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

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Van Dyk v Donnovan Theodore Majiedt Inc and Another (4070/2021) [2021] ZAFSHC 246 (22 October 2021)

Provisional trustees-powers-court extended on ex parte application -If the Master is approached, s 18(3) must be read with s 80*bis* and if the Court is approached in terms of s18(3) for the sale of property of the insolvent estate, "such sale shall furthermore be after such notices and subject to such conditions as the Master may direct." The two sections are not in conflict with each other. The s 18(3) application was served on the Master as was the case with the court order of 6 September 2021. The Master would be within his rights to agree to the sale of property subject to such conditions he deemed fit to impose. He did not do so. No injustice or prejudice to any creditor was shown and/or can be imagined as a result of the methodology followed by the provisional trustees and their appointed auctioneer.

Section 21 of the Insolvency Act-wife wants to claim from husband's estate based on a loan- she was a creditor of the insolvent estate- her right to claim money in respect of a loan has fallen in the insolvent estate in accordance with the provisions of s 21- She has failed to apply for the release of her asset(s)- she did not have *locus standi* to apply for reconsideration of the order of 6 September 2021.

[1] Having considered the documents before the court and legal arguments presented to me by the legal representatives of the parties on 12 October 2021, I dismissed the application with costs, including the costs occasioned by the postponements on 29 September 2021 and 7 October 2021.

[2] The High Court's capacity to grant an order in terms of s 18(3) of the Insolvency Act in order to allow provisional trustees of an insolvent estate several powers, specifically the power to sell assets, and the possible interaction between this sub-section and s 80*bis* of the Act came under the spotlight in this application.

[3] However, before the legal issue raised in paragraph 2 could be addressed, the applicant who sought leave to intervene as an intervening creditor had to overcome four obstacles which I shall address *infra*.

II THE PARTIES

[4] Mrs Marna van Dyk sought an order in terms whereof she be joined as a party in case number 4070/2021, referring to herself as the intervening creditor. She was represented by Adv CM Oberholzer, he being instructed by Bekker Attorneys. Mrs Van Dyk is the wife of the insolvent, Mr Willem Miekel van Dyk, insolvent estate

number B41/2021. I shall refer to Mr Van Dyk as the insolvent herein and to his wife as Mrs Van Dyk.

[5] The provisional trustees who have been cited as first and second applicants respectively are Mr Donovan Theodore Majiedt and Mrs Beatrix Elize Groenewald. Adv S Tsangarakis, instructed by Rossouws Attorneys, appeared for them before me.

On 6 September 2021 the provisional trustees brought an *ex parte* urgent application in terms of s 18(3) of the Insolvency Act. They were granted the relief sought and furthermore, a whole host of powers were granted to them, in particular the following:

> 6.1 they were authorised to bring the application in terms of the aforesaid sub-section;
>
> 6.2 it was declared that all property, including rights of action, belonging to the insolvent estate vest in them as provisional trustees and they were authorised to bring or defend proceedings relating to the property of the insolvent estate;
>
> 6.3 they were authorised in terms of s 18(3) to exercise numerous powers in relation to the administration of the insolvent estate (may I add that these powers are normally granted to trustees by creditors at the second meeting of creditors), *inter alia* the power to sell any movable or immovable property, the farming operation or any component thereof by public auction, public tender or private treaty.
>
> 6.4 Any action prior to the 6th of September 2021 by the applicants falling within the powers granted by the court was authorised and ratified.

IV THE APPLICATION FOR RECONSIDERATION OF THE ORDER OF 6 SEPTEMBER 2021

[7] On 29 September 2021 and after giving one day's notice to the provisional trustees, Mrs Van Dyk as a so-called intervening creditor approached the court on an urgent basis, seeking *inter alia* the following relief:

> "(b) That the intervening creditor be joined as a party that has a legitimate interest and entitled to participate in the proceedings in this matter that is currently before the Honourable Court and to file affidavits as required by the Uniform Rules of Court;
>
> (c) That the Court Order granted 6 September 2021, be and be (sic) set aside;
>
> (d) That the applicants are ordered to pay the costs of this application."

[8] It is not surprising to see that the matter was postponed on 29 September 2021 as insufficient notice was given to the provisional trustees. It was postponed by agreement to 7 October 2021 on which date it was again postponed to the urgent court and not to the opposed motion court roll. Consequently, I had to deal with this matter as an urgent application on 12 October 2021. In terms of the court order of 7 October 2021 leave was granted to the parties to file heads of arguments the day before the hearing, to wit 11 October 2021. I dealt with the matter on the 12th and subsequently granted the order mentioned in paragraph 1 *supra,* indicating that my reasons would follow in due course. The costs in respect of both the 29th September 2021 and 7th October 2021 stood over for later adjudication. No reasons have been

advanced as to why the provisional trustees should not be entitled to the wasted costs occasioned by the two postponements and consequently such an order was made.

V THE FOUR HURDLES

[9] I mentioned from the onset to Mr Oberholzer appearing for Mrs Van Dyk that his client had to overcome four hurdles before the merits, to wit the provisional trustees' entitlement to rely on s 18(3) and the court order of 6 September 2021 could be considered. These are the following:

1. her *locus standi* as creditor;

2. her right to intervene in application 4070/2021 and be joined as a party in so far as a final order had already been made on 6 September 2021;

3. the consequences of s 21 of the Insolvency Act in so far as her assets fall in the insolvent estate of her husband and will remain there until released to her by the trustees upon application;

4. the sheep belonging to the insolvent estate had already been sold by private treaty at market value with the cooperation and consent of the insolvent and if the order of 6 September 2021 was to be set aside, a necessary consequence would be that the transaction pertaining to the sheep had to be set aside as well whilst the purchaser of the sheep had not been joined in the proceedings or given notice thereof.

VI THE FIRST HURDLE

[10] Mrs Van Dyk's *locus standi* as creditor:

10.1 Mrs Van Dyk initially claimed that she was the owner of 268 sheep which were in possession of the insolvent. No proof of her ownership was provided to the provisional trustees who eventually rejected her claim.

10.2 It appears from the papers that Mrs Van Dyk changed her version and later on relied on a loan account as is evident from the insolvent's financial statements. The latest figure available is in respect of the financial year ending on 28 February 2017 which indicates a loan account in her favour of R166 339.00**[2]**. There is no indication as to the existence of the loan in 2021, i.e. four years after the latest financial statements and in particular on the date when the insolvent was provisionally sequestrated. Mrs Van Dyk did not prove that she is a creditor of the insolvent estate clothed with *locus standi*.

10.3 I do not agree with Mr Tsangarakis' submission that Mrs Van Dyk's claim would have prescribed in so far as prescription started to run when the money was lent and advanced. The reliance on the judgment of *Trinity Asset Management (Pty) Ltd v Grindstone Investments 132 (Pty) Limited***[3]** does not support his case. In any event, s 13(1)(c) of the Prescription Act**[4]** provides specifically that prescription does not run between spouses married to each other until a year after separation, i.e. either by divorce or death.

VII THE SECOND HURDLE

[11] Section 21 of the Insolvency Act:

11.1 Even if I could find in favour of Mrs Van Dyk that she was a creditor of the insolvent estate, her sheep or her right to claim money in respect of a loan has fallen in the insolvent estate in accordance with the provisions of s 21. She has failed to apply for the release of her asset(s). Therefore, she did not have *locus standi* to apply for reconsideration of the order of 6 September 2021.

VIII THE THIRD HURDLE

[12] The sheep have already been sold:

12.1 Nothing more needs to be said in this regard, save to mention that an entity known as Oswald Botes en Seun purchased the sheep of the insolvent estate in the total sum of R953 683.50 on 8 September 2021. The purchaser is apparently a friend of the insolvent and the sheep were purchased to enable the insolvent to continue with sheep farming.**[5]**

12.2 If the order of 6 September 2021 is to be set aside, the transaction pertaining to the sheep would have to be set aside as well. The purchaser has not been cited as a party to these proceedings and furthermore, the whereabouts of all the sheep are unknown. This is another reason why relief cannot be granted to Mrs Van Dyk.

IX THE FOURTH HURDLE m

[13] The application for reconsideration:

13.1 Rule 6(12)(c) stipulates as follows:

"A person against whom an order was granted in such person's absence in an urgent application may by notice set down the matter for reconsideration of the order."

13.2 No order was granted against Mrs Van Dyk on 6 September 2021. On the face of it and bearing in mind the clear and unambiguous wording of the rule, she has no right to apply for reconsideration of the order. The mere fact that she sought an order in terms whereof she be joined as a party to the proceedings is indicative of the fact that no order was granted against her.

[20] The authorities dealing with s 18(3) are few and far between. However, it is apposite to deal with the following judgments. In *Van Zyl and Another NNO v Kaye NO and Others***[14]** Binns-Ward J set out the requirements for an application by a provisional trustee in accordance with the sub-section as follows:

"[46] It remains to determine the application by the applicants in terms of s 18(3) of the Insolvency Act for authorisation to have instituted these proceedings. The editors of Meskin et al *Insolvency Law* (LexisNexis) have ventured that '(i)n the case of motion proceedings . . . it is competent for the provisional trustee to seek simultaneously both authority to bring such proceedings and the substantive relief'. I have no quarrel with that postulate. The approach does, however, carry the risk that, should the application fail, the provisional trustees may be personally exposed to adverse costs consequences. No doubt in most cases a prudent provisional trustee would

only take such a course after having obtained a suitable indemnity from one or more of the insolvent's creditors.

[47] It was held by Van Oosten J in *Warricker and Another NNO v Liberty Life Association of Africa Ltd* that '(a)n applicant seeking the authority of the Court in terms of the subsection must satisfy the Court, on good cause shown, that a departure from the normal course of events provided for in the Act is warranted. Where the institution of proceedings to enforce a claim is contemplated, to be entitled to an order the applicant must satisfy the Court, first, that some degree of urgency exists; secondly, that the cause of action which is to become the subject-matter of the proceedings is prima facie enforceable; and, thirdly, that the interests of creditors in the insolvent estate will not be prejudiced by the earlier institution of proceedings.' The applicants have failed to satisfy me in respect of the second of the aforementioned requirements. The application in terms of s 18(3) of the Insolvency Act therefore also falls to be dismissed."

[21] In *Warricker and Another NNO v Liberty Life Association of Africa Ltd***[15]** the court held as follows:

"[5] I shall first deal with the requirements to be met by an applicant seeking the leave of the Court in terms of s 18(3) of the Act. Section 18 empowers the Master, upon the provisional or final sequestration of an estate, to appoint a provisional trustee. In terms of s 18(3):

'A provisional trustee shall have the powers and the duties of a trustee, as provided in this Act, except that without the authority of the Court or for the purpose of obtaining such authority he shall not bring or defend any legal proceedings. . . .'

The main aim of this provision has been described by Van Zyl J in *Lane and Another NNO v Dabelstein and Others (Lane and Another NNO Intervening)* **1999 (3) SA 150 (C)** at 1638 (sic) as 'probably to protect creditors against liability for costs incurred and dissipation of assets caused by a trustee's ill-conceived litigation'. The subsection, clearly, was enacted to protect the interests of creditors of the insolvent estate. It does not afford an applicant an open sesame to the relief provided for. An applicant seeking the authority of the Court in terms of the subsection must satisfy the Court, on good cause shown, that a departure from the normal course of events provided for in the Act is warranted. Where the institution of proceedings to enforce a claim is contemplated, to be entitled to an order the applicant must satisfy the Court, first, that some degree of urgency exists; secondly, that the cause of action which is to become the subject-matter of the proceedings is *prima facie* enforceable; and, thirdly, that the interests of creditors in the insolvent estate will not be prejudiced by the earlier institution of proceedings."

[22] The order providing that any action prior to 6 September 2021 by the provisional trustees falling within the powers set out in the order was authorised and ratified must be seen in context. If the provisional trustees acted contrary to their powers, such actions, without the prior consent of the Master or the court would be a nullity as the law prescribes that a nullity cannot afterwards be ratified by the court.**[16]**

[23] It is necessary to establish whether the provisional trustees met the requirements set out by *inter alia* Binns-Ward in Van Zyl as well as by Van Oosten J in *Warricker supra*. I am satisfied that a departure from the normal cause of events provided for in the Act was warranted and that a clear degree of urgency existed. Although the only issue at present is the sale of assets belonging to the insolvent estate and not the institution of action, I am satisfied that the provisional trustees have shown a *prima facie* right to proceed with a sale of the assets. The major creditor of the insolvent estate, FNB with a claim of about R5 million supported the provisional trustees' application. There is not an iota of evidence that the liquidation of the assets would be to the detriment of the creditors of the insolvent estate. The following background facts are needed to contextualise my view point.

23.1 The Master has extremely extensive powers and the duties are far-reaching, not only in respect of insolvencies, but also liquidations and deceased estates. The Insolvency Act deals with these powers and duties in numerous sections, starting with s 4 in respect of the surrendering of an estate by a debtor to s 155(2) dealing with the destruction of documents five years after an insolvent person has been rehabilitated. Upon sequestration of an insolvent person his/her estate vests in the Master and upon his/her/their appointment in the trustees. It is the Master who appoints the trustees. I have quoted s 18(3) and s 80*bis* and shall say more *infra*. The Master may apply to the court to direct a trustee to submit an account and/or vouchers in support thereof.**[17]** The Master confirms the trustee's account**[18]** and he/she may direct a trustee to deliver any books, documents or property belonging to the insolvent estate of which he/she is a trustee.**[19]**

23.2 As mentioned, on 17 June 2021 the insolvent was provisionally sequestrated after an opposed sequestration application. He was finally sequestrated on 22 July 2021.

23.7 Based on my experience as a practitioner the powers granted to the provisional trustees on 6 September 2021 are in line with the powers generally granted by creditors to trustees at the second meeting of creditors. None of the powers granted herein are out of the ordinary although s 18(3) does not provide therefore. However, Mrs Van Dyk's only quibble is with the provisional trustees' right to sell the assets of the insolvent estate. It is apparent that the court granting the s 18(3) application did not issue the orders subject to such conditions as the Master may direct as s 18(3) provides. Fact of the matter is that the court order was served on the Master on 7 September 2021 and by the time Mrs van Dyk's application was heard by me, no directions have been received from the Master *ex facie* the submissions made by Tsangarakis.

23.8 Clearly the provisional trustees did not believe that they had *carte blanche* to deal with the assets of the insolvent estate as they liked and therefore they approached the court for relief.

23.9 The sheep, the subjects of theft and several other risks, needed to be disposed of as soon as possible, obviously to the advantage of creditors. This is exactly what transpired after the order in terms of s 18(3) was granted.

23.10 The other movable property as well as the fixed properties were advertised to be sold at a public auction to be held on 14 October 2021. The

provisional trustees indicated the efforts made by the auctioneer, a very senior and experienced person, to ensure that the auction would come to the attention of all prospective buyers. I cannot think of any other condition that the Master could have placed on the sale of the properties.

23.11 I noted that the assistant Master, Mr Strauss indicated that the provisional trustees could be outvoted at the first meeting of creditors still to be held. It may be so, but that would be quite a surprise to me, bearing in mind that the only known creditors clearly supported the application in terms of s 18(3). In any event, if government officials fail to comply with their statutory functions, they should not complain if litigants proceed to the court to obtain relief in the form of a mandamus against them, or alternative relief provided for in legislation as occurred in this case.

[24] Having stated the above, I am cautious of the possibility that the floodgates might be opened for provisional trustees to approach the court on a regular basis to obtain similar relief. It must be emphasised that the Master is, generally speaking, the first person to be approached in matters pertaining to the administration of estates, deceased or insolvent, bearing in mind the legislation and his/her expertise and that of his/her personnel.

[25] I am satisfied that on an appropriate interpretation of the provisions of ss 18(3) and 80*bis* of Insolvency Act, and depending on the facts and circumstances present in the administration of a particular insolvent estate, the provisional trustees may utilise both methodologies, i.e. to either apply to the particular Master or the High Court for consent to sell assets of an insolvent estate. If the Master is approached, s 18(3) must be read with s 80*bis* and if the Court is approached in terms of s18(3) for the sale of property of the insolvent estate, "such sale shall furthermore be after such notices and subject to such conditions as the Master may direct." The two sections are not in conflict with each other. The s 18(3) application was served on the Master as was the case with the court order of 6 September 2021. The Master would be within his rights to agree to the sale of property subject to such conditions he deemed fit to impose. He did not do so. No injustice or prejudice to any creditor was shown and/or can be imagined as a result of the methodology followed by the provisional trustees and their appointed auctioneer.

[26] Both counsel referred me to the judgment of the Constitutional Court in the matter of *Swart v Starbuck and Others* **[20]**. Mrs Van Dyk's counsel made submissions with reference to the minority judgment of Jafta J which did not take the matter any further. In that case Mr Swart raised the constitutionality of ss 18(3) and 80*bis* for the first time in the Constitutional Court. The majority in that court decided not to deal with the issue. In that case one of the future trustees of an insolvent estate accepted an offer for immovable property of the estate on condition that the Master consent to the sale which he ultimately did. The Supreme Court of Appeal found that the sale, subject to the suspensive condition, was valid. The majority in the Constitutional Court refused to grant leave to the disgruntled Mr Swart, the effect being that the SCA judgment stands.

XI CONCLUSION

[27] In conclusion I wish to emphasise that Mrs Van Dyk failed to overcome the four obstacles referred to above in order to successfully deal with the merits of her

complaint, to wit that the orders of 6 August 2021 should be set aside. I advanced full reasons for my conclusions in this regard, but went further to explain that, bearing in mind the factual position present pertaining to this specific insolvent estate over the period from June to September 2021, the provisional trustees could not be faulted for applying to the court in terms of s 18(3) of the Insolvency Act. Save for the comments made herein, the order of 6 September 2021 cannot be validly attacked and should stand.

Akoodie and Another v Organi Mark (Pty) Ltd (11435/20) [2021] ZAGPPHC 648 (4 October 2021):

Locus standi-company incorporated in accordance with the laws of Eswatini.(Swaziland) AND LIQUIDATED IN ESWATINI- in a case where the *lex causae* is foreign, that law applies to the dispute, and the matter will be decided by reference to the law of the country concerned, including its statutes where applicable-SUMMONS AGAINST DIRECTORS IN THE RSA

[1] The respondent (plaintiff) issued a summons on 12 February 2020 against the applicants (defendants) in their capacities as directors of the company Spintex Swaziland (Proprietary) Limited (Spintex). The defendants reside in Johannesburg. Spintex is a company incorporated in accordance with the laws of Eswatini. Spintex was finally liquidated on 8 May 2019 by order of the High Court of Eswatini. The plaintiff is a company incorporated in terms of the laws of South Africa with its registered address in Stellenbosh.

[2] The plaintiff pleads in its particulars of claim that Spintex applied on 30 January 2017 to open an account with the plaintiff pursuant to which credit facilities would be extended to it for the purposes of facilitating the provision of services and the supply of goods by the plaintiff to Spintex. During May 2017, the plaintiff and Spintex entered into a written Integrated Supply Chain Agreement (the ISCA). The ISCA was signed by both parties in Johannesburg. In terms of this agreement, the plaintiff undertook to sell cotton fibre to Spintex. Spintex would spin such fibre into cotton yarn to supply yarn to the Mr. Price Group Ltd Integrated Supply Chain Programme. In July 2017, the plaintiff and Spintex entered into two additional further agreements. From January 2017 - November 2017, the plaintiff rendered services to Spintex and sold cotton to Spintex pursuant to the ISCA and the further credit agreements. On 30 November 2017, Spintex was indebted to the plaintiff in the aggregate amount of R6 352 523.34. This amount, which is not in dispute, was due and payable. The amount continued to attract interest, and as of 31 March 2019, Spintex was indebted to the plaintiff in the sum of R7 167 880.97.

[3] The plaintiff pleads in its particulars of claim that since 28 February 2014, Spintex was trading in insolvent circumstances to the knowledge of the defendants. As directors of Spintex, the defendants recorded in each of its financial statements for the years ended 28 February 2014 to 28 February 2017 that such statements *'have been prepared on the basis of accounting policies applicable to* a *going concern. This basis presumes that funds will be available to finance future obligations '* The audited financial statement of Spintex for the year ended 28 February 2017, in particular, reflects that *'the ability of the company to continue as* a *going concern is dependent on* a *number of factors. The most significant of these is that the members continue to procure funding*

for the ongoing operations for the company' and that the *' ability of the company to continue as* a *going concern depends upon the continued support of its stakeholders.*'

[4] The plaintiff pleads that Spintex, to the knowledge of its directors, thus applied for and obtained credit from the plaintiff in circumstances where the payment of its indebtedness to the plaintiff was dependent upon the procuring of funding and the continued support of its shareholders. The defendants were under a positive obligation to ensure that Spintex did not incur credit unless adequate funding and adequate financial support from Spintex's shareholders were in place to ensure that creditors and the plaintiff, in particular, would be paid in full. The defendants recklessly permitted Spintex to incur credit with the plaintiff and to become indebted to the plaintiff. In these circumstances, the plaintiff pleads that:

a. The defendants are declared liable, without limitation of liability, in terms of s 361 of the Eswatini Companies Act of 2009 for the payment of all or any of the debts of Spintex, including its debt to the plaintiff;

b. The plaintiff is entitled to an order declaring that the defendants are liable to make payment to it in the sum of R7 167 880.97, together with interest;

c. The plaintiff is entitled to judgment against the defendants jointly and severally the one to pay the other to be absolved.

[5] In their plea, the defendants denied that they acted recklessly or that Spintex traded in insolvent circumstances and pleaded that the plaintiff was provided with, amongst others, the contact details of their auditors and three credit references. They also pleaded that payments in the amount of R5 291 955,37 were made to the plaintiff, which payments are not reflected or accounted for by the plaintiff. They pleaded that a portion of Spintex's factory burnt down during December 2017 , and as a result of the damages occasioned by the fire, Spintex was forced to shut down permanently.

[6] The defendants subsequently filed a notice of intention to amend their plea to include a special plea. The defendants plead that the plaintiff's cause of action offends the principle that foreign statutes, such as the Eswatini Companies Act No 8 of 2009, have no extra-territorial effect. They contend that the reference to 'court' in s 361 of the Eswatini Companies Act is a reference to the High Court of Swaziland and not the High Court of South Africa. As a result, they plead that this court lacks jurisdiction to grant the declaratory and consequential relief sought in terms of the plaintiff's particulars of claim.

The plaintiff gave notice of its intention to oppose the proposed amendment of the defendants' plea. The basis of the objection is that the special plea is exipiable in that it does not disclose a defence to the plaintiff's claim nor raise a triable issue. The plaintiff submits that the court is clothed with jurisdiction over the persons of the defendants because they reside in the court's area of jurisdiction. As a result, the court has the jurisdiction to determine a dispute concerned with conduct in Eswatini.

The defendants subsequently filed a notice of motion seeking an order to the effect that they are given leave to amend their particulars of claim by incorporating

the special plea. The defendants submit that the court should consider this application for what it is, an application to amend a plea to introduce a triable issue by objecting to the court's jurisdiction to hear the matter. They maintain that the court cannot deal with this application to amend on the basis of an exception. The defendants contend that the plaintiff wants this court to apply foreign law to enforce rights that accrued in Eswatini in circumstances where there is no evidence before the court as to what the law of Eswatini, or Swaziland, entails. They hold that the deponent to the plaintiff's answering affidavit does not qualify as an expert who can express an opinion in this regard, and that a court is not entitled to assume that the foreign law is the same as the law of South Africa. They submit that the court should grant the requested leave to amend for the issue to be ventilated at the hearing of the special plea where evidence can be led as to the laws of Swaziland and a decision can be made with a full appreciation of the applicable law.

[9] The plaintiff contends that the proposed amendment should not be permitted because the special plea sought to be introduced is not sustainable in law and does not amount to a defence to the claim. The plaintiff avers that there is a fundamental misconception in the stance adopted by the defendants. The plaintiff explains that it is common cause that the action instituted by the plaintiff is concerned with the running of an Eswatini company - Spintex- in Eswatini. The plaintiff seeks relief based upon the wrongful conduct of the defendants in the running of the Eswatini company. The plaintiff seeks to enforce a claim where the proper law applicable to the dispute is Eswatini law. The plaintiff thus seeks to enforce a right that has accrued in Eswatini concerning the running of an Eswatini company. The plaintiff does not seek, extra-territorially, to enforce the provisions of s 361 of the Eswatini Companies Act, but rather to enforce the rights accruing in Eswatini against defendants who are not subject to the jurisdiction of Eswatini but are subject to the jurisdiction of this court. The plaintiff proposes to litigate an Eswatini dispute in the court that has jurisdiction over the defendants by virtue of their domicile. The plaintiff contends that defendants conflate the question of extra-territoriality with the application of the proper law of the dispute in a South African suit against South African *incolae.* The plaintiff submits with reference to *Standard Bank of South Africa Ltd and Another v Ocean Commodities Inc and Others* ***[1]*** that where the proper law of a dispute is foreign, the court will apply that law, including any relevant statute. Plaintiff's counsel submitted with reference to applicable case law that in a case where the *lex causae* is foreign, that law applies to the dispute, and the matter will be decided by reference to the law of the country concerned, including its statutes where applicable. During argument counsel for the plaintiff submitted that the issue should be decided now or the same arguments will be regurgitated when the special plea is to be determined.

[10] The defend ants' case is that the issue introduced by the proposed special plea is not about which law constitutes the proper law that needs to be applied in adjudicating the dispute. They concede that the dispute is to be determined in accordance with the Eswatini Companies Act (the EC Act). The defendants' proposition is, (i) that the EC Act has no extra-territorial effect, and (ii) that the very Act excludes this court's jurisdiction to adjudicate the dispute. The

second submission is based thereon that the EC Act provides that the issues in question are to be determined by the Eswatini courts because the reference to 'the court' ins 361 of the EC Act is a reference to the High Court of Swaziland and not the High Court of South Africa.

[11] I agree that the issue raised in the proposed amendment is a triable issue. To determine the validity of the defendants' plea, this court needs to interpret a foreign statute. There is no evidence regarding the principles underpinning statutory interpretation in terms of the law of Eswatini before the court.

[12] As far as costs are concerned, the principle that costs follow success finds application. No reasonable grounds underpin the opposition of the application to amend. The application to amend is not so complex that it justifies the costs of two counsel.

ORDER

In the result, the following order is made:

1. The defendants are granted leave to amend their plea in accordance with the notice of intention to amend dated 7 July 2021;

2. The defendants shall deliver an amended plea within five days of this order;

3. The plaintiff is to pay the costs of opposition to the defendants' application for the amendment of the defendants' plea .

Lougot Property Investments (Pty) Limited v Group Five Coastal (Pty) Limited (A5004/2021) [2021] ZAGPJHC 472 (5 October 2021)

Winding-up – Appeal-Debtor company disputing liability for debt relied on – Creditor relying on s 345 (1) (a) (i) of Act 61 of 1973 – Debtor company entitled to dismissal of liquidation proceedings if dispute *bona fide* –debtor must establish the grounds which they advance for the company's disputing the Creditor’s claim are not unreasonable –

ORDER

On appeal from: The Gauteng Local Division of the High Court, Johannesburg (Dosio AJ sitting as Court of first instance):

(1) The applicant's appeal against the order of the court *a quo* is dismissed with costs, including the costs of the application for leave to appeal and the costs consequent upon the employment of Senior Counsel.

(2) The order of the court *a quo* is confirmed.

[1] The appellant appeals against the Court ***a quo's*** dismissal of an application for the final liquidation of the respondent. The appellant also seeks that this Court grants a final liquidation of the respondent. The respondent's defence is that the debt relied on is disputed on *bona fide* and reasonable grounds. Reliance is therefore placed by the respondent on the so-called *Badenhorst* rule, derived from *Badenhorst v Northern Construction Enterprises Limited,* to the effect that an application for liquidation is not a legitimate means of seeking to enforce payment of a debt which is *bona fide* disputed on reasonable grounds.

[2] The source of the indebtedness claimed is the costs portion of an arbitration award, handed down on 16 November 2018, in favour of the appellant against the respondent for payment of the sum of R878 196.21, being the costs of the reference awarded on the party and party High Court scale. The arbitrator's award was made an Order of the Western Cape Division of the High Court, Cape Town, on 22 January 2019.

[3] The appellant's cause of action in the arbitration was based on a written Principal Building Agreement ('the agreement'), which, according to the appellant, was concluded between it (the appellant), as the employer, and the respondent, as the contractor. It is however the respondent's contention that the contractor was in fact a company related to the respondent, namely Group Five Construction (Pty) Limited ('the Construction Company'), and that in all its dealings with the appellant, including in the arbitration, the respondent was merely acting as an agent on behalf of the Construction Company. And therein lies the crux of the dispute between the parties, which, according to the respondent is a *bona fide* dispute based on reasonable grounds.

[4] The appellant denies the respondent's claim that it was not a party to the agreement. The appellant also persists with its contention that the award by the arbitrator and the subsequent court order based on that award was in fact against the respondent, and not against the Construction Company, as claimed by the respondent. This, so the appellant submits, is evidenced by the fact that the capital amount of the award and other ancillary charges, amounting to a total sum in excess of R8 million, was paid without demur. The respondent's case is, however, that this amount was in fact paid by the Construction Company and not by it.

[5] Moreover, in support of their cause, the respondent lays emphasis on the fact that the arbitrator was appointed to determine a dispute between the appellant and the respondent, 'as agent for Group Five Construction (Pty) Ltd'. This fact is undisputed and unchallenged and it is confirmed by a written communiqué from the arbitrator dated 28 May 2018, in which the arbitrator confirmed in as many words that the arbitration which had been referred to him was between the appellant and 'Group Five Coastal (Pty) Limited acting as Agents for Group Five Construction (Pty) Limited'.

[6] There is merit in the respondent's contention in that regard. That is the contextual basis on which the arbitrator was nominated and accepted his appointment to determine a dispute between the aforementioned parties. His jurisdiction and the ambit of authority was prescribed by that fact. This then means, as argued on behalf of the respondent, that the respondent was not a party to the agreement or to the arbitration, in any capacity other than as agent.

[7] Moreover, so the respondent contends, its capacity as agent of the Construction Company is common cause as between all the parties including the legal representatives for the appellant who were present at the preliminary meeting with the arbitrator. The appellant was fully aware of that fact since it had caused its bank to issue a payment guarantee in favour the respondent but as agent for the Construction Company.

CJ Polymers Sendiran Berhad v Savino Del Bene (South Africa) (Pty) Ltd (2020/13410) [2021] ZAGPJHC 541 (8 October 2021)

Winding up application-final order-dismissed with costs-applicant could have foreseen a dispute of fact on claim

1. This is an application for the final liquidation of the respondent. It is opposed. The matter originally came before me in May 2021, when it was postponed to allow for the filing of further affidavits and completion of mandatory service requirements, which was duly completed, and the matter was argued on the merits on 26 July 2021.

2. Advocate Danie Preis SC, who appeared for the respondent at the hearing in May 2021, sadly fell victim to Covid-19, and passed away in early July 2021.

3. Mr Kevin van Huyssteen of Fluxmans Attorneys represented the applicant, and Advocate Andrew South SC represented the respondent at the hearing on the merits. I am indebted to both for the quality of their submissions, which have been of great assistance.

4. The applicant ("CJ Polymers") is a company incorporated and based in Malaysia. It is an international trading and distribution enterprise, specialising in the procurement and distribution of petrochemicals, polymers and textile raw materials.

5. The respondent ("Savino"), is a company incorporated in South Africa, and operates as the South African branch of Savino Del Bene S.p.A, a global logistics and forwarding company, founded over a century ago, with global headquarters in Florence, Italy.

6. Mr Isaac Solomon David ("Isaac"), owner and CEO of the Solomon David Group (Pty) Ltd ("SDG"), is a businessman who plays a central role in these proceedings, albeit that neither he nor his business are cited as parties. SDG is currently in business rescue.

7. CJ Polymers asserts that Savino is indebted to it to the tune of some R59 million rand, in respect of goods sold and delivered to Savino at its special instance and request, during the period April to December 2018. Savino disputes this, and asserts that at all times it merely acted as a freight forwarding agent for SDG, the actual purchaser of the goods supplied by CJ Polymers. Isaac has deposed to a confirmatory affidavit in support of Savino's version. There is no dispute that monies are owed to CJ Polymers for goods delivered to Savino – the issue is who is liable for payment.

38. For the reasons set out above, the application must fail. I see no reason why costs should not follow the result. It should have been apparent to CJ Polymers, on a reading of the answering papers, that there was little hope in succeeding in an application for final winding up on the papers. It could have elected to withdraw the application and to issue summons against Savino for payment, or it could have sought a referral to oral evidence of the disputes. It did neither, and elected to proceed with this application. Choices in litigation have consequences, and in this instance support an order that costs follow the result.

39. The postponement of the matter on 3 May 2021 was largely the applicant's doing, in failing to attend to mandatory service requirements (which had to be rectified prior to the hearing of the matter), and in raising new matter in reply. The reserved costs of this postponement should therefore also follow the result.

Order

40. The application to place the respondent in final winding-up is dismissed with costs, which costs are to include the reserved costs of 3 May 2021

Grapentine and Another v Sue Mcguinnes Communications CC and Others (2018/15776) [2021] ZAGPJHC 569 (19 October 2021)

Master-Master's actions in terms of Section 70(4) of the Close Corporations Act, 69 of 1984, ("Section 70(4)") in terms of the Promotion of Administrative Justice Act, 3 of 2000 ("PAJA"),- set aside the civil judgement granted pursuant to the issuing of the Certificate aforesaid.

Interrogations- Enquiry is accordingly not capable of founding a Court Order against a person and simply provides a vehicle for the liquidators to obtain evidence for later court proceedings. Section 415 is not intended in itself to give an order against a person being examined to pay money to the corporate entity in winding up.

[1] This First and Second Applicants ("the Applicants'") seek to review the Certificate issued by the Master in terms of Section 70(4) of the Close Corporations

Act, 69 of 1984, ("Section 70(4)") in terms of the Promotion of Administrative Justice Act, 3 of 2000 ("PAJA"), and to set aside the civil judgement granted pursuant to the issuing of the Certificate aforesaid.

[2] In addition, the Applicants' seek condonation in terms of sections 7 and 9 of PAJA, to the extent necessary, for bringing this review outside the 180-day time limit.

[3] The Applicants' in the alternative, sought an order declaring **Sections 70(4)** and **70**(5) of the **Close Corporations Act 69 of 1984**, unconstitutional. At the hearing of the matter, the Court was advised by Counsel for the Applicants', that in the event the Court granted such an order, same would need to be confirmed by the Constitutional Court, this would result in great expense to the Applicants'. It was submitted that the review in terms of PAJA would achieve the outcome sought by the Applicants and the Constitutional challenge would not be pursued at this time. The Court will accordingly deal with the issue of the PAJA review and ancillary relief only and will disregard the submissions made in respect of the constitutionality of **Sections 70(4)** and **Sections 70(5)**, to the extent it is possible to do so.

[4] This matter was on the opposed Motion Court roll on the 26 May 2021, opposing papers have been filed by the Fifth, Sixth and Seventh Respondents, ("the Respondents'"). There was however no appearance on behalf of the Respondents' when this matter was heard and the Respondents' have not filed heads of argument, despite a Court order, dated 23 February 2021 directing them to do so.

[5] The Respondents' seek condonation for the late filing of the Answering Affidavit, citing the unavailability of counsel, the Fifth and Seventh Respondents and a delay in obtaining various documentation. The Respondents' contend that this matter is of significant public importance beyond the interests of the parties, as the provisions under attack serve an important public purpose and the Court should have regard to all the facts and contentions in order to determine the matter properly.

[6] It is noted that the Applicants' consented to an extension of time to allow the Respondents' to file this affidavit on the 16th of July 2018. The court is asked to condone this extension of time. The Answering Affidavit, despite the agreement to file same on the 16 July 2018, was only served on the 31 August 2018.

HISTORY OF THE MATTER

[10] The Applicants' are equal members of the First Respondent which conducted business as a medical conference organizer. On the 12th of March 2012, the First Respondent sold its business to the Fourth Respondent for R2 500 000.00. Following a dispute between the First and Fourth Respondents, the Fourth Respondent cancelled the agreement on the 22 November 2012. This dispute was referred to arbitration and on the 17 January 2014, the Arbitrator found that the First Respondent had breached the agreement in circumstances justifying the Fourth

Respondent's cancellation of the agreement. The Arbitrator ordered the First Respondent to pay R2 500,000.00 to the Fourth Respondent together with interest at 15.5%. Against such payment the Fourth Respondent was ordered to return the business to the First Respondent.

[11] The First Respondent did not recover the business and the Applicants' argue that the Liquidators made no effort to retrieve the business for the benefit of the First Respondent. As a result, the First Respondent was unable to pay its debts on grant of the arbitration award and was wound up effectively from the 7 February 2014 in terms of sections 344(f) and 345(1)(c) and (2) of the Companies Act, 61 of 1973 ("1973 Companies Act"). Following the First Respondents liquidation, an enquiry was conducted into its affairs in terms of sections 414 and 415 of the 1973 Companies Act, read with section 9 of Schedule 5 to the 2008 Companies Act, ("the Enquiry").

[12] The Applicants,' duly represented by their legal representatives gave evidence at the Enquiry held on the 26 September 2015. It is apparent from the papers filed of record that the Enquiry was not finalised on the 26 September 2015 and was postponed to the 16 February 2016. On the 10 February 2016 the Attorneys for the liquidators wrote a letter to the Applicants' attorneys cancelling and ending the enquiry scheduled for the 16 February 2016.

[13] On the 24 March 2016, the Attorneys for the Second Respondent, addressed a letter to the Master, requesting him to issue a Certificate in terms of Section 70(4), attached to this letter was a draft Certificate. The Master issued *this* (my emphasis) Certificate on the 13 April 2016. The Applicants' attorneys delivered a letter to the Master on the 14th of April 2016 denying any basis for the Master to issue a Certificate and requesting an opportunity to respond to the request for the Certificate. Unbeknownst to the Applicants', the Certificate had already been issued and was recorded as a judgement on or about the 22nd of April 2016.

[14] On the 15 June 2016 the court issued a warrant of execution in favour of the Fourth Respondent. On the 8 August 2016, the sheriff attended at the residence of the Applicants' to attach the Applicants' property pursuant to the judgement. It was at this stage that the Applicants' became aware of the Judgement. The warrant was not executed as it had been entered in error, in the name of the Fourth Respondent, as opposed to the First Respondent as required by Section 70(4).

[15] On the 9 December 2016, the Applicants applied to the Magistrates Court in terms of Section 70(5) of the Close Corporations Act, 69 of 1984, ("Section 70(5)") for an order setting aside the Master's certificate and the civil judgement recorded by the Magistrates Court. This application was dismissed on the 22 December 2017. A Notice of Appeal was delivered against the judgement on the 30 January 2018, the Appeal is still pending.

THE LEGISLATIVE BACKGROUND

[16] The first stage of an enquiry into the winding up of a Close Corporation is an enquiry in terms of Sections 414 and 415 of the 1973 Companies Act, this is then followed by the second stage in which the Master issues a Certificate as to the amount payable by any member or former member of the Close Corporation in terms of Section 70(4), (only the relevant paragraphs are reproduced here).

"*Section 414- Duty of directors and officers to attend meetings-*

(1) In any winding-up of a company unable to pay its debts, every director and officer of the company shall-

(a) attend the first and second meetings of creditors of the company, including any such meeting which is adjourned, unless the Master or the officer presiding or to preside at any such meeting has, after consultation with the liquidator, authorized him in writing to absent himself from that meeting;

(b) attend any subsequent meeting or adjourned meeting of creditors of the company which the liquidator has in writing required him to attend.

(2) ……..

(3) Any director or officer of a company who fails to comply with any provision of this section, shall be guilty of an offence.

Section 415- Examination of directors and others at meetings -

(1) The Master or officer presiding at any meeting of creditors of a company which is being wound up and is unable to pay its debts, may call and administer an oath to or accept an affirmation from any director of the company or any other person present at the meeting who was or might have been subpoenaed in terms of section 414(2)(a), and the Master or such officer and any liquidator of the company and any creditor thereof who has proved a claim against the company, or the agent of such liquidator or creditor, may interrogate the director or person so called and sworn concerning all matters relating to the company or its business or affairs in respect of any time, either before or after the commencement of the winding- up, and concerning any property belonging to the company: Provided that the Master or such officer

shall disallow any question which is irrelevant or would in his opinion prolong the interrogation unnecessarily.

(2) In connection with the production of any book or document in compliance with a subpoena issued under section 414 (2)(b) ……

(3) No person interrogated under subsection (1) shall be entitled at such interrogation to refuse to answer any question upon the ground that the answer would tend to incriminate him or her and shall, ……

(4) The Master or officer presiding at any meeting aforesaid shall record or cause to be recorded in the manner provided by the rules of court for the recording of evidence in a civil case before a magistrate's court the statement of any person giving evidence under this section….on.

(5) ……..

(6) ……...

(7) ……

(8) ……...

[17] **Section 70** of the **Close Corporations Act, 69 of 1984**, reads as follows:-

70(1) Subject to the provisions of this section, no member of a corporation shall in the winding- up of the corporation be liable for the repayment of any payment made by the corporation to him by reason only of his membership, if such payment complies with the requirements of ***section 51(1)[1]****.*

70(2) In the winding-up of a corporation unable to pay its debts, any such payment made to a member by reason only of his membership within a period of two years before the commencement of the winding-up of the corporation, shall be repaid to the corporation by the member, unless such member can prove that:-

(a) after such payment was made, the corporation's assets, fairly valued, exceeded all its liabilities; and

(b) such payment was made while the corporation was able to pay its debts as they became due in the ordinary course of its business; and

(c) such payment, in the particular circumstances, did not in fact render the corporation unable to pay its debts as they became due in the ordinary course of its business.

70(3) A person who has ceased to be a member of the corporation concerned within the said period of two years, shall also be liable for any repayment provided for in subsection (2) if, and to the extent that, repayments by present members, together with all other available assets, are insufficient for paying all the debts of the corporation.

70(4) A certificate given by the Master as to the amount payable by any member or former member in terms of subsection (2) or (3) to the corporation, may be forwarded by the liquidator to the clerk of the magistrate's court in whose area of jurisdiction the registered office of the corporation is situated, who shall record it, and thereupon such notice shall have the effect of a civil judgment of that magistrate's court against the member or former member concerned.

70(5) The court in question may, on application by a member or former member referred to in subsection (3), make any order that it deems fit in regard to any certificate referred to in subsection (4).

[18] **Section 70(4)** thus empowers the Master to issue a certificate, after the Enquiry as to amounts payable by members of a Close Corporation in terms of **sections 70(2)** or **70**(3) and provides that such a Certificate may be forwarded by the liquidator to the clerk of the Magistrates Court who shall record it. On such recordal, the Certificate shall have the effect of a civil judgement against the member/s concerned. This then forms the basis of the dispute between the parties. The Court will first deal with the Applicants' application for condonation in terms of PAJA.

CONDONATION

[19] The Applicants' seek condonation, (to the extent necessary), for bringing this review Application, their submissions in this regard are twofold. Firstly, that the Applicants' were required to exhaust the internal remedy, set out in **section 7(2)(a)[2]** of PAJA before this Court could be approached. The Applicants' construed the internal remedy, to mean exhausting the remedy provided for in **Section**

70(5). In December 2016, the Applicants applied to the Magistrates Court in terms of **Section 70(5)** for an Order setting aside the Master's Certificate and setting aside and/or rescinding any civil judgement recorded by that Court consequent upon the issuing of the Certificate. The Magistrates court dismissed this application on the 22 December 2017. The Applicants' submit that the 180-day period started to run from the 22 December 2017, which would imply that the Applicants' were within the 180-day period, when this application was launched on the 23 April 2018.

[20] In the Alternative, if the Court does not accept that **Section 70(5)** constituted an internal remedy, then the Applicants' seek an extension of time in terms of **section 9** of PAJA.

THE PAJA REVIEW

[30] The Court is asked to review the Certificate issued by the Master on the grounds that same does not constitute fair procedure in terms of PAJA.

[31] It is firstly necessary to consider whether PAJA applies to the process established by S70(4). In this regard, PAJA defines Administrative action as

32] The Court accepts that the Master, when acting under Section 70(4), is an organ of state which exercises a public power or performs a public function which adversely affects the rights of a person, and has a direct, external, legal effect**[4]**.

[33] The Respondents' do not dispute that the Masters decision to issue a certificate in terms of Section 70(4) constitutes administrative action or the exercise of public power and confirm that to the extent contrary submissions were made in the Magistrates court, this is incorrect. The question is whether the issuing of such Certificate was procedurally fair.

[34] Section 3 of PAJA records:-

> "*(1) Administrative action which materially and adversely affect the rights or legitimate expectations of any person must be procedurally fair.*
>
> *(2) (a) A fair administrative procedure depends on the circumstances of each case.*

(b) In order to give effect to the right to procedurally fair administrative action, an administrator, subject to subsection (4) must give a person referred to in subsection (1)-

(i) *Adequate notice of the nature and purpose of the proposed administrative action;*

(ii) *A reasonable opportunity to make representations;*

(iii) *A clear statement of the administrative action;*

(iv) *Adequate notice of any right of review or internal appeal, where applicable; and*

(v) *Adequate notice of the right to request reasons in terms of section 5.*

(3) In order to give effect to the right to procedurally fair administrative action, an administrator may, in his or her or its discretion also give a person referred to in subsection (1) an opportunity to

(a) obtain assistance and in serious or complex cases, legal representation;

(b) present and dispute information and arguments; and

(c) appear in person.

4(a) If it is reasonable and justifiable in the circumstances, an administrator may depart from any of the requirements referred to in subsection (2).

[[42] The Applicants argue that no factual findings or legal conclusions are made at the end of the Enquiry. An Enquiry is accordingly not capable of founding a Court Order against a person and simply provides a vehicle for the liquidators to obtain evidence for later court proceedings. Section 415 is not intended in itself to give an order against a person being examined to pay money to the corporate entity in winding up.

[43] The deponent to the Respondents' affidavit, Ntuwiseni Netshitahame, ("Netshitahame") indicates that he chaired the Enquiry which the Applicants' attended and participated in and that the transcript that was compiled as well as the documents that was submitted formed the basis upon which the Master issued the Certificate in terms of Section 70(4). That the Applicants' were heard at the enquiry with regard to payments that formed the basis of the certificate issued in terms of section 70(4) and that the Applicants' must be taken to have been aware of the provisions of sections 51 and 70 of the Act at all material times. It is further submitted that the Enquiry satisfied the requirements of procedural fairness in the circumstances of the case.

[44] The Respondents concede that Section 70(4) of the Act has to be read subject to section 33**[6]** of the Constitution and PAJA as well as the principle of legality under the Constitution. This would imply that procedural fairness must be observed alternatively that a rational process must be followed prior to the issuing of the certificate. The Respondents are however silent on the lack of procedural fairness prior to the issue of the Section 70(4) Certificate. It is noted that the Enquiry was held on the 26 September 2015, same was not finalised and was adjourned to the 16 February 2016. Prior to the hearing on the 16 February 2016, the Attorneys for the liquidators notified the Applicants that the meeting for the 16 February 2016 was cancelled and ended the enquiry. At this stage, the Master should have issued the Certificate if he was of mind to do so, he did not. No new evidence was led after the 26 September 2015, effectively, the enquiry ended then and not on the 10 February 2016 when the Liquidators notified the Applicants they are cancelling the enquiry of the 16 February 2016. The Master only issued the Certificate when called upon by the Second Respondent to do so, and after receipt of the letter of the 24 March 2016, with accompanying Certificate. It is evident that no regard to the procedural prescripts in PAJA was considered before same was issued and the Applicants' contention that the Master simply rubber stamped the Certificate drafted by the Second Respondent's Attorneys seems likely.

[45] The Applicants do not take any issue with the Enquiry but the fact the Section 70(4) confers on the Master the authority to convert that process into a civil judgement against the witness in breach of Section 34**[7]** of the Constitution.

[51] The Magistrate records that the issue she had to decide was the setting aside of the certificate issued by the Master in terms of **section 70(5)** of the **Close Corporations Act, the** Magistrate said as much in paragraph 6 of her Judgement. The Magistrate further confirmed that the court has no jurisdiction to pronounce on the constitutionality of **section 70(4)** and that in dealing with a pronouncement on administrative action, which falls within PAJA, the court did not have jurisdiction. The relief the Applicants seek in this Application is the review of the **Section 70(4)** Certificate in terms of PAJA and not the setting aside of same in terms of the **section 70(5)** Certificate. The Court is not in agreement that these proceedings are the same as that instituted in the Magistrates Court.

[52] In the circumstances, I make an order in the following terms:

1. The Certificate issued against the Applicants' by the Master of the High Court on 13 April 2016 in terms of Section 70(4) of the Close Corporation Act, 1984 in the estate of Sue McGuinness Communications CC (in liquidation) is declared to be invalid and is set aside.

2. The judgment granted in the Magistrates Court for the District of Johannesburg held at Johannesburg Central under case number 13144/2016 is set aside.

3. The Fifth, Sixth and Seventh Respondents are directed to pay the costs of their opposition to the Application.

Sithole N.O and Another v Sachal & Stevens (Pty) Ltd and Another (14657/2019) [2021] ZAWCHC 194 (5 October 2021)

Interrogations-liquidators seek an inquiry in terms of s 423 of the 1973 Companies Act; proof of ownership of the vehicles; and whether a proper case has been made out for a s 423 enquiry and whether more appropriate mechanisms have been exhausted.The court finds that a s 423 inquiry would not be appropriate

Impeachable transactions- Three payments are declared void by virtue of s 341(2) of the 1973 Companies Act and two other payments are found to have been made *sine causa*, such that the second company was unjustly enriched.

Sachal Haulers was placed into liquidation at the instance of one of its creditors, by reason of its inability to settle its debts. Mr Steven, the director, had caused several payments to be made to another company at which he was a director, prior to the order placing Sachal Haulers into liquidation, effectively clearing out its cash resources. The joint liquidators challenge the validity or lawfulness of the payments on a number of grounds.

Binns-Ward J discusses whether the payments should be set aside since the liquidators content that these were made when the company was factually insolvent; the determination of ownership of certain vehicles and equipment, for which the liquidators seek an inquiry in terms of s 423 of the 1973 Companies Act; proof of ownership of the vehicles; and whether a proper case has been made out for a s 423 enquiry and whether more appropriate mechanisms have been exhausted.

The court finds that a s 423 inquiry would not be appropriate.
Three payments are declared void by virtue of s 341(2) of the 1973 Companies Act and two other payments are found to have been made *sine causa*, such that the second company was unjustly enriched.

[1] In these proceedings the applicants, who are the joint liquidators of Sachal Haulers (Pty) Ltd (in liq.), seek relief, under various heads, against the first and second respondents, Sachal & Stevens (Pty) Ltd and Mark Cater Stevens, respectively. I shall refer to the company in liquidation as 'SH' and to the first respondent, Sachal & Stevens (Pty) Ltd, as 'S&S'. The second respondent will be referred to by his surname, Stevens. He was a director and the controlling mind of both SH and S&S. He remains at the helm of S&S.

[2] SH was placed into liquidation at the instance of one of its creditors, Kroucamp Plumbers CC, by reason of its inability to settle its debts. The application for liquidation was lodged on 9 November 2015 and, despite opposition, a provisional winding-up order was granted on 5 August 2016. A final order followed on 6 September 2016.**[1]**

[3] It is common ground that SH, whose sole business would appear to have been to undertake earth transportation work for Arcelor Mittal, ceased active operations in July 2015 after it was denied access to Arcelor Mittal's site in Saldanha. Arcelor Mittal gave formal notice of the termination of its contract with SH in August 2015. Stevens claims to have learned of the termination only at the beginning of November 2015, although the circumstances are such that it is highly improbable that he could have been unaware that SH had ceased its operations in July. I say that because Stevens stated in affidavits made in earlier proceedings that Randall Kapot, the co-director and operations manager of SH, stopped work in July and, in these proceedings, he testified to the sale during July 2015 of various vehicles and equipment that were used in SH's operations. Some vehicles were disposed of at that time as payment in kind of SH's debts.

[4] Whilst Kroucamp Plumbers did not receive any payment in respect of its outstanding claim for services rendered to SH when the company was still in business, Stevens caused SH to make several payments to S&S during the interval between SH's cessation of business and the date on which the order was granted placing the company into liquidation.

[11] As I shall explain presently, the institution of an enquiry in terms of **s 423** is a matter within the court's discretion. It is not a procedure that is made available merely for the asking, and it therefore does not follow that the respondents' consent to such an enquiry in any way obliges the court to hold one. The court will order such an enquiry only if a proper case for one has been made out, and even then only if the court is satisfied that the exceptional procedure afforded in terms of the provision would be appropriate in the circumstances.

The applicants' allegations and other information apparent on the founding papers

[12] The applicants' case falls into two broad categories. The first category concerns the setting aside of the above-mentioned payments, all of which, they contend, were made at a time that SH was factually insolvent. The second category concerns the determination of the ownership of certain vehicles and equipment. It is in relation to the second category that the applicants have sought an enquiry in terms of s 423 of the 1973 Companies Act. The contemplated enquiry would also examine the propriety of the rental payments by SH to S&S for the vehicles and equipment should it be found that the company in liquidation had not been the owner

thereof. There is an overlap between the two categories because the applicants also claim the repayment of the amounts ostensibly paid as rental even if S&S is the owner of the vehicles and equipment. They do so on the basis that they do not accept that there was a lease agreement in place and that SH did not use or obtain any benefit from the vehicles and equipment after it ceased to trade.

[14] At the enquiry conducted in terms of s 415 of the 1973 Companies Act into the affairs of SH, the company's co-director, Randall Kapot, testified that SH had purchased the vehicles identified in items 1-12 of the preceding paragraph. Kapot reportedly testified that the purchase of the vehicles was financed by means of loans of obtained from S&S.

[35] The cases consistently refer to the procedure in terms of s 423 as a 'summary' one. In my judgment, a summary procedure is indicated only when a strong or fairly clear-cut case is made out, albeit on a prima facie basis. This much seems to be supported by the observation in Henochsberg that s 423 '*creates no new rights but provides a summary procedure for the enforcement of rights of action which the company already owns arising from the conduct of the respondent*'.**[19]** The procedure should not be seen as an alternative exploratory tool to the information gathering procedures available under s 415 or 417. Whereas the latter procedures are exploratory and can be used to confirm or establish the existence of rights of action, s 423 is directed at providing a summary enforcement mechanism for rights of action that have already been established, at least prima facie.

[36] I think this much is confirmed in the wording of the provision. The words '*it appears that .. any past or present director ... of the company has misapplied or retained or become liable or accountable for any money or property of the company or has been guilty of any breach of faith or trust in relation to the company the court may, on the application of ...., inquire into the conduct of the ... director ... concerned ...*' imply that the misfeasance involved must be apparent when the application for the enquiry is made. The primary purpose of s 423 is to provide a robust and expeditious means to a result, whether by payment of money or delivery up of property to the company by the delinquent director, officer or promoter, as the case might be.

[37] I have noted that Coetzee J in *Timmers* supra, at pp. 252-253, considered that there was a lacuna in the legislation by reason of its omission to lay down any procedural directions for enquiries in terms of s 423. The convention had been for orders instituting such enquiries to be granted in the simple and unadorned form used in *Waisbrod v Potgieter and Others* **1953 (4) SA 502** (W), viz. an order '*that the application be set down on a date to be fixed by the Registrar for viva voce examination and cross-examination* [of the alleged delinquents] *and of those witnesses who have made affidavits and of any other witnesses whom the Court may allow the parties call*'. Coetzee J feared that orders in such terms were liable to result in the enquiry lapsing into a '"*free for all", casting unnecessary extra burdens on the Judge hearing the matter*'. The learned judge considered it desirable that the issues to be dealt with at the enquiry be defined (he appears to have in mind something in the nature of the so-called 'Metallurgical order'**[20]**), that there be

discovery as provided in the Uniform Rules of Court and a 'pre-trial conference under Rule 37'.

[38] In my view, however, the undelimited application of such ordinary pretrial procedures in an enquiry under s 423 would be at odds with the very object of the provision, being the provision of a *summary* procedure to obtain an exigible substantive result. An enquiry under s 423 is a procedure appropriately availed of when a trial should not be necessary by virtue of the apparent strength of the prima facie case made out against the respondent. The evidence adduced in support of an application in terms of s 423 should be such that little more might be expected to happen at the enquiry than a hearing of the apparently delinquent director's evidence as to why the substantive relief sought from him should not be granted.**[21]** That would represent a realisation of the 'summary' character of the remedy crafted by the provision.**[22]**

[39] In the current case, as the summary of evidence above bears out, all the indications are that S&S is the owner of the vehicles and equipment in issue. The information that can be vouched in support of that conclusion has been provided. In the circumstances, it is of little consequence that evidence previously given by Stevens has not been consistent in all respects. An enquiry is unlikely to take matters further, and s 423 in any event does not afford the machinery by which S&S could be ordered to restore the property. The evidence does not support a case for the institution of an enquiry to summarily dispose of a case against Stevens for having misapplied SH's property or committed a breach of faith or trust in relation to SH. It goes no further than to suggest that the possibility of such delinquency should be explored.

[43] The court is vested with a discretion to declare that payments made between the lodging of the winding-up application and the making of an order placing a company into liquidation (whether such be a provisional or a final order matters not). The respondents have contended in the answering papers that the court should not make such an order in this case, but there is no counter-application formally seeking such relief. The respondents adopted the position that a determination whether to exempt the payments from the voiding effect of s 341(2) should stand over until after the enquiry in terms of s 423 to which they had consented. That was a misdirected approach. An enquiry in terms of s 423 is not, according to the terms of the provision, directed at determining whether a case for an exemption from s 341(2) can be made out. The payments are void *ex lege*, and if the respondents sought a special exemption it was for them to make out a case for it.

[55] I consider that a robust approach to the issue of the existence of a lease is justified in the current case. It impels the conclusion that there was no valid lease for want of any certainty as to the rent. In the circumstances where the company in liquidation had no use of the allegedly hired out vehicles and equipment from August 2015, S&S was unjustly enriched at the expense of SH in respect of its receipt of the payments ostensibly in payment of rent for the months August to December 2015. The applicants are entitled to an order requiring S&S to repay those amounts to the company in liquidation. The affected payments are those listed as items 6-10 in paragraph [5] above, which relate to the payment of the amounts, totalling

R757 302 invoiced for August, September and October 2015. As discussed earlier, three of those payments were in any event void by virtue of s 341(2) of the 1973 Companies Act,

[56] An order will not be made for the repayment of the payments made ostensibly in respect of rent for the period before and including July 2015 because it appears that SH enjoyed the use of the vehicles and equipment during that period and it is therefore unclear to what extent, if any, S&S was unjustly enriched by such payments.

Bester NO v Massyn [2021] ZAWCHC 204

Schemes- forex scheme and payments sine causa

The liquidators of Octox seek an amendment to increase their claim against the respondent for unjust enrichment sine causa, contending that no valid causa existed for certain payments made by Octox to Ms Massyn.
Wille J discusses the contention that the claims have prescribed and the appointment of the liquidators; the backround facts involving an irregular investment scheme and billions paid by investors in a “forex scheme”; the insolvency enquiry; Ms Massyn’s contentions that she was entitled to the payments; and the contention that monies paid by investors cannot be the property of Octox and the effect of the unlawfulness of the scheme [29]-[38].
The amendment is granted and Ms Massyn is ordered to repay the amended amount.

Voltex (Pty) Limited v First Strut (RF) Limited (In Liquidation) and Others (43914/17) [2021] ZAGPPHC 662 (5 October 2021):

Concursus creditorum- application for rectification of a contract –after concursus- creditor then a secured creditor- it is possible

If rectification was possible , after concursus, was it proved in casu?

The court in par 34, quotes Boraine et al opines that the right should already exist at the institution of the institution of the concursus.

The court ruled (par36) “It is a misconception to view ex post facto rectification of the description of a party to an agreement as an interference with the position obtained at the concursus creditorum.

The court found there was a valid cession of book debts, applicant is a secured creditor.

FERROSTAAL GMBH AND ANOTHER v TRANSNET SOC LTD AND ANOTHER 2021 (5) SA 493 (SCA)

Business rescue — Business rescue plan — Vote — Rejection — Application to court to set aside rejection vote on grounds of being inappropriate — Whether it was just and reasonable to set aside creditor's vote against adoption of proposed business rescue plan — No reason to interfere with discretion exercised by High Court to refuse to set aside vote — Appeal dismissed — Companies Act 71 of 2008, s 153(1)*(b)*(i)(*bb*), s 153(7).

The present matter concerned the terms of a proposed business rescue plan (BRP) published in July 2019 aiming to regulate the affairs of the company Ferromarine Africa (Pty) Ltd (FMA), which had been placed in business rescue in December 2016. Such BRP provided for the continuation of a 15-year lease that FMA, as lessee, had entered into in December 2006 with the Transnet National Ports Authority (Transnet) — presently FMA's only independent creditor — and in terms of which FMA had been further granted an 'option' to renew but on terms still to be negotiated and agreed upon prior to the date of termination, failing which the option clause would have no effect. The BRP also provided that *Transnet approve the terms of a proposed sublease between FMA* and ArcelorMittal for a period of three years; and *that the repayment of the arrear rentals in respect of the main lease be deferred until the commencement of the extended period*, and that repayment be rescheduled on terms to be agreed between Transnet and FMA. Transnet voted against the adoption of the BRP. So, the appellants — Ferrostaal GmbH and Atlantis Marine Projects (Pty) Ltd, both shareholders of FMA — applied to the Western Cape High Court seeking an order setting aside Transnet's vote. They relied on the Companies Act 71 of 2008, s 153(1)*(b)*(i)*(bb)*, which entitled affected persons to apply to court to set aside, *on the grounds that it was inappropriate*, the vote of shareholders rejecting a BRP. The High Court, per Bozalek J, dismissed the application. The appellants were granted leave to appeal to the Supreme Court of Appeal (SCA).

The appellants argued that the rejection of the BRP was not in the best interests of Transnet, having regard to the low return that would be yielded in the case of liquidation (which would in effect be the consequence of allowing Transnet's vote to stand) (see [9]). For its part, Transnet argued that the BRP failed to adequately provide for the protection of its interests and was hinged on numerous contingencies and uncertainties (see [10]), and, in addition, argued that the renewal of the lease on the terms set out in the BRP violated the provisions of s 56(5) of the National Ports Act 12 of 2005.

The SCA noted that in terms of s 153(7) of the Companies Act a court may, on an application in terms of ss (1)*(b)*(i)*(bb)*, set aside a vote if it were satisfied that it was reasonable and just to do so, having regard to the interests of the persons who voted against the BRP; the provisions made in the proposed BRP with respect to the interests of such persons; and a fair and reasonable estimate of the return to such persons if the company were liquidated (see [13]). In addition to such requirements, the SCA noted, a court should take into account all relevant circumstances, and the purpose of business rescue, when determining whether it would be just and equitable to set aside a rejection vote (see [14]). In this regard, the court had regard to the following:

- In terms of the BRP, *arrear rental would not be paid* unless and until the extension of the lease had been agreed upon between Transnet and FMA (see [20] and [21]). No explanation was provided by FMA for its not starting to pay the arrear rentals during the remaining period of the lease (see [20]).

- The renewal of the lease was not a *fait accompli*: the parties' agreement in regard to the renewal of the lease amounted merely to an unenforceable agreement to negotiate in the future (see [23]).
- Even were the lease to be extended, the terms of the repayment still needed to be agreed upon. In the case of failure to agree, the BRP provided that the arrears would have to be amortised over the 15-year extended period of the lease; Transnet was placed in a weakened position regarding the negotiation of the terms of the extended lease. (See [23].)
- In order to generate sufficient revenue to cover FMA's monthly rental obligations in the future, the BRP provided that FMA would enter into further subleases with *potential subtenants*; and that it would make a cash contribution from its own resources. (See [25] – [27].) However, FMA had not yet secured prospective additional subtenants (see [26]). Further, the BRP made no mention of where the cash contribution would be obtained (see [26]).

In light of the above, the SCA found to be warranted Transnet's concern about the implementation of the BRP, being as it was dependent on the occurrence of future uncertain events, and Transnet's doubts about the commercial viability of FMA (see [25], [26] and [29]). The SCA accordingly approved of Transnet's contention that the implementation of the revised BRP would not achieve the legislated objective set out in s 7*(k)* of the Companies Act, of facilitating the efficient rescue and recovery of financially distressed companies in a manner that balances the rights and interests of all stakeholders (see [29]).

The SCA further had regard to the provisions of s 56(5) of the National Ports Act, which enjoined port authorities, that had decided to outsource the services they were statutorily required to perform, to follow procedures that were fair, equitable, transparent, competitive and cost-effective (see [30]). A contractual term that obliged an organ of state to extend a lease agreement despite the tenant not settling a substantial arrear rental could not be said to be cost-effective, and its enforcement would severely prejudice Transnet (see [31]). Setting aside the vote in question, the SCA stressed, would give an imprimatur to non-compliance with peremptory legal requirements pertaining to public procurement, and the High Court was correct to decline to do so (see [31]).

The SCA went on to address the appellants' claims that the return that would be yielded by FMA's liquidation would be less than the return yielded on implementation of the BRP. Such conclusion, however, the SCA held, was not supported by the evidence presented. (See [32] – [34].)

Finally, the SCA considered s 128(1)*(b)*(i) which envisaged a *temporary* supervision of the distressed company by the business rescue practitioner (see [35]). Given the fact that the payment of arrear rental would only be negotiated at the end of the head lease which would terminate in three years' time, and that the arrears would, in the absence of an agreement on the structuring of the repayments, be amortised over an extended 15-year period, the vague arrangement set out in the revised BRP could not be described as 'temporary' within the contemplation of s 128(1*)(b)*(ii) of the Act. (See [36].)

The SCA concluded that there was no reason to interfere with the exercise of discretion of the High Court to refuse to set aside Transnet's vote against the adoption of the BRP, on the basis that its vote was not inappropriate considering all the circumstances. (See [11], [37] – [39].) It accordingly dismissed the appeal (see [40]).

SOUTH AFRICAN RESERVE BANK v LEATHERN NO AND OTHERS 2021 (5) SA 543 (SCA)

Exchange control — Exchange control regulations — Blocking order — Requirements for setting aside — No reasonable grounds — Whether established — Currency and Exchanges Act 9 of 1933, reg 22D read with s 9(2)*(d)*(i)*(bb)*.

Insolvency — Property passing to Trustee — Funds in insolvent's bank accounts blocked in terms of exchange control regulations — Whether such funds vesting in insolvent estate — Whether sequestration order invalidates blocking order.

A designated functionary of the Reserve Bank, who on reasonable grounds suspects a person to be involved in the contravention of any provisions of the regulations promulgated under s 9 of the Currency and Exchange Act 9 of 1933 (the Act), is empowered under regs 22A and/or 22C to issue a blocking order in respect of a banking account suspected of being used for illegal purposes. Regulation 22D provides, among other things, for the review of an order made in terms of reg 22A or 22C.

On 15 June 2017 the appellant, the South African Reserve Bank (the Reserve Bank), issued a blocking order * against two bank accounts of one Mr Bhorat held with the fourth respondent bank on the suspicion that these accounts had been used as conduits for illicit financial flows.

On 20 June 2017 Mr Bhorat's estate was provisionally sequestrated at the instance of the South African Revenue Service (Sars). The trustees, the respondents here, in a reg 22D review, obtained a High Court order lifting the blocking order and declaring that the blocked funds formed part of Mr Bhorat's estate. The absence of reasonable grounds for the blocking order is one of the bases for setting it aside in terms of reg 22D, read with s 9(2)*(d)*(i)(*bb*) of the Act. The High Court was not persuaded that there was reasonable suspicion, noting 'no proof of any kind was before the court'.

In the present case, an appeal by the Reserve Bank to the Supreme Court of Appeal, the issues were (1) whether the High Court was correct to set aside the blocking order; (2) whether the funds standing to the credit of Mr Bhorat's bank accounts 'belonged' to him and fell into his insolvent estate, thus vesting in the trustees; and (3) whether a sequestration order invalidated a blocking order by operation of law.

Held

(1) The High Court applied the wrong test by requiring the Reserve Bank to provide some 'proof' that the regulations had, in fact, been contravened. All that was required of the Reserve Bank was a suspicion based on reasonable grounds, which had to be objectively assessed. The High Court also failed properly to assess the explanation and evidence provided by the Reserve Bank. In all the circumstances, the Reserve Bank's suspicion was well founded and reasonable. The High Court was thus not entitled to set aside the blocking order, as the provisions of reg 22D, read with those of s 9(2)*(d)*(i)*(bb)* of the Act, were not satisfied. (See [15] – [16].)

(2) The general position in our law was that where money was deposited into a bank account of an account holder, it mixed with other money and, by virtue of commixtio, it became the property of the bank. The account holder had no real right of ownership of the money standing to his credit but acquired a personal right to payment of that amount from the bank. It was not a universal rule that only an account holder may assert a claim to money held in its account with a bank. Where to the knowledge of the bank and the account holder, the account holder had limited

control over the funds, the right to claim the funds standing to the credit of the account did not accrue to the account holder but to the depositor. In this case, on the uncontroverted version of the Reserve Bank, there seems to be an understanding between the depositor(s) and the account holder that the latter is only entitled to deal with the funds as directed by the depositor. The High Court's conclusion that Mr Bhorat enjoyed a personal right to the funds as against the fourth respondent bank could not have been made on the evidence before it and on the basis of the law governing these matters. At this stage the trustees had no better claim than Mr Bhorat as against the Reserve Bank. Provided the Reserve Bank's blocking order complied with the regulations, it may block the funds and the trustees could enjoy access to them, whatever was ultimately proven as to who had a claim to the funds. Viewed in this light, the trustees' application to the High Court was premature and should not have succeeded. (See [17], [20], [24] and [29] – [30].)
(3) The purpose of a blocking or attachment order in terms of the regulations was to secure assets which may be liable to forfeiture in terms of the regulations. This added to the general context of the regulations in that a blocking order was provisional only and the final position can only be determined if the Reserve Bank sought a forfeiture order. A blocking or attachment was therefore a prerequisite for a valid forfeiture of the funds to the state. If a blocking order was terminated by the grant of a subsequent sequestration order, the forfeiture of the assets used in the contravention of the regulations might never be realised. The remedy of forfeiture, a sanction of public law imposed to protect the currency and the economy, would be lost by operation of the law of insolvency. That was an absurdity so glaring that the legislature could not have contemplated it. A blocking order functioned to temporarily delay a determination whether the funds in a blocked account vest in the trustees. For that reason, in the interim, the trustees were not entitled to demand that the funds be paid out to them for distribution. (See [36] – [39].)

WATSON NO v NGONYAMA AND ANOTHER 2021 (5) SA 559 (SCA)

Company — Shares and shareholders — Application for restoration of shares — Claim that shares donated on basis of misrepresentation that persons with BBBEE credentials would benefit — Case withdrawn against registered shareholder and entities alleged to be beneficial shareholders not cited — Order by court against individual said to have made representation incapable of execution — Issues, including ownership of shares involving corporate structures, complex — Motion proceedings inappropriate.

Mr Watson was ordered by the High Court to 'take whatever steps . . . necessary to restore' to Thunder Cats Investments 92 (Pty) Ltd (Thunder Cats) shares in Nkonjane Economic Prospecting and Investment (Pty) Ltd (Nkonjane) which had been donated by Thunder Cats to Bosasa Youth Development Centres (Pty) Ltd (Bosasa Youth). The basis of the High Court's order was that the donation was validly cancelled as it was induced by Watson's misrepresentation that the 'beneficial shareholders' in Bosasa Youth had Black economic empowerment (BBBEE) credentials, when he and his family were the ultimate beneficiaries.
The application was withdrawn against Bosasa Youth, originally cited together with Watson, who died shortly after the order and before the High Court granted his leave

to appeal. This case concerned that appeal, prosecuted by the executor of his deceased estate.
Nkonjane had been created as a vehicle for Watson, Ngonyama and one Mr Macingwane, to invest in Ntsimbintle Mining (Pty) Ltd (Ntsimbintle). They initially agreed that 10% of their equity in Nkonjane would be donated, in equal shares, to two companies to hold it on behalf of BBBEE beneficiaries. In 2003 it was decided to instead use Bosasa Youth to hold 25% in Nkonjane on behalf of the beneficiaries. In the same year, Watson transferred his shareholding in Ntsimbintle to Bosasa Operations (Pty) Ltd, which later became African Global Operations (Pty) Ltd (Operations), of which Bosasa Youth was a wholly owned subsidiary.

When an offer was made by an investment company to buy out Nkonjane's shares in Ntsimbintle at R33 million for each of their 25%, Operations and Bosasa wanted to sell but not Ngonyama and Macingwane. Ngonyama withheld his consent to the sale, citing a right to nominate groups of shareholders to hold shares in Bosasa Youth in accordance with the original agreement. In 2015 Operations and Bosasa Youth successfully applied for Nkonjane's winding-up, during the course of which it was agreed that each Nkonjane shareholder would buy from the liquidator its pro rata portion of Nkonjane's shares in Ntsimbintle (the Agreement). This so that they would thereafter hold their shares directly in Ntsimbintle. The envisaged substitution was implemented in October 2016.
In the High Court application Ngonyama claimed that it was only in September 2017 that he and Macingwane learnt that at no relevant time had there been BBBEE shareholders in Bosasa Youth; the donation of the shares by him and Macingwane was premised on ensuring that historically disadvantaged individuals would benefit from an investment opportunity and would be entitled to lay claim to and enjoy the benefits thereof, including the receipt of dividends. Watson and Bosasa Youth both opposed the application. The provisional liquidators of Nkonjane were not joined. Bosasa Youth's defences were that no misrepresentation had taken place because Ngonyama knew that it was a wholly owned subsidiary of Operations; and that whatever claims concerning the return of the shares Ngonyama and Macingwane might have had against Watson and/or Bosasa Youth, were compromised under the Agreement and therefore moot.
It was only when provisional liquidators of Bosasa Youth belatedly sought to intervene that the Supreme Court of Appeal became aware that it had been liquidated after an opposed voluntary liquidation. An application to take Bosasa Youth out of liquidation had been successful but at the time of the High Court's hearing of the Ngonyama and Thunder Cats application, that matter was subject to appeal (which was subsequently upheld so that Bosasa Youth remained in liquidation).
Held
The withdrawal of the case against Bosasa Youth did not excuse the court below from considering mero motu whether its joinder and continued presence were obligatory and whether, without its continued presence, any order made would be effective. How could the provisional liquidators of Bosasa Youth not have a substantial and direct interest in the litigation conducted in the High Court? When the company was placed in provisional liquidation that consideration did not fall away. The withdrawal of the claim against Bosasa Youth and the non-joinder of the liquidators, or the failure to inform the High Court of their existence, and then later, of

the pending appeal, were reason enough to vacate its decision. (See [52] and [54] – [55].)
The conclusions reached by the High Court as to Watson's alleged misrepresentation were not justified. Ngonyama's own version of the agreement in relation to BBBEE shareholding, and the verification thereof, was inconsistent and vague; there was material doubt as to whether, at the time Ngonyama and Macingwane donated shares to Bosasa Youth, Watson made any fraudulent misrepresentation as to an existing fact or his state of mind. (See [54] and [59].)
The High Court was correct to conclude that the Agreement did not constitute a compromise but a share substitution agreement. Its conclusions on the true ownership of the disputed shares was not correct. It used the expression 'beneficial ownership' rather loosely. In the sphere of corporations, the beneficial ownership of shares referred to the case where shares, although registered in the name of a nominee, were in truth owned beneficially by a person whose name did not appear on the company's share register. Bosasa Youth was the registered shareholder of the disputed shares. (See [60] – [63].)
The lis against Bosasa Youth having been withdrawn, absent a rectification of Ntsimbintle's share register or the dispute between Bosasa Youth and the present respondents concerning the ownership of the shares being finally adjudicated, any order made involving Bosasa Youth's liquidators having to restore the shares held in its name was of no value; it was not binding on them and so had no practical effect. A court order must be framed in terms that were capable of being enforced. (See [63] and [66].)
Questions of ownership of shares, as opposed to questions related to rectification of a share register, were more often than not dealt with by way of a trial, rather than on motion, especially where the issues were complex or difficult.
The robust approach followed by the High Court in resolving all the issues on affidavit, given the complexities involved, was not appropriate. (See [65] – [67].) The appeal would accordingly be upheld.

Mwale v Financial Services and another [2021] 4 All SA 167 (GP)

Financial Services Regulation – Pyramid scheme – Carrying on business of bank – Financial Services Tribunal dismissal of application for reconsideration of directive by Prudential Authority – Nature and requirements of reconsideration application before Tribunal – Financial Services Tribunal decision not open to challenge on review where its conclusion was justified by the facts and bias alleged by applicant was not proven.

On 28 June 2018, second respondent, the Prudential Authority (the “Authority”) issued a direction in terms of section 83 of the Banks Act 94 of 1990 against the applicant and a close corporation in which he was sole member. It was common cause that during 2010, the applicant joined an illegal pyramid scheme.

The applicant applied to the Financial Services Tribunal for a reconsideration of the decision of the Authority. The Tribunal’s dismissal of his application led to the present application for review of that decision. The grounds of review were that the Tribunal’s decision was influenced by a material error of law; that the decision was unreasonable; that it was irrational; and that the Tribunal (and specifically the chairman) was biased.

Held – A reconsideration application must be made in accordance with the Tribunal Rules, must contain full particulars of the grounds on which the application is based

and must be drafted to conform as far as possible to a standard form. The court described the procedure around proceedings before the Tribunal.

A reconsideration application constitutes an internal remedy as contemplated in section 7(2) of the Promotion of Administrative Justice Act 3 of 2000. The court had regard to the Authority's reasons to determine whether the Tribunal correctly dismissed the reconsideration application. The Authority had found that the pyramid scheme in which the applicant had participated had conducted the business of a bank in contravention of the Banks Act, and the Tribunal could not fault that finding. Arguing that the Tribunal had materially erred in its interpretation of "the business of a bank", the applicant alleged that his involvement in the pyramid scheme was not a regular feature of his business practice. The Tribunal held that the acceptance or obtaining of money, directly or indirectly, from members of the public by the applicants, was a regular feature of the scheme, and was satisfied on the facts that the applicants conducted the business of a bank. The court agreed with the Tribunal's evaluation of the facts and the conclusion reached.

The court was also not persuaded that the Tribunal decision was unreasonable or irrational, as there were sufficient facts before the Tribunal to justify the conclusion that it should not interfere with the discretion exercised by the Authority.

For the applicant to establish bias by the Tribunal, he had to show that he (as the person who apprehended bias) and the apprehension itself were reasonable. He failed to discharge the onus upon him in that regard.

The application was accordingly dismissed with costs.

END-FOR NOW