereof, or order lesser costs than it might otherwise have done as a mark of its displeasure at such party's conduct in relation to the litigation.'

[22]. Applying these principles *in casu*, I am persuaded that a punitive costs order would be appropriate. I agree with the submissions on behalf of the respondents that the present proceedings are clearly frivolous and vexatious, both in intent and in effect. The application is also an abuse of the processes of this Court.

Order

[23]. Accordingly, I make the following order: -

(1) The applicant's application in terms of its notice of motion dated 29 June 2021, for a stay of the main application is dismissed;

(2) The applicant's application for leave to deliver a supplementary replying affidavit in terms of the notice of motion dated 28 May 2021 is dismissed;

(3) The applicant's main application in terms of the notice of motion dated 11 July 2020 is dismissed;

(4) The applicant shall pay the costs of the second to fourth respondents and the fifth and sixth respondents, in respect of all three applications, on the attorney and client scale, including the costs occasioned by the employment of two counsel, here so employed.

Pride Milling Company (Pty) Ltd v Bekker NO and Another (393/2020) [2021] ZASCA 127 (30 September 2021)

Dispositions- void dispositions and were thus hit by the prohibition in s 341(2) of the Companies Act. Consequently, the joint liquidators asserted that these payments were liable to be set aside because they were made after the effective date of the winding-up application.

[1] This appeal concerns the question whether, and the circumstances in which it would be appropriate for a court to validate a disposition made by a company that is being wound up. And more particularly whether a court may validate dispositions made after a provisional winding-up order has been granted but prior to the grant of a final order. This question arises against the following backdrop.

[2] A detailed exposition of the factual narrative is not strictly necessary. For present purposes it is sufficient to state the following. On 29 June 2017 Irfan Sohail Trading

(Pty) Ltd (Irfan), a private company carrying on business as a general trading store at Ga-Masha Village in Limpopo, was placed under provisional winding-up at the instance of Eendag Meule Bothaville (Pty) Ltd (Eendag Meule).

[3] The application for the liquidation of Irfan – presented to the court on 5 May 2017 – was founded on the contention that Irfan was indebted to Eendag Meule in the sum of R144 165 in respect of goods sold and delivered for which Irfan had failed to pay because it was unable to pay its debts as contemplated in s 345(1) of the Companies Act 61 of 1973 (the Companies Act). Irfan was placed under final liquidation on 14 September 2017. During the period 7 June 2017 and 8 August 2017 Irfan made four payments to Pride Milling Company (Pty) Ltd (Pride Milling), the appellant in this appeal, in settlement of amounts owing in respect of goods sold and delivered by Pride Milling to Irfan. The following were the payments made to Pride Milling: (i) R70 000 on 7 June 2017; (ii) R75 000 on 7 July 2017; (iii) R130 000 on 7 August 2017; and (iv) R20 000 on 8 August 2017. (In total the payments amounted to R295 000.)

[4] As a sequel to Irfan's final liquidation, a dispute arose between Pride Milling, on the one hand, and Messrs Marthinus Jacobus Bekker and Edward Gnanapargarsum Sebastian NNO (the respondents in this appeal, who were appointed initially as provisional joint liquidators and finally as joint liquidators), on the other hand. For convenience, I shall refer to Messrs Bekker and Sebastian as joint liquidators. The joint liquidators questioned the propriety of the four payments made to Pride Milling, contending that they constituted void dispositions and were thus hit by the prohibition in s 341(2) of the Companies Act. Consequently, the joint liquidators asserted that these payments were liable to be set aside because they were made after the effective date**[1]** of the winding-up application.

[5] As a result of this dispute, the joint liquidators instituted legal proceedings on notice of motion, citing Pride Milling as the respondent, in which they sought an order directing it to repay the amount of R295 000 together with interest, and ancillary relief. As already alluded to above, reliance was placed on s 341(2), which reads as follows:

> 'Dispositions and share transfers after winding-up void
>
> (1) . . .

(2) Every disposition of its property (including rights of action) by any company being wound-up and unable to pay its debts made after the commencement of the winding-up, shall be void unless the Court otherwise orders.'

[6] It is helpful at this juncture to also make reference to s 348 of the Companies Act. It is headed 'Commencement of winding-up by Court' and reads as follows:

'A winding-up of a company by the Court shall be deemed to commence at the time of the presentation to the Court of the application for the winding-up.'

[7] It bears mentioning that Pride Milling not only resisted the application brought by the joint liquidators but also brought a counter-application seeking an order that the impugned payments be validated in accordance with the rider to s 341(2) and costs occasioned by its counter-application.

[8] The matter came before Strijdom AJ in the Gauteng Division of the High Court, Pretoria (high court). The high court granted the relief sought in the main application with costs but dismissed the counter-application with costs. In coming to this conclusion, the high court held:

'On a conspectus of the evidence before me and having considered the guidelines, I am not persuaded that the general body of creditors is not disadvantaged by the dispositions. Little weight should be attached to the hardship which will be suffered by the respondent as the focus ought to be on the body of creditors.

When regard is had to the interest of creditors, in the exercise of striking a balance between their interests and those of the respondent, the scales of fairness tilt in favour of refusing validations.'

The high court also refused the application by Pride Milling for leave to appeal. However, leave was subsequently granted by this Court.

The fate of this appeal hinges on the proper interpretation of s 341(2) of the Companies Act, read with s 348. The principles relating to statutory interpretation are well-established. Almost a decade ago they were restated in *Natal Joint Municipal Pension Fund v Endumeni Municipality* **[2012] ZASCA 13**; **2012 (4) SA 593** (SCA). There, Wallis JA, at para 18, said:

> '[T]he present state of the law can be expressed as follows. Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. . . . The process is objective not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. . . . The "inevitable point of departure is the language of the provision itself", read in context and having regard to the purpose of the provision and the background to the preparation and production of the document.' (Citations omitted.)

That the text, context and purpose of the legislation must be considered together when interpreting a statutory provision, has been affirmed in various decisions of the Constitutional Court.**[2]**

[10] The material facts set out by the joint liquidators in their papers were not placed in issue by Pride Milling. The case presented by the joint liquidators was that the payments in issue were made after the effective date and therefore hit by s 341(2). This assertion was not disputed by Pride Milling. Instead, Pride Milling asserted that the disputed payments should be validated in accordance with the rider to s 341(2).

[11] In support of its case, Pride Milling alleged that the payments: (a) were made in the ordinary course of business and in good faith; (b) were not to the 'detriment of the general body of Irfan's creditors; (c) had 'the effect of increasing the asset value of Irfan to the benefit of the body of the creditors'; (d) were received at a time when Pride Milling was not aware that Irfan was in financial distress; and (e) were made when it had no knowledge of the fact that Irfan was being wound-up. So much for the factual background to the dispute.

[12] Before the high court it was common cause between the parties that although the provisional winding-up order against Irfan was granted on 29 June 2017, the effective date of Irfan's winding-up was in actual fact 5 May 2017, which is the date on which Eendag Meule's application for Irfan's liquidation was presented to the court. Thus, Pride Milling unequivocally accepted that all of the disputed payments were made at a time when Irfan was being wound-up as contemplated in s 341(2) of the Companies Act. And the fact that at the time Irfan was deemed to be unable to pay its debts was not seriously disputed.

[13] In *Engen Petroleum Ltd v Goudis Carriers (Pty) Ltd (In Liquidation)* **[2015] 1 All SA 324** (GJ); **2015 (6) SA 21** (GJ) the court held that the 'primary purpose of s 341(2) is to address the anomaly that occurs as a result of the retrospective invalidation of dispositions by a company which were initially lawful and valid'. This statement is not entirely correct. What s 341(2) does as its predominant purpose is to decree that all dispositions made by a company being wound-up are void. This provision must of course be read with s 348, which provides that the winding-up of a company by a court shall be deemed to have commenced at the time of the presentation of the application for winding-up to the court. The effect is that the payments are potentially invalid at the moment they are made, because the grant of a winding-up order will render s 341(2) operative. This is different from saying that they are rendered invalid retrospectively, or that they were initially lawful and valid. That suggests that the invalidation of all such payments is presumptively harsh or undesirable, which is not the case.

> [14] Dealing with s 115 of the 1926 Companies Act that was couched in identical terms as s 348, Snyman J pointed out in *Lief NO v Western Credit (Africa) (Pty) Ltd* **1966 (3) SA 344** (W) that the mischief that the section was designed to obviate was: '. . . a possible attempt by a dishonest company, or directors, or creditors or others, to snatch some unfair advantage during the period between the presentation of the petition for a winding-up order and the granting of that order by a Court'**[3]** by, for example, dissipating the assets of the company or, as it happened in this case, preferring one creditor above another to the prejudice of the *concursus creditorum*.

[15] The effect of a winding-up order, said De Villiers CJ in *Walker v Syfret NO* **1911 AD 141** at 160, 'is to establish a *concursus creditorum*, and nothing can

thereafter be allowed to be done by any of the creditors to alter the rights of the other creditors'. In the same case Innes JA succinctly stated the legal position as follows (at 166):

> 'The sequestration order crystallises the insolvent's position; the hand of the law is laid upon the estate, and at once the rights of the general body of creditors have to be taken into consideration. No transaction can thereafter be entered into with regard to estate matters by a single creditor to the prejudice of the general body. The claim of each creditor must be dealt with as it existed at the issue of the order.'

[16] In *Incledon (Welkom) (Pty) Ltd v Qwaqwa Development Corporation* **[1990] ZASCA 85**; **1990 (4) SA 798** (A) Goldstone AJA stated:

> 'As between the estate and the creditors and as between the creditors *inter se* their relationship becomes fixed and their rights and obligations become vested and complete.'**[4]**

[17] Turning to the crux of the appeal, it is convenient to deal first with the three dispositions made during the period between the grant of the provisional order on 29 June 2017, and the final order of liquidation on 14 September 2017. The joint liquidators contended that in relation to these payments the court had no power to validate them. In my view they were correct in that contention.

[18] In dealing with the effect of dispositions made subsequent to the grant of a provisional winding-up order the learned authors M S Blackman et al in their Commentary on the Companies Act, after analysing the judgment in *International Shipping Co (Pty) Ltd v Affinity (Pty) Ltd and Another* 1983 (1) SA 79 (C),**[5]** and other decisions of this Court, sum up the position thus:**[6]**

> 'It would seem that the position is as follows. A company is being wound-up on the grant of a provisional order of liquidation. Once that stage is reached, the court (although it can ratify a disposition made before the winding-up order) no longer has the power in terms of s 341(2) to authorise a company to make a disposition of its property. Section 2 of the Insolvency Act is irrelevant . . . Consequently, where compliance with a court order constitutes a 'disposition', it is void in terms of s 341(2). . . After a winding-up order (whether provisional or

> final) has been made, the court cannot grant an order for specific performance; for, on the making of the winding-up order, a *concursus creditorum* is established and the creditor loses his right to specific performance (the provisions of s 359 are therefore not relevant).
>
> . . . The court has no power to permit a company being wound up to make dispositions of its assets. After a winding-up order has been granted the court may validate disposition made before the provisional winding-up order was granted, but it cannot validate dispositions made after that order.'

[19] As noted earlier, once a court grants a provisional order a *concursus creditorum* is established. The effect of this is that the claim of each creditor falls to be dealt with as it existed at the time when the provisional order was granted. (See, in this regard, *Walker* above at 160 and 166.) Accordingly, to order otherwise would not only render nugatory the operative part of s 341(2), in terms of which dispositions made by a company being wound-up are void, but would also have the effect of undermining the essence of the *concursus creditorum* and indeed the substratum of insolvency law.

[20] In the context of the facts of this case, validating the payments would mean that Pride Milling would be left to enjoy the benefit of its claim being settled in full, whilst the other creditors would have to be content with whatever residue might still be available. In *Excellent Petroleum (Pty) Ltd (In Liquidation) v Brent Oil (Pty) Ltd* **2012 (5) SA 407** (GNP) Prinsloo J held, with reference to *Walker*, that whilst s 341(2) makes no express distinction, for purposes of validation of void dispositions, between payments made before the grant of the provisional order and those made thereafter, principle nevertheless dictated that dispositions made after the grant of a provisional order ought not to be allowed to stand.**[7]**

[21] Counsel for Pride Milling sought to persuade us that *Excellent Petroleum* is wrong and urged us to overrule it. The foundation for this contention was that when a court grants a provisional winding-up order it still retains the power on the return date of such order to discharge the provisional order. In that event, so counsel argued, the provisional order would be rendered ineffectual ie as if it had never been granted in the first place. The *status quo ante* would thus be restored. This argument is plainly unsustainable for it contains the seeds of its own destruction. Fundamentally,

its flaw is that it seeks to compare the position when there is a winding-up with the position when there is not. These are no more alike than the proverbial apples and pears.

[22] I now turn to deal with the single disposition made on 7 June 2017 ie before the provisional order was granted. Counsel were agreed that in determining the question whether to direct otherwise, the high court exercised a discretion in the true sense. In *Media Workers Association of South Africa and Others v Press Corporation of South Africa Ltd (Perskor)* **[1992] ZASCA 149**; **1992 (4) SA 791** (A), E M Grosskopf JA described a discretion in the true sense as follows:

> 'The essence of a discretion in this narrower sense is that, if the repository of the power follows any one of the available courses, he would be acting within his powers, and his exercise of power could not be set aside merely because a Court would have preferred him to have followed a different course among those available to him.'**[8]**

[23] A discretion in the true sense proceeds from the premise that a court exercising such a discretion may properly come to different decisions having regard to a wide range of equally permissible options available to it. Thus, a court exercising a wide discretion should not fetter its own discretion, and, in the words of Hefer JA, 'particularly not by adopting an approach which brooks of no departure except in special circumstances, it must decide each case upon a consideration of all the relevant features, without adopting a predisposition either in favour of or against granting security'.**[9]** An appellate court may interfere with the exercise of a discretion in the true sense by a court of first instance only if it can be demonstrated that the latter court exercised its discretion capriciously or on a wrong principle, or has not brought an unbiased judgment to bear on the question under consideration, or has not acted for substantial reasons.**[10]**

[24] In *Herrigel NO v Bon Roads Construction Co (Pty) Ltd and Another* **1980 (4) SA 669** (SWA) the court was confronted with an action instituted by a liquidator who sought to recover payments made by a company being wound up a day after the grant of the provisional winding-up order. The court enumerated several factors that a court called upon to exercise its discretion to order otherwise under s 341(2) of the Companies Act should bear in mind. The factors are useful guides, but only in

relation to payments made before a provisional order is made. Beyond that, there is no discretion to be exercised. These factors were usefully summarised by Pincus AJ in *Lane NO v Olivier Transport* **1997 (1) SA 383** (C) at 386D-387B. The learned Acting Judge listed the following:

'(a) The discretion should be controlled only by the general principles which apply to every kind of judicial discretion. (See *Re Steane's (Bournemouth) Ltd* **[1950] 1 All ER 21** (Ch) at 25.)

(b) Each case must be dealt with on its own facts and particular circumstances.

(c) Special regard must be had to the question of good faith and the honest intention of the persons concerned.

(d) The Court must be free to act according to what it considers would be just and fair in each case. See *Herrigel's* case supra at 678 and see *Re Clifton Place Garage Ltd* **[1970] Ch 477** (CA) at 490 and 492 ([1970] **1 All ER 353** at 356 and 357-8).

(e) The Court, in assessing the matter, must attempt to strike some balance between what is fair *vis-à-vis* the applicant as well as what is fair vis-à-vis the creditors of the company in liquidation.

(f) The Court should gauge whether the disposition was made in the ordinary course of the company's affairs or whether the disposition was an improper alienation. See *Re Wiltshire Iron Co; Ex parte Pearson* **(1868) LR 3 Ch App 443** at 447.

(g) The Court should investigate whether the disposition was made to keep the company afloat or augment its assets. See *Herrigel's* case supra at 679-80.

(h) The Court should investigate whether the disposition was made to secure an advantage to a particular creditor in the winding-up which otherwise he would not have enjoyed or with the intention of giving a particular creditor a preference and which latter factor may be decisive.
See *Wiltshire's* case *supra* at 447.

(i) The Court should enquire whether the recipient of the disposition was unaware of the filing of the application for winding-up or of the fact that the company was in financial difficulties. See *Re Tellsa Furniture (Pty) Ltd* **(1984-85) 9 ACLR 869** (NSW).

(j) Little weight should be attached to the hardship which will be suffered by the applicant if the payment is not validated, the purpose of the subsection being to minimise hardship to the body of creditors generally. See *Herrigel's* case *supra* at 680.

(k) The payment should not be looked upon as an isolated transaction if in fact it formed part of a series of transactions. See *Herrigel's* case *supra* at 680.

. . .'

[25] It is necessary to emphasise that it is near impossible to catalogue exhaustively the factors to be borne in mind by a court exercising its discretion under s 341(2). Suffice it to state that a court confronted with this question is enjoined to keep at the forefront of its mind that the legislature has ordained that all dispositions by a company of its property whilst it is being wound up are void. But at the same time a court must be alive to the fact that in an appropriate case it may order otherwise. And, I daresay, that when sanctioning a departure from the statutorily ordained default position, ie voidness of the disposition, a court must guard against a result that would undermine the underlying purpose of the provision.

[26] To conclude on the nature of the discretion under consideration in this case, it is necessary to make reference to two leading textbooks on the Companies Act. In P M Meskin et al *Henochsberg on the Companies Act 61 of 1973* vol 1 5ed (1994), the learned author discusses the topic at 676-681. Insofar as the discretion of the court to order otherwise is concerned, the learned author says the following:

> 'The Court's discretion is controlled only by the general principles which apply to every kind of judicial discretion: the Court must decide what would be just and fair in the circumstances of the case, bearing in mind the purpose of the subsection. . . . A disposition valid when effected and only retrospectively invalidated by virtue of the operation of the provisions of section 348 . . .

ordinarily will be validated by the Court if it amounts to no more than the result of the *bona fide* carrying on of the company's operations in the ordinary course . . . but the court ordinarily will refuse to validate a disposition where it was made e g with the object of securing an advantage to a particular creditor in the winding-up which otherwise he would not have enjoyed or with the intention of giving a particular creditor a preference.'**[11]**

[27] In their discussion of the same topic, the learned authors M S Blackman et al *Commentary on the Companies Act* Original Service (2002) vol 3, state the position as follows:

'The court's discretion to validate a disposition is absolute and is controlled only by the general principles which apply to every kind of judicial discretion. It is free to act according to the judge's opinion of what is just and fair in each case. In assessing what is just and fair the court must of necessity strike some balance upon looking at what is fair *vis-a-vis* the applicant as well as what is fair vis-a-vis the creditors. Each case is dealt with on its own facts and particular circumstances, special regard being had to the question of the good faith and honest intention of the persons concerned. All the cases in this area indicate useful guidelines, but they are no more than that, for the courts have had to consider the use of the validating power in a very wide variety of circumstances and will no doubt in future have to consider further and different combinations of the possibilities inherent in commercial situations involving insolvent companies. The different factual combinations are, as a matter of possibility, so varied that any attempt to state binding rules would be highly likely to find the courts concerned with factual situations for which the rules were inappropriate.'**[12]**

[28] Professor M S Blackman elaborated on this in his work published in *Lawsa* and explained that:

'The central issue is whether the payments were made so as to allow the company to carry on business for the ultimate benefit of the creditors. The element of benefit to the company will usually be satisfied if the transaction relates to the need to continue business and earn income or save loss during the pendency of the application.

> This will usually involve a counter-performance from the recipient after the date of the commencement of the liquidation. Thus, usually, if the payment is made honestly and in the ordinary course of business for the benefit of the company for goods or services supplied to the company after the commencement of the liquidation, a validation order will generally be made on the grounds that the delivery of goods or performance of the services increased the assets of the company. . . Even if no benefit actually accrued in the sense that the company's undertaking or assets were built up by the attacked transaction, the payments may still be validated if they were made in good faith for the benefit of the company. In the case where some form of commercial assessment is required, this will not involve an examination of minute detail such as the necessity or otherwise to make particular telephone calls; nor will it involve any element of reasoning by hindsight in an endeavour to determine whether the transactions provided actual benefit to the creditors. But at the very least the court should consider whether: *(a)* the company was carrying on business; *(b)* the continuation of the business might be considered to be in the best interests of the creditors; and *(c)* the provision of the services by the appellant (in this case the recipient of the payments) appeared, at the time of the transactions, to be necessary or desirable for the continuation of business operations. Knowledge at the time of the transaction by anyone of the parties that an application for the winding-up has been presented and that a winding-up order may be made is not fatal to the success of an application for validation of a transaction otherwise rendered void by the section.'**[13]**

[29] Reverting to the facts of this case, the record reveals that for some time Irfan had consistently purchased its maize products from Eendag Meule (the petitioning creditor in the winding-up application). In April 2017 it inexplicably ceased doing so and instead turned to Pride Milling. This was at a time when it was indebted to Eendag Meule for some R144 000 in respect of maize products sold and delivered to it for which it had failed to pay. Curiously, when it commenced dealing with Pride Milling, Irfan ensured that the former was paid regularly for the goods that it had supplied. And within a period of two months, Pride Milling was paid the total sum of R295 000 as set out in para 3 above.

[30] The provisions of s 341(2) could not be clearer. They, in unequivocal terms, decree that every disposition of its property by a company being wound-up is void. Thus, the default position ordained by this section is that all such dispositions have no force and effect in the eyes of the law ie the disposition is regarded as if it had never occurred. The mischief that s 341(2) seeks to obviate is plain enough. It is to prevent a company being wound-up from dissipating its assets and thereby frustrating the claims of its creditors.

[31] As to the rider to s 341(2), its manifest purpose is to give a court an unfettered discretion to decide whether or not to direct otherwise and thus depart from the default position decreed by the legislature. As already discussed, this discretion is only exercisable in relation to payments made between the date of lodging of the application for winding-up and the grant of a provisional order. In exercising this discretion, a court will, amongst other relevant factors, naturally have regard to the underlying purpose of the provision in the context of winding-up a company unable to pay its debts, the interests of the creditors**[14]** and those of the beneficiary of the disposition.

[32] It bears mentioning that the consequences of visiting dispositions of the kind dealt with in s 341(2) with voidness, will not always be harsh. This is so especially when the potential countervailing harshness of allowing the disposition, which would invariably denude the company of its assets in proportion to the value of the disposition to the prejudice of its creditors, is borne in mind. In this instance it was always open to Pride Milling to join the other creditors and prove a claim against Irfan with the joint liquidators. It deliberately elected not to avail itself of this opportunity but instead sought to retain the fruits of the impugned dispositions.

[33] Here Pride Milling asserted that the dispositions sought to be recouped from it by the joint liquidators were made in good faith in the ordinary course of business at a time when it was not aware that Irfan was being wound-up. A similar argument was advanced in *Gainsford NO and Others v Tanzer Transport (Pty) Ltd, In Re; Gainsford NO and Others v Tanzer Transport (Pty) Limited and Others* **[2014] ZASCA 32**; **2014 (3) SA 468** (SCA); **[2014] 3 All SA 21** (SCA) and given short shrift by this Court. Noting that s 341(2) 'of the Act is clear in its terms' this Court held that:

'The court will only order otherwise in terms of this section in limited circumstances. To have the defence proffered by Tanzer upheld in general terms would have the effect of avoiding the objects of the Act in that it would undoubtedly prefer one creditor above another.'**[15]**

[34] The court continued:

'It is no defence to assert as Tanzer does that the dispositions were made by the company's staff in ignorance of the fact that the company had been placed under winding-up. Staff at a lower level carry out instructions and in any event that does not deal with the question of whether the dispositions were made at a time after the commencement of the winding-up. As has already been mentioned, the instances in which a court will validate a disposition are limited. Even where a disposition was alleged to constitute "a mere administrative rectification", the fact that the effect thereof was to remove a claim from the concursus and settle it in full in favour of the creditor concerned, to the prejudice of the general body of creditors, is impermissible. This is in accordance with the principle that "the free assets of the insolvent at the commencement of the liquidation shall be distributed rateably amongst the insolvent's creditors as at that date".'**[16]** (Citations omitted.)

[35] It bears mentioning that the words 'any company being wound-up' in s 341(2) of the Companies Act are not without significance. Notably, they are expressed in the continuous tense. Consequently, their import must be that after the commencement of and for as long as the winding-up process is in progress an affected company may not validly dispose of its property.

[36] I pause here to mention that given the effect of s 341(2), a party approaching a court and seeking that the court order otherwise would logically need to establish its entitlement to the relief sought. Thus, in that sense such a party bears the onus to persuade the court with clear evidence as to why a court should depart from the statutorily ordained default position and 'otherwise order'. This, Pride Milling failed to do.

[37] For all the foregoing reasons there is no tenable reason to interfere on appeal with the manner in which the high court exercised its discretion in relation to the

disposition made on 7 June 2017 before the grant of the provisional winding-up order.

[38] It remains to consider the question of costs. Counsel for the joint liquidators requested us to allow costs of two counsel in the event of the appeal being unsuccessful. Counsel submitted that costs of two counsel were warranted not only because of the relative complexity of the matter but also due to the importance of the issues at stake which, although not novel, were not entirely free of difficulty. It must be said that lead counsel for the joint liquidators appeared alone in the high court. Counsel for Pride Milling took issue with this request in his reply. He argued that one counsel could have adequately dealt with the matter just as lead counsel had done in the high court.

[39] It is trite that a court enjoys a wide discretion in considering the question whether costs of more than one counsel in any particular matter should be allowed. And such discretion must be exercised judicially on a consideration of all the relevant factors. The question always is, as Colman J posited in *Koekemoer v Parity Insurance Co Ltd and Another* **1964 (4) SA 138** (T), '. . . whether, in all the circumstances, the expenses incurred in the employment of more than one counsel were "necessary or proper for the attainment of justice or for defending the rights of the parties", and were not incurred through "over-caution, negligence or mistake"'.**[17]** The learned Judge went on to mention, amongst others, the following as being some of the relevant considerations: (a) the volume of evidence (oral or written) dealt with by counsel or which she or he or they could reasonably have expected to be called upon to deal with; (b) the complexity of the facts or the law relevant to the case; (c) any difficulties or obscurities in the relevant legal principles or in their application to the facts of the case; (d) the importance of the matter in issue, in so far as that importance may have added to the burden of responsibility undertaken by counsel. This is by no means an exhaustive list. Ultimately, how a court should exercise its discretion is essentially a matter of fairness to both sides.

[40] Although the issues raised in this appeal are neither obscure nor novel, they are nevertheless not entirely free from a measure of complexity. In these circumstances it cannot be said that the costs occasioned by the employment of two counsel were incurred through over-caution or the employment of two counsel was merely luxurious. It was therefore a wise and reasonable precaution on the part of

the joint liquidators, acting as they did to advance the collective interests of the general body of creditors of the company in liquidation, to employ two counsel. This is, in my view, a sufficient reason for allowing the costs of two counsel in this case.

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

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

Silkstar 178 (Pty) Limited v Smit (11494/2020) [2021] ZAWCHC 176 (3 September 2021)

Sequestration application- no evidence to prove that he is factually insolvent - The applicant has shown *prima facie* that the balance of probability on the affidavits is in its favour in respect of each of the issues required by section 10

[1] The applicant, Silkstar 178 (Pty) Limited ("Silkstar"), seeks the provisional sequestration of the respondent, Mr Willem Adriaan Smit, arising from his indebtedness to Silkstar in the amount of R1 047 214,43 under a written agreement of suretyship.

[2] The undisputed facts are that Mr Johannes Viviers, a director of Silkstar, entered into a loan agreement with the ABP Group (Pty) Ltd ("ABP"), represented by Mr Smit, on 19 June 2018. In terms of the agreement an amount of R700 000,00 was loaned by Silkstar to ABP. The loan agreement recorded that ABP was indebted to Silkstar in the total amount of R1 221 750,00, made up of the loan amount of R700 000,00 and additional amounts of R205 000,00 and R316 750,00. The R205 000,00 debt arose from funds advanced by Silkstar to ABP in relation to the lease of an excavator used by ABP at Optimum Coal Mine. After the mine was placed under business rescue Mr Smit and Mr Brett Pritchard assured Mr Viviers that ABP would repay Silkstar but proposed that to do so Silkstar advance a further loan of R700 000,00 to ABP in order to enable it to start its specialised crusher plant machine so as to generate funds to pay Silkstar. Silkstar agreed to make the further loan to ABP on the basis that both Mr Smit and Mr Pritchard sign written suretyships in favour of Silkstar in respect of ABP's indebtedness; and that ABP register a notarial bond for the amount of R905 000,00 over the crusher plant in Silkstar's favour. The written suretyship agreements were signed on 19 June 2018. Although both Mr Smit

and Mr Pritchard indicated to Mr Viviers that the crusher plant machine belonged to ABP, it later transpired that this was not the case and that no notarial bond had been registered over the machine in favour of Silkstar.

[3] ABP made payment of the first instalment under the loan agreement in the amount of R174 535,37, but the second payment due on 31 August 2018 and subsequent payments thereafter were not paid. On 17 September 2018 letters of demand were sent by Silkstar to ABP, Mr Smit and Mr Pritchard. Mr Viviers was shortly thereafter informed that ABP was to be placed in business rescue, with the special resolution to this effect signed on 7 September 2018 and business rescue practitioners appointed on 14 September 2018.

[4] On 1 November 2018 Mr Viviers was told that no notarial bond had been registered over the crusher plant in favour of Silkstar. He stated that he was "completely flabbergasted" when he found out on 5 November 2018 that Mr Smit and Mr Pritchard had been dishonest in claiming that the APB owned the crusher plant when in fact it did not. Mr Pritchard in a meeting did not dispute that this was so, with Mr Viviers stating that had he known this fact he would not have agreed to loan APB a further R700 000,00.

Basis of application

[5] In his founding affidavit filed in support of the application for provisional sequestration Mr Viviers stated that as surety Mr Smit is indebted to Silkstar in the amount of R1 047 214,43 and that -

> "Notwithstanding the letter of demand addressed to [Mr Smit] wherein payment of the aforementioned amount is claimed, [he] has not affected any payment to [Silkstar]. The only reasonable inference that can be drawn from [his] failure to effect payment to [Silkstar] is that [Mr Smit] is factually insolvent. If [he] was solvent, he would have paid the admitted debt."

[6] The relevant company and deeds office searches undertaken on behalf of Silkstar indicated that Mr Smit is a director of various companies and the owner of one immovable property situated in Cape Town, which was purchased in December 2016 for the amount of R925 000,00. It was said that his sequestration would be to the advantage of creditors when Silkstar had been

"blatantly defrauded" by Mr Smit and Mr Pritchard, and that the further loan amount would not have been advanced had it been known that ABP did not own the crusher plant. Mr Viviers expressed his view that a trustee should be appointed to investigate the financial affairs of Mr Smit as this was the only hope of recovering Silkstar's debt.

[7] The application for provisional sequestration was opposed by Mr Smit on the basis that there is no evidence to prove that he is factually insolvent in that the immovable property owned by him is "*valued conservatively at R1 300 000"*; that an agreement was entered into between the parties to discharge the debt of ABP to avoid litigation which constituted a *pactum de non petendo in anticipado*; and that while he signed the suretyship agreement, he did so in error in that he did not intend to agree to the renunciation of benefits recorded in such agreement.

The application for provisional sequestration was opposed by Mr Smit on the basis that there is no evidence to prove that he is factually insolvent in that the immovable property owned by him is "*valued conservatively at R1 300 000"*; that an agreement was entered into between the parties to discharge the debt of ABP to avoid litigation which constituted a *pactum de non petendo in anticipado*; and that while he signed the suretyship agreement, he did so in error in that he did not intend to agree to the renunciation of benefits recorded in such agreement.

[8] In reply Mr Viviers produced a deeds office search from which it was apparent that First Rand Bank holds a mortgage bond registered over Mr Smit's property for the amount of R825 000,00. Mr Smit was invited to seek to file a further affidavit to explain what amount remains outstanding to First Rand Bank but no further affidavit was filed by Mr Smit.

Submissions of the parties

[9] It was submitted for Silkstar that Mr Smit is clearly a major creditor of the respondent who cannot realistically dispute its indebtedness to it. From the papers it is evidence that he is factually insolvent in that his liabilities exceed his assets and that despite the opportunity afforded to him to show differently,

the contrary has not been proved. There is reason to believe that there will be an advantage to creditors if his estate is sequestrated and in this regard our courts have emphasised repeatedly that the wishes of an unpaid creditor is a serious consideration to be taken into account.**[1]** Consequently Silkstar seeks that Mr Smit's estate be placed under provisional sequestration.

[10] In opposing the application Mr Smit states that he is solvent. He disputes that it has been shown that he is insolvent, with no factual or legal basis advanced to show this and that Silkstar is using the application as a means of debt enforcement. Although he relies on an agreement apparently concluded between the parties to discharge the debt of ABP, this agreement was not produced. Nevertheless, he states that the intent of such agreement was to avoid litigation, submitting that it could be deemed a *pactum de non petendo in anticipado.* While he admits having signed the suretyship agreement on behalf of ABP, he denies that it was ever his intention to renounce the benefits of and states that this would be a matter for evidence.

Discussion

[11] Section 9(1) of the Insolvency Act, No. 24 of 1936 ("the Act") permits a creditor with a liquidated claim "*who has committed an act of insolvency, or is insolvent,* …[to] *petition the court for the sequestration of the estate of the debtor*". In terms of section 10 of the Act, a provisional order of sequestration may be granted where "the court… is of the opinion that *prima facie* –

(a) the petitioning creditor has established against the debtor a claim such as is mentioned in subsection [9(1)]; and

(b) the debtor has committed an act of insolvency or is insolvent; and

(c) there is reason to believe that it will be to the advantage of creditors of the debtor if is estate is sequestrated…".

Claim established

[12] The current indebtedness of ABP under the 2018 loan agreement concluded with Silkstar is not disputed by Mr Smit, nor is the fact that he concluded the written suretyship agreement expressly binding himself as –

> "…surety for and co-principal debtor jointly and severally with [ABP]…to Silkstar…for the due and punctual performance by the debtor of all its obligations to the creditor whether presently due, owing and payable or becoming due, owing and payable in the future".

[13] Mr Smit's contention that although he signed the suretyship agreement, he did not intend to renounce the benefits be would ordinarily enjoy and only became aware that he had done so when he met with his lawyers, is without merit. A surety that signs a suretyship as "*surety and co-principal debtor*" *ipso facto* renounces the benefit of excussion and division.**[2]** The suggestion that a unilateral mistake exists in relation to the agreement does not create a factual dispute which requires determination when it is not contended that the agreement does not reflect the common intention of the parties and there is no attempt to seek a rectification of such agreement.**[3]**

[14] In such circumstances the belated attempt to rely on an alleged unilateral mistake is no more than an opportunistic attempt to avoid liability. It does not provide a legal defence, nor does it advance a *bona fide* or reasonable basis on which to dispute Silkstar's claim. Furthermore, without more, the purported reliance on an agreement which is alleged to constitute a *pactum de non petendo in anticipado*, but which is not placed before this Court, takes the matter no further. This is so since the terms of such agreement are simply not disclosed. It follows that such averment similarly does not provide a *bona fide* or reasonable dispute to Silkstar's claim.

Factual solvency

[15] Mr Smit suggestion that his failure to respond to Silkstar's letter of demand is not a sufficient basis upon which to infer that he is factually insolvent and that no evidence has been put up to allow the Court to find that his liabilities exceed his assets, is equally lacking in merit. As is made clear in

Bertelsmann *et al*, *Mars: The Law of Insolvency in South Africa**[4]*** a debtor's factual solvency is to be established on a balance of probabilities in the sense that clear proof, but not necessarily the clearest proof, must be advanced that the debtor's liabilities as a fact exceed his assets. The affidavits before this Court show clearly that Mr Smit's liabilities exceed his assets and that he is unable to pay his debts due to his factually insolvency. The opportunity provided to Mr Smit to show differently was not grasped by him, with him electing instead to advance as little information on the issue as possible to enlighten the Court.

[16] It remains so that, in the words of Innes CJ in *De Waard v Andrew and Thienhaus Ltd*:**[5]**

> "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."

[17] The submission advanced for Mr Smit that new material pertinent to his financial position could not be put up in reply by Silkstar is, on the facts of this matter, without foundation. In reply Mr Viviers responded to the information raised by Mr Smit in his answering affidavit. As much is the purpose of a replying affidavit. This new information put up by Mr Viviers related to the mortgage bond registered over Mr Smit's property. While it is so that the general rule in motion proceedings is that the applicant must make out its case in the founding affidavit and that new matter is not be introduced in the replying affidavit, this is neither an inflexible nor absolute rule. In *Shepherd v Mitchell Cotts Seafreight (SA) (Pty) Ltd* **[6]** recognising the general rule, the Court made clear that there will exist circumstances in which it is apposite to allow new matter to be introduced in a replying affidavit. Since it was impossible for Silkstar to have a full knowledge of all facts relevant to Mr Smit's financial affairs before it launched the application, it was apposite and

appropriate for it to put up the information it had obtained relating to the mortgage bond registered over Mr Smit's property for the first time in reply. This was so given that Mr Smit in detailing the value of his immovable property had failed to provide such information himself. Given his recognition that this constituted new material, Mr Viviers appropriately invited Mr Smit to seek to place a further affidavit before this Court to answer to this material. He failed to do so.

[18] It follows that having regard to the information placed before this court, it has been shown prima facie by Silkstar that Mr Smit's liabilities exceed his assets and that he is factually insolvent.

Advantage to creditors

[19] While it has been recognised that the best judges of their own interest are creditors themselves,**[7]** it is the court which must ultimately be satisfied that sequestration is to the benefit of creditors and the *ipse dixit* even of a sole creditor not being decisive. **[8]** In *Meskin & Co v Friedman**[9]*** it was stated that:

> "(T)he 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. It is not necessary to prove that the insolvent has any assets. Even if there are none at all, but there are reasons for thinking that as a result of enquiry under the [Insolvency Act] some may be revealed or recovered for the benefit of creditors, that is sufficient".

[20] In *Stratford and Others v Investec Bank Ltd and Others**[10]*** the Constitutional Court held that:

> "The correct approach in evaluating advantage to creditors is for a Court to exercise its discretion guided by the dicta outlined in Friedman. For example, it is up to a Court to assess whether the sequestration will result in some payment to the creditors as a body;

that there is a substantial estate from which the creditors cannot get payment except through sequestration; or that some pecuniary benefit will be renowned to the creditors.*"*

[21] It was made clear in *Commissioner, South African Revenue Services v Hawker Air Services (Pty) Ltd***[11]** that whether sequestration would render any benefit to creditors does not require that *a Court "be satisfied that there will be advantage to creditors in the sense of immediate financial benefit. The Court need be satisfied only that there is reason to believe - not necessarily a likelihood, but a prospect not too remote - that as a result of the investigation and enquiry assets might be unearthed that will benefit creditors."*

[22] I am satisfied on the facts placed before this Court that there is reason to believe, in the sense that it seems to me that a reasonable prospect exists, that it will be to the advantage or that a pecuniary benefit will be obtained by creditors if the estate of Mr Smit is to be sequestrated.

Conclusion

[23] The applicant has shown *prima facie* that the balance of probability on the affidavits is in its favour**[12]** in respect of each of the issues required by section 10. Silkstar's claim has not been shown by Mr Smit to be *bona fide* disputed on reasonable grounds. I am satisfied therefore that sequestration proceedings are not inappropriate.**[13]** It follows that Mr Smit's estate should be placed under provisional sequestration in the hands of the Master of this Court.

Order

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

1. The respondent's estate is placed under provisional sequestration in the hands of the Master.

2. A rule nisi is issued calling upon all interested parties to show cause on 11 November 2021:

   (i) why the respondent's estate should not be placed under final sequestration;

   (ii) the costs of the application, on the attorney and client scale, should not be costs of administration in the sequestration.

3. Service of this order shall be effected in the following manner:

   (i) on the respondent; and

   (ii) on the South African Revenue Service, Cape Town by the applicant's attorney of record per hand.

PEPKOR HOLDINGS LTD AND OTHERS v AJVH HOLDINGS (PTY) LTD AND OTHERS 2021 (5) SA 115 (SCA)

Company — Legal personality — Companies in group of companies separate legal entities even if wholly owned — Appeal against interim order restraining company holding majority shares in subsidiary from freely dealing with shares and directing company to exercise specified control.

Interdict — Interim interdict — Application to preserve res litigiosa pendente lite — Requirements restated and applied — Appeal against interim order restraining company holding majority shares in subsidiary from freely dealing with shares and directing company to exercise specified control.

Practice — Applications and motions — Allegations of fraud — Inappropriate to make findings on motion — Appeal against interim order restraining company holding majority shares in subsidiary from freely dealing with shares and directing company to exercise specified control.

This case concerned two appeals to the Supreme Court of Appeal, with its leave, against an urgent interim interdict issued by the High Court restraining the appellant companies from dealing freely with their property, pending the determination of an action instituted by the first to fifth respondents. The appellants in the first appeal were Pepkor Holdings Ltd (Pepkor), Pepkor Speciality (Pty) Ltd (Speciality), Tekkie Town (Pty) Ltd (Tekkie Town); in the second, Steinhoff International Holdings NV (Steinhoff NV) and Town Investments (Pty) Ltd (Town Investments).

Through a series of transactions, the Tekkie Town shares were ultimately purchased by Pepkor Holdings Ltd, and the Tekkie Town business sold to Speciality. Pepkor and Speciality were not parties to the main action when the High Court issued the interdict, but joined as parties subsequently. The action was instituted in May 2018 against Steinhoff NV and Town Investments (Pty) Ltd.

The respondents had ceded their claims and sold 56,94% of their shares in Tekkie Town (Pty) Ltd to Steinhoff NV, for a purchase price discharged by the issue of shares in Steinhoff NV to each of the respondents (the consideration shares). They alleged that the value of the consideration shares had been overstated and were but a fraction of their value when the sale agreement was concluded, and claimed redelivery of the equity. Their cause of action was that Steinhoff NV's true financial position had been fraudulently misrepresented and concealed to induce them to enter into the sale agreement.

The repondents' case for the urgent interdict was that the Tekkie Town shares and business became *res litigiosa* — property which was the subject of litigation — which entitled them to an interdict pending the final determination of the main action. The appellants contended that the doctrine was inapplicable because the companies within the Steinhoff Group were all separate corporate entities, each with its own board of directors which manages its business and affairs; Steinhoff NV did not control Pepkor.

In granting the interim interdict, the High Court had made certain conclusions on allegations of fraud and control by Steinhoff NV over its subsidiaries (see [33] – [38]). These were also placed in issue on appeal.

Held

When applying to preserve *res litigiosa* pendente lite, in addition to the requirements for an ordinary interdict, the property which was the subject of the interim interdict

must be the subject of the action; and the action and the interim application must be between the same parties. (See [19].)

Here the doctrine was inapplicable for three reasons:

- The doctrine only applied where there was a lis between the plaintiff enforcing a right to or ownership of property and the possessor thereof. Here it could not apply to Pepkor and Speciality since the res described in the particulars of claim in the main action was not *litigiosa* in relation to them. Also, here there was no question of property subject to litigation in the main action being transferred while those proceedings were pending; the Tekkie Town shares and business were transferred to Pepkor and Speciality, respectively, well before the main action was instituted. (See [25] – [26].)
- The order issued by the High Court did not preserve the property at issue in the main action, but affected Steinhoff NV's right to deal with different property, ie the shares which Steinhoff NV held directly and indirectly in any of its subsidiaries, or any juristic persons related to it. There was no entitlement to preserve that which never served as the res vendita in terms of the sale agreement. (See [26] – [29].)
- On the pleadings before the High Court, the main action was not one in rem, but an action in personam, and pleadings had not closed when the interdict was granted. The source of the right asserted was a legal relationship between the plaintiffs and the defendants in the main action; not a legal relationship between the plaintiffs and the property itself. The cause of action was an alleged fraudulent misrepresentation that induced the respondents to enter into the sale agreement. The relevant property would therefore have become *res litigiosa* only after litis contestatio. (See [30] – [31].)

The respondents' allegations, that Steinhoff NV controlled all corporate actions within the Steinhoff Group, were simply not established on the papers in the interdict application. Neither did they make out a case on those papers for the High Court to disregard the appellants' separate corporate personalities. The High Court erred. The respondents produced no evidence to substantiate fraud in the application for the interdict, other than facts of the transactions subsequent to the sale agreement themselves, and the accounting irregularities in relation to the Steinhoff Group. It followed that the High Court's order would be set aside. (See [40] and [46].)

It was an established principle that a company was a legal entity distinct from its shareholders and that property owned by a company was not that of its

shareholders. The principle applied equally where the company was a subsidiary or even a wholly owned subsidiary of another company. In terms of s 66(1) of the Companies Act 71 of 2008, the board of a subsidiary must independently manage and direct the business and affairs of the subsidiary company. The board of a holding company was thus not able to dictate the decisions of the board of a subsidiary, even if that subsidiary was a direct, wholly owned subsidiary. (See [43] – [44].)

The cases made it clear that it was inappropriate and unwise for findings of fraud or deceit to be made on the basis of untested allegations on motion, which were denied on grounds that could not be described as far-fetched or untenable. (See [39].)

VAN ZYL v AUTO COMMODITIES (PTY) LTD 2021 (5) SA 171 (SCA)

Suretyship — Surety — Liability — Business rescue — Effect of adoption and implementation of business rescue plan on company's sureties' liability to creditor — Whether sureties released from liability — Interpretation of s 154(1) and (2) of Companies Act — Under situation of ss (1), company's debt to creditor discharged, such that sureties debt also discharged — Under situation of ss (2), no discharge of debt, but effect merely that company granted personal protection against enforcement of debt against it; but sureties' liability not extinguished — Companies Act 71 of 2008, s 154(1) and (2).

Company — Business rescue — Business rescue plan — Release of company from debts — Effect of adoption and implementation of business rescue plan on company's sureties' liability to creditor — Whether sureties released from liability — Interpretation of s 154(1) and (2) of Companies Act — Under situation of ss (1), company's debt to creditor discharged, such that sureties' debt also discharged — Under situation of ss (2), no discharge of debt, but effect merely that company granted personal protection against enforcement of debt against it; but sureties' liability not extinguished — Companies Act 71 of 2008, s 154(1) and (2).

The respondent, Auto Commodities (Pty) Ltd (Auto Commodities), supplied petroleum products on credit to the company Blue Chip Mining and Drilling (Pty) Ltd (BCM). BCM's CEO at the time — the appellant, Mr Van Zyl — agreed to stand

surety for its resulting debts. BCM fell into financial difficulties, so was placed in business rescue, in December 2014. A business plan was adopted in June 2015, which provided, in clause 7, that 'the controlled winding-down of the Company's affairs and the successful finalisation of Proceedings will only be achieved upon adoption of this Business Rescue Plan in terms of which the Company will be released from the payment of some of its debts'. The plan was implemented, as a result of which Auto Commodities received dividends, totalling R1,9 million, in December 2015 and December 2016, respectively. After the substantial implementation of the business plan, business rescue terminated on 31 January 2017. Subsequently, Auto Commodities sued the appellant in his capacity as surety in the Kimberley High Court for the shortfall with respect to BCM's original indebtedness. Auto Commodities was successful in its claim, so the appellant sought leave to appeal to the Supreme Court of Appeal, and was granted it.

The broad question on appeal was whether the appellant was liable under the deed of suretyship to pay the amount claimed by Auto Commodities. In arguing that he was not, the appellant relied on s 154 of the Companies Act 71 of 2008, titled 'Discharge of debts and claims', and more specifically s 154(2), which provided that, *if a business rescue plan had been approved and implemented in accordance with the Act, a creditor was not entitled to enforce any debt owed by the company immediately before the beginning of the business rescue process, except to the extent provided for in the business rescue plan*. The appellant submitted that, given the implementation of BCM's business rescue plan, in terms of s 154(2), properly interpreted, BCM was released from any further indebtedness to Auto Commodities. Accordingly, he submitted, given that suretyship was an accessory obligation, he in turn was released from liability. (See [2] and [14].) The SCA held that, in fact, the appeal could be dismissed based on the construction of the deed of suretyship itself: even were one to assume that the implementation of the business plan had the effect of discharging BCM from liability to Auto Commodities, the latter's rights under the suretyship were, by virtue of clauses 3 and 5.4 thereof, unaffected. (See [3] – [10].) The SCA nevertheless addressed the legal point raised, given the degree of uncertainty in the legal landscape surrounding the impact of an approved and implemented business plan (see [10]).

The SCA ultimately held that, under s 154(2), properly constructed, the impact of the implementation and approval of a business rescue plan was simply that a company

was granted *personal* protection against the enforcement of a debt against it (see [28] – [29] and [32]). Subsection (2) went no further than precluding a creditor from pursuing claims against the company; it did not affect or extinguish the liability of a surety to a debt (see [45]). (This was in contrast, the SCA held, to the situation provided for under s 154(1) of the Companies Act, upon which the appellant had not relied, which dealt with the position of a creditor who had 'acceded to the discharge' of a debt, who would as a result of the implementation of the business rescue lose the right to enforce such debt (see [22]). Under such subsection, given the strong language used, not only did the creditor lose the right to enforce the debt, but *the company's debt itself was also discharged*, which conveyed in ordinary parlance that it ceased to exist. (See [22] – [23].) In such a situation the surety would likewise be discharged, in line with the general principle that the liability of the surety was accessory to that of the principal debtor so that the discharge of the latter served to discharge the former. (See [25].)

The SCA accordingly rejected the appellant's argument that his liability as surety to Auto Commodities was discharged upon adoption and implementation of BCM's business rescue plan (see [45]). It dismissed the appeal (see [46]).

CJ PHARMACEUTICAL ENTERPRISES (PTY) LTD AND OTHERS v MAIN ROAD CENTURION 30201 CC t/a ALBERMARLE PHARMACY AND ANOTHER 2021 (5) SA 246 (GJ)

Insolvency — Voidable dispositions — Void transfer of business — Failure to comply with notice requirements in s 34(1) of Insolvency Act 24 of 1936 — Invalidity relative, being only as against creditors, not absolute.

Insolvency — Voidable dispositions — Common law — Actio Pauliana — Requirements.

Sale — Of business — Validity — Sale of business as intended in s 34(1) of Insolvency Act 24 of 1936 — Failure to publish required notice — Invalidity relative, being only as against creditors, not absolute.

Section 34(1) of the Insolvency Act 24 of 1936 provides that where a notice of intended transfer has not been published in respect of a relevant transfer by a trader within the period before the date of transfer specified in that subsection, such transfer 'shall be void as against [the trader's] creditors for . . . six months after such transfer, and shall be void against the trustee of his estate, if his estate is sequestrated at any time within the said period'. This invalidity is not absolute but relative: during the specified six-month period the transfer is void only as against the trader's creditors and for their purposes. Thus, the protection afforded to creditors is that, during the specified six-month period, they may treat such a transfer as being void for the purpose of recovering payment of their debts. (See [10] – [12] and [17].) In order for the transfer of an asset to be set aside under the *actio Pauliana* because it was detrimental to the transferor's creditors where the former later became insolvent, it must be shown that the transfer diminished the transferor's assets; that the transferor made the transfer with the intention of defrauding its creditors; and that there was collusion between transferor and transferee (see [24]).

MATJHABENG LOCAL MUNICIPALITY v MCDONALD AND OTHERS 2021 (5) SA 254 (FB)

Company — Register of companies — Deregistration of company — Effect — Properties registered in names of deregistered company — Common-law principle to effect that properties registered in name of deregistered company vesting in state as bona vacantia — Whether common law should be developed such that municipality automatically becoming owner of bona vacantia situated within its municipal boundaries, or upon declaration to such effect — Court declining to develop common law in manner sought, not being convinced that such development would be consistent with inherent basic principles of SA law following upon promulgation of Constitution.

The Matjhabeng Local Municipality was the applicant in three cases heard together, considering their similarity to each other, in the Free State High Court. In each application, the Municipality sought relief against the previous director/directors of a company that had become deregistered and that owed money to it for arrear rates and taxes, to the following effect:

- That the property registered in the name of the deregistered company *be declared bona vacantia the property of the municipality*; and that
- the Registrar of Deeds be authorised and directed to transfer the properties to the Municipality.

The common law did not support the Municipality's claim of ownership and registration of the properties in *its name* ([27]), its being long established that property that had become ownerless — which would be the case of the property of a company on its deregistration — *passed automatically to the state* as bona vacantia, without any form of delivery being necessary (see [1], [16], [19], [28]). The Municipality, while conceding the common-law position (see [24] and [28]), argued, however, that the above common law was no longer relevant but had been changed by the Constitution, and should be developed such that a municipality automatically became owner of bona vacantia within its municipal boundaries, or upon declaration to such effect (see [2], [24] [30]). Such development was demanded, the Municipality argued, given the obligation imposed on municipalities by s 229 of the Constitution to levy and collect rates and taxes from its residents and property owners, and the corresponding duties imposed on ratepayers by ss 5(1)*(g)* and 5(2)*(b)* of the Systems Act to pay for municipal services; and taking into account that municipalities had been granted by s 151(3) of the Constitution the right to govern on their own initiative the local government affairs of their communities, and by s 156(1) executive authority and administrative powers in respect of listed local government matters, which included 'municipal public works in respect of the needs of municipalities in the discharge of their responsibilities to administer functions specifically assigned to them under the Constitution or any other law'. (See [28] – [30].)

Held, that, in order to grant relief in favour of the applicant, the court would have to depart from the common law and a long list of authorities. The court was not convinced that a development as suggested by the Municipality would be consistent with inherent basic principles of SA law following upon the promulgation of the Constitution. It would not be a case of adapting 'the common law to reflect the changing social, moral or economic fabric of the country', but a dramatic departure from existing legal principles. Such a major change in order to reform SA law was the prerogative of the legislature and not the judiciary. In fact, the Public Finance Management Act 1 of 1999 and its regulations and schedules were indicative * of the

legislature's intention not to change the common-law principles in respect of bona vacantia. (See [40].)
Held, accordingly, that the Municipality was not entitled to any relief, with ownership in the immovable property passing to the state, being the Government of the Republic of South Africa (see [42]).

Capitec Bank Holdings Limited and another v Coral Lagoon Investments 194 (Pty) Ltd and others [2021] 3 All SA 647 (SCA)

Civil Procedure – Evidence – Whether evidence of manner in which the parties implemented the subscription agreement could be considered in light of parol evidence rule – Explaining scope of parol evidence rule, the court confirmed the importance of context and had regard to the evidence in question.

Civil Procedure – Mootness – Court having discretion to entertain the merits of an appeal, even where the matter is moot – Where a case poses a legal issue of importance for the future that requires adjudication, that may incline the court to hear the appeal.

Corporate and Commercial – Subscription of shares agreement – Subsequent disposal of shares – Existence of requirement of consent for sale – Interpretation of subscription agreement – Rules of interpretation set out by court.

In terms of a subscription of shares agreement, the first appellant (“Capitec Holdings”) issued 10 million shares to the first respondent (“Coral”). Coral, in turn, was required to allot and issue shares to the second respondent (“Ash Brook”). A company holding a majority interest in Ash Brook, and various parties related to it (the “Regiments Parties”), Coral and the third respondent, Transnet Second Defined Benefit Fund (the “Fund”), entered into a settlement agreement in terms of which the Fund would be paid R500m by the other parties in settlement of claims it had against the Regiments Parties. The settlement amount was to be funded by the sale of 810 230 Capitec Holdings shares. Capitec Holdings’ consent was requested for the disposal of the shares by Coral. Its refusal of consent led to Coral and Ash Brook approaching the High Court which held 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. Capitec Holdings appealed against the order that it consent to the sale.

Coral, Ash Brook, and the fourth and fifth respondents submitted that the decision of the present Court would have no practical effect or result, and in terms of section 16(2)(a) of the Superior Courts Act 10 of 2013, the appeal should be dismissed.

Held – The court has a discretion to entertain the merits of an appeal, even where the matter is moot. Where a case poses a legal issue of importance for the future that requires adjudication, that may incline the court to hear the appeal. The appeal in this case was of practical consequence, and was not moot. But even if it were, the interpretation of the relevant clause (clause 8.3) in the subscription agreement was a legal issue of consequence for the future of the parties' commercial relationship. The point regarding mootness was thus dismissed.

On the merits, the key question was whether Capitec Holdings' consent was required before Coral could sell the sale shares to the Fund, and if it was, whether Capitec Holdings owed duties of good faith and reasonableness to Coral, which Capitec Holdings breached in failing to consent to the sale.

In considering the provisions of the subscription agreement that had relevance for deciding whether Capitec Holdings' consent was required, the court referred to the established rules of interpretation. Of significance in the exercise, was the submission by Coral and Ash Brook that the manner in which the parties implemented the subscription agreement was relevant evidence as to what clause 8.3 meant. The wider approach to interpretation endorsed in case law referred to by the court states that extrinsic evidence is admissible to understand the meaning of the words used in a written contract. However, the parol evidence rule which remains part of our law, states that barring exceptional circumstances, extrinsic evidence is inadmissible to contradict, add to or modify the contract. Explaining the scope of the parol evidence rule, the court confirmed the importance of context and had regard to the evidence in question. That led it to conclude that the subscription agreement did not require Capitec Holdings' consent to the sale by Coral of the shares to the Fund. The Court also discussed the role of good faith and public policy in the context of freedom of contract.

The appeal was upheld.

Timasani (Pty) Ltd and another v Afrimat Iron Ore (Pty) Ltd [2021] 3 All SA 843 (SCA)

Civil Procedure – Court proceedings during business rescue – Requirement of notice to creditors – Non-joinder – Section 145(1) of the Companies Act 71 of 2008 not requiring the joinder of every creditor in such proceedings.

Corporate and Commercial – Company law – Business rescue – Claim by creditor against company in business rescue for repayment of deposit paid – Moratorium on legal proceedings – Section 133(1) of the Companies Act 71 of 2008 provides that during business rescue proceedings, no legal proceedings, including enforcement action, against the company; and no legal proceedings in relation to property belonging to or in the lawful possession of the company may be commenced or proceeded with – Moratorium inapplicable to legal proceedings in relation to property belonging to an entity other than the company in business rescue.

Upon the first appellant ("Timasani") being placed in business rescue on 28 July 2015, the second appellant, as business rescue practitioner, was authorised to sell its assets in terms of a business rescue plan adopted by its creditors.

Prior thereto, the respondent ("Afrimat") had made an offer to purchase Timasani's assets, and had paid a deposit of R1 700 000 to Timasani. The contracts for the purchase of the assets did not materialise due to the non-fulfilment of suspensive conditions.

In the present appeal, the question was whether Afrimat was precluded from launching proceedings for repayment of the deposit by the moratorium on legal proceedings imposed by section 133 of the Companies Act 71 of 2008 (the "Act"). The present appeal was against the High Court's declaration that section 133 was inapplicable and its order that Timasani repay the deposit.

One of the points raised by Timasani was that of non-joinder in that Afrimat had failed to join all its creditors to the proceedings in terms of section 145(1) of the Act.

Held – The test for non-joinder is whether a party has a direct and substantial interest in the subject matter of the proceedings, ie a legal interest in the subject matter of the litigation which may be prejudicially affected by the judgment of the court. Section 145(1) of the Act sets out the rights and obligations of creditors when participating in business rescue proceedings as a whole. Inasmuch as a company in business rescue must be cited in legal proceedings against it, the duty to give notice to creditors in

terms of section 145(1)(a) rests on the business rescue practitioner. Being a general notification requirement, the purpose of section 145(1)(a) is to inform creditors of court proceedings brought during business rescue. It does not require the joinder of every creditor in such proceedings. Afrimat was thus not required by section 145(1) of the Act to join all Timasani's creditors in the application to recover its deposit.

On the question of whether section 133(1) of the Act precluded Afrimat from claiming repayment of the deposit, the court held that the section is a general moratorium provision that applies in relation to the assets and liabilities of the company at the stage when business rescue comes into effect. It protects the company against legal action in respect of claims in general, save with the written consent of the business rescue practitioner and failing such consent, with the leave of the court.

The court held that properly construed section 133(1) provides that during business rescue proceedings, no legal proceedings, including enforcement action, against the company; and no legal proceedings in relation to property belonging to or in the lawful possession of the company may be commenced or proceeded with. The latter part of the provision was relevant in the present appeal. Afrimat contended that section 133(1) was inapplicable because the deposit did not belong to Timasani and it was in unlawful possession thereof. The provision limits the reach of the moratorium and renders it inapplicable to legal proceedings in relation to property belonging to an entity other than the company in business rescue.

The High Court's finding that the deposit was property in respect of which Timasani exercised the powers of a trustee, as envisaged in section 133(1)(e) of the Act was not endorsed, as the deposit was not paid as property in trust.

The appeal was dismissed with costs.

END-FOR-NOW