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TREVO CAPITAL LTD AND OTHERS v STEINHOFF INTERNATIONAL HOLDINGS (PTY) LTD AND OTHERS 2021 (6) SA 260 (WCC)

Company — Directors and officers — Board of directors — Financial assistance — Financial assistance to related or interrelated company — Prohibition against except under conditions set out in s 45(3) — 'Related or inter-related company' — Whether concept including 'foreign company' — Companies Act 71 of 2008, s 45(1), (2) and (3).

The Steinhoff Group, which comprised interrelated companies situated in South Africa and abroad, became the target of legal claims after there came to light revelations of numerous irregularities in their financial statements, leading to significant losses for shareholders, and defaults on loans. Trevo Capital Ltd (the first applicant) and two foreign companies, Hamilton BV and Hamilton 2 BV (the second and third applicants, respectively, collectively referred to as Hamilton), were two such claimants (in other proceedings). Two critical sets of related events gave rise to the present application.

- In order to raise funding, in January 2014 Steinhoff Finance Holding GMBH ('SFHG') — an Austrian subsidiary in the Steinhoff Group — issued to certain investors ('2021 bondholders') convertible bonds (the '2021 bond'), with a maturity date of 30 January 2021. Critically, the first respondent, Steinhoff International Holdings (Pty) Ltd (SIHPL) — a private South African company, and then the holding company in the Steinhoff Group — also issued a guarantee (the '2014 guarantee') in respect of the financial indebtedness of SFHG, such that in the event of a default by SFHG under the 2021 bond and its failure to pay the amount due, SIHPL was required to pay such amount to the 2021 bondholders.
- In around December 2015 revelations of accounting irregularities led to losses by the Steinhoff Group, and ultimately to SFHG being unable to comply with the terms of the 2021 bond. A result was that the 2021 bondholders demanded payment from SIHPL pursuant to the 2014 guarantee. This state of affairs prompted the Steinhoff Group to effect a financial restructuring in respect of its debt, as

follows: *Firstly*, SFHG entered into a so-called 'company voluntary arrangement' in around November 2018 with, inter alia, the 2021 bondholders (the 'CVA'), whereby *the maturity of the 2021 bond was extended to 31 December 2021*, and the SFHG debt in terms of the 2021 bond was 'restated' or reconstituted, in terms of which the 2021 bondholders would issue a cashless loan to the Luxembourg-based Steinhoff Group company, Lux Finco 1, in terms of a Facilities Agreement; the cashless proceeds of that loan Lux Finco 1 would then on-lend to SFHG, which would then in turn pay such proceeds over to the 2021 bondholders, thereby extinguishing its debt with them. *Secondly*, SIHPL for its part entered into a so-called 'contingent payment undertaking' (2019 CPU) in around August 2019 with, inter alia, the 2021 bondholders in terms of which it 'restated' its indebtedness under the original guarantee, but that such debt would no longer remain *immediately due and payable*, but would be deferred in terms of the CPU, such that the payment amount could not be demanded before 31 December 2021, and further that the amount recoverable from SIHPL would not exceed the so-called initial payment amount.

In the present application brought before the Western Cape High Court against, inter alia, SIHPL, the applicants claimed that both the 2014 guarantee and the 2019 CPU constituted the provision of financial assistance, as contemplated in s 45(1) of the Companies Act 71 of 2008, by SIHPL to SFHG and Lux Finco 1, respectively. Both SFHG and Lux Finco 1 were, as contemplated by s 45(2), 'related or interrelated company[ies] or corporation[s]' vis-à-vis SIHPL at the times the latter granted them financial assistance. In terms of s 45(3) of the Act, a board may authorise such financial assistance only *(a)* where preceded by a special resolution of shareholders approving such assistance; and *(b)* providing it was satisfied that 'immediately after providing the financial assistance, the company would satisfy the solvency and liquidity test; and the terms under which the financial assistance was proposed to be given were fair and reasonable to the company'. The applicants argued that, in respect of the 2014 guarantee, the board, while purporting to have been satisfied that the conditions set out in *(b)* above had been met, could not reasonably have held that belief. SIHPL had relied on inaccurate and irregular financial statements that incorrectly suggested that the company was solvent. The applicants argued, pertinently, that a company acting reasonably would have uncovered the irregularities and realised that the financial statements were inaccurate. The applicants further argued, as to the 2019 CPU, SIHPL had not even purported to

comply with s 45(3) in concluding the CPU, and in any event at that time SIHPL was factually and materially insolvent, in that its liabilities exceeded its assets on a consolidated basis. Accordingly, the applicants argued, both the 2014 guarantee and the 2019 CPU, as well as the resolutions by the board authorising them, were void in terms of s 45(6). They sought declarators to such effect, and their setting-aside, as well as an order interdicting SIHPL from making payments in terms of such instruments.

Preliminary point — whether s 45 applied to a 'foreign company'

Disagreeing with a preliminary point raised by SIHPL, the court held that the legislature intended that *foreign companies* would fall within the class of persons to whom financial assistance could only be extended by local companies upon compliance by the latter with the provisions of s 45(3). (See [52].) It reached such a conclusion, based on the following. Firstly, such an interpretation accorded with the language used in the section: Section 45 applied to the giving of financial assistance to a 'related or interrelated company *or corporation*'. To interpret the word 'corporation' as including within its scope a foreign company would provide justification to the word's use in this context, avoiding superfluity, given the already wide meaning of 'company' [as per its definition, 'company' did not include a foreign company]. (See [46] – [52].) Secondly, such an interpretation was in keeping with the purpose of s 45, namely to prevent a company's directors abusing their powers by providing financial assistance to external entities or persons on terms which have insufficient regard to the interests of the company's creditors and shareholders. (See [50] – [52].)

Whether SIHPL satisfied the requirements of s 45 prior to the issuance of the 2014 guarantee

The court considered the requirement in s 45(3)*(b)* that the board '[be] satisfied' that the conditions set out in items (i) and (ii) were met. In this regard, it held that the purely subjective belief of directors could never be a sufficient test, since in that event a wilfully, or even negligently, ignorant judgment would suffice, in the face of obviously foreseeable circumstances pointing in a different direction. It approved of Trevo's submission that the requisite standard was 'subjective satisfaction based on reasonable grounds'. (See [61].)

However, the court accepted the submission of SIHPL that, based on the facts, information and documentation available to it at the time, the board was justified in

concluding that the two conditions set out in s 45(3)*(b)* had been met (see [24], [67] and [72]). It highlighted the difficulty of the applicants' challenge, that it was almost wholly reliant on ex post facto analysis of the company's financial position with the benefit of hindsight (see [71]). It concluded that the applicants had failed to make out a case that the board, acting reasonably, could or should not have been satisfied that the financial assistance in the form of the 2014 guarantee satisfied both the solvency-and-liquidity test and that its terms were fair and reasonable. In the result the applicants had not made out a case that the 2014 guarantee was void for want of compliance with s 45. (See [72].)

Whether the SIHPL CPU was void for lack of compliance with s 45

The court rejected SIHPL's contention, that the 2019 CPU was merely a restatement of its debt under the 2014 guarantee and that there was therefore no creation of a new debt (see [115]). The effect, the court held, of the debt-restructuring arrangement, as constituted by the CVA referred to above, was to *discharge SFHG*'s debt to the bondholder (see [119] and [123]), thereby discharging SIHPL's liability under the 2014 guarantee (see [124] – [128] and [136]). The 2019 CPU entered into with a new party to the arrangements, Lux Finco 1, replaced the 2014 guarantee, and served to protect the bondholders in the case of Lux Finco 1 being unable to perform in terms of the Facilities Agreement entered into with the bondholders (see [119], [131] and [136]. The court went on to hold that the 2019 CPU consequently constituted new financial assistance by SIHPL to a company or corporation related or interrelated to it, namely, Lux Finco 1. (see [120] and [136]). Given that SIHPL had failed to comply with the provisions of s 45 in granting such financial assistance, the resolution of SIHPL's board authorising the conclusion of the SIHPL CPU, as well as the CPU itself, was void, by virtue of s 45(6) of the Companies Act. (See [137].) The court granted a declaration to such effect (see [137] and [140]).

Ferrostaal GmbH and another v Transnet Soc Ltd t/a Transnet National Ports Authority and another [2021] 4 All SA 330 (SCA)

Corporate and Commercial – Company law – Business rescue proceedings – Vote against business rescue plan – A court determining whether a vote against the

adoption of a business rescue plan was inappropriate, exercises a discretion and appellate court's power to interfere is curtailed by broader policy considerations.

In December 2006, the first respondent ("Transnet") concluded a lease agreement with a company ("FMA") in which the appellants were shareholders. The leased property was located at the port of Saldanha and was to endure for a period of 15 years, terminating on 30 September 2022. In December 2016, FMA was placed under business rescue and the business rescue practitioner (the "practitioner"), suspended FMA's obligation to pay rental to Transnet.

Two business rescue plans published by the practitioner were rejected by Transnet, which happened to be FMA's only independent creditor. In July 2019, the practitioner published a final revised business rescue plan. Transnet rejected the plan based on its conclusion that it was commercially unviable and failed to adequately protect Transnet's interests as the major creditor of FMA.

As FMA's shareholders, the appellants launched an application in the High Court, averring that Transnet's rejection of the business rescue plan was inappropriate, and based on section 153(1)(b)(i)(bb) of the Companies Act 71 of 2008, sought an order setting aside Transnet's vote against the adoption of the revised plan. The dismissal of the application led to the present appeal.

Held – One of Transnet's concerns regarding the revised plan was its failure to provide a firm arrangement for the settlement of arrear rental. The Court found that concern to be valid. Since the advent of the business rescue proceedings, FMA had not paid rental due leading to the amount owing ballooning to approximately R40 million. It was therefore important for the revised business rescue plan to demonstrate that FMA would be able to settle the arrears.

Transnet's misgivings as to whether future rentals would be paid was also a valid concern.

It was common cause that FMA was not fully utilising the leased property itself, and the court agreed with Transnet's assertion that liquidation would free the premises up, leading to a competitive tender process that could potentially give Transnet an opportunity to fully exploit the property's commercial value.

For the appellants to be successful in their appeal, the court had to be satisfied that the High Court was wrong in the exercise of its value judgment. A court determining whether a vote against the adoption of a business rescue plan was inappropriate, exercises a discretion. An appellate court's power to interfere is curtailed by broader policy considerations. Finding that the High Court's discretion was properly exercised, the present Court was not free to interfere with the decision.

The appeal was accordingly dismissed with costs.

Trevo Capital Ltd and others v Steinhoff International Holdings (Pty) Ltd and others [2021] 4 All SA 573 (WCC)

Civil Procedure – Standing of investors to bring application for declaratory order regarding alleged breach of section 45(2) of the Companies Act 71 of 2008 – Proper plaintiff rule – Whether breach of section 45 is a wrong done to the company meaning that only the company or a shareholder deploying a derivative action is entitled to sue – Applicants having interest that was not too remote clothed them with standing to bring application.

Corporate and Commercial – Company law – Prohibition against provision of financial assistance to related company in terms of section 45(2) of the Companies Act 71 of 2008 – Applicability to foreign companies – Legislature intended that foreign companies would fall within the class of persons to whom financial assistance can only be extended by local companies upon compliance with the provisions of section 45(3) of Companies Act.

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

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

The first and second respondents challenged the applicants' standing on the ground that they were not "proper plaintiffs" since a breach of section 45 is a wrong done to the company and it was only SIHPL or a shareholder deploying a derivative action that was entitled to sue. It was also contended that neither of the applicants had valid claims against SIHPL in law.

Held – The challenge to the applicants' standing could not be upheld. The Court discussed the applicability of the proper plaintiff rule against recovery of reflective loss, and confirmed that the applicants had an interest which was not too remote.

The respondents contended that the applicants' reliance on section 45 was misplaced because the transactions sought to be impugned related to the provision of financial assistance to a foreign company within the meaning of the Companies Act whereas section 45 does not apply to a foreign company. The court examined the Act's definitions of "company" and "corporation"; and discussed the approach to statutory interpretation and the presumption against superfluity. It concluded that the Legislature intended that foreign companies would fall within the class of persons to whom financial assistance could only be extended by local companies upon compliance by the latter with the provisions of section 45(3). The question of whether SIHPL satisfied the requirements of section 45 before issuing the guarantee was however, answered against the applicants.

On a conspectus of all the evidence, the Court found that in concluding the CPU, SIHPL gave financial assistance to a related company in breach of the provisions of section 45 of the Act. In the circumstances, by virtue of section 45(6), the resolution of SIHPL's board authorising the conclusion of SIHPL CPU was void as was the CPU itself and the applicants were granted a declaration to that effect. The interdictory relief sought was refused.

WENTZEL v DISCOVERY LIFE LTD AND OTHERS 2021 (6) SA 437 (SCA)

Insolvent — Property — Life insurance benefit — Husband and wife marrying in community of property and wife taking out life insurance with husband as beneficiary — Husband incurring debts and joint estate sequestrated — Wife later dying — Whether husband or trustees were entitled to insurance benefit.

Insurance — Life insurance — Policy — Proceeds of policy — Nominated beneficiary being an unrehabilitated insolvent — Husband and wife marrying in community of property and wife taking out life insurance with husband as beneficiary — Husband incurring debts and joint estate sequestrated — Wife later dying — Whether husband or trustees were entitled to insurance benefit.

Mr and Mrs Wentzel were married in community of property and Mrs Wentzel later took out life insurance with Discovery Life Ltd, with Mr Wentzel nominated as beneficiary in the event of her death. Thereafter the joint estate was sequestrated on debts apparently incurred by Mr Wentzel. Some years later, during the extancy of the insolvency, Mrs Wentzel died, and both Mr Wentzel and the trustees of the insolvent joint estate claimed the insurance proceeds.

The matter went to the High Court, which found for the trustees. Mr Wentzel appealed to the Supreme Court of Appeal (SCA).

Mr Wentzel's arguments were that the joint estate (rather than Mr Wentzel and Mrs Wentzel) had been the debtor (see [13]); that the Master's confirmation of the liquidation and distribution account had the effect that there were no longer debts payable to creditors (see [14]); that Mrs Wentzel's death ex lege dissolved the marriage and joint estate (see [14]); and that this allowed him again to hold property personally (see [7] and [14]).

The SCA rejected the argument, finding that the trustees were entitled to the insurance sum (see [19]). It considered that the joint estate was not the debtor but rather Mr Wentzel and Mrs Wentzel, with the joint estate merely the source to satisfy creditors' claims (see [13], [18]); that Mr Wentzel had indeed incurred the debts precipitating the sequestration and that those debts remained extant (a deficit remained in the joint estate's account) (see [14]); that Mr Wentzel remained insolvent; and therefore that all property accrued by him (encompassing the insurance proceeds) fell in his estate for use in satisfying the creditors' claims (see [15] – [17] and [19] – [20]).

The SCA dismissed the appeal and upheld the cross-appeal. It set aside the order of the High Court and replaced it with an order declaring that the trustees of the insolvent joint estate were entitled to the insurance proceeds and that the insurer should pay them to the trustees (see [30]).

Pride Milling Company (Pty) Ltd v Bekker NO and another [2021] 4 All SA 696 (SCA)

Corporate and Commercial – Company law – Winding up of company – Validity of dispositions made by company being wound-up – Whether a court may validate dispositions made after a provisional winding-up order has been granted but prior to the grant of a final order – Default position in terms of section 341(2) of the Companies Act 61 of 1973 is that all dispositions by a company being wound up have no force and effect in the eyes of the law – Court's discretion to order the contrary only exercisable in relation to payments made between the date of lodging of the application for winding-up and the grant of a provisional order.

Four payments for goods sold and delivered were made to the appellant (Pride Milling) by a company which was in the process of being liquidated. As joint liquidators of the company, the respondents contended that the payments were void and prohibited in terms of section 341(2) of the Companies Act 61 of 1973. They maintained that the payments were liable to be set aside because they were made after the effective date of the winding-up application. The High Court upheld the respondents' contentions, leading to Pride Milling's appeal.

Held – The appeal hinged on the proper interpretation of section 341(2), read with section 348. The text, context and purpose of the legislation must be considered together when interpreting a statutory provision. The predominant purpose of section 341(2) is to decree that all dispositions made by a company being wound-up are void. That provision had to be read with section 348, which provides that the winding-up of a company by a court shall be deemed to have commenced at the time of the presentation of the application for winding-up to the court. The effect is that the payments are potentially invalid at the moment they are made, because the grant of a winding-up order will render section 341(2) operative.

The question for determination was whether a court may validate dispositions made after a provisional winding-up order has been granted but prior to the grant of a final order.

Once a court grants a provisional order a *concursus creditorum* is established. The effect thereof is that the claim of each creditor falls to be dealt with as it existed at the time when the provisional order was granted.

Regarding the High Court's discretion in such applications, the court confirmed that a court exercising such a discretion may properly come to different decisions having regard to a wide range of equally permissible options available to it. Thus, a court exercising a wide discretion should not fetter its own discretion. An appellate court may interfere with the exercise of a discretion in the true sense by a court of first instance only if it can be demonstrated that the latter court exercised its discretion capriciously or on a wrong principle, or has not brought an unbiased judgment to bear on the question under consideration, or has not acted for substantial reasons.

The provisions of section 341(2) decree that every disposition of its property by a company being wound-up is void. Thus, the default position ordained is that all such dispositions have no force and effect in the eyes of the law ie the disposition is regarded as if it had never occurred. A rider in section 341(2) aims to give a court an unfettered discretion to decide whether or not to direct otherwise and thus depart from the default position decreed by the Legislature. That discretion is only exercisable in relation to payments made between the date of lodging of the application for winding-up and the grant of a provisional order.

Finding no reason to interfere on appeal with the manner in which the High Court exercised its discretion, the court dismissed the appeal with costs.

Burger N.O. and Others v Bester N.O. and Others (CCT 246/20) [2021] ZACC 48 (13 December 2021)

Sequestration application-Power of a single trustee to conclude loan agreement on trust's behalf — use of trust to channel funds to company — factual disputes — no arguable point of law — misdirection on the facts — jurisdiction of constitutional court not engaged

On Monday, 13 December 2021 at 10h00, the Constitutional Court handed down judgment in an application for leave to appeal against a judgment of the High Court

of South Africa, Western Cape Division, Cape Town, which granted an order of final sequestration of the HNP Trust (the Trust).

The applicants are the trustees of the HNP Trust. The background facts and issues pertaining to this application are as follows: Mr Louw was an auditor and financial adviser who confessed that he had defrauded his clients of around R110 million and the funds had been used in his company, Pholaco. His joint estate with his wife, Mrs Louw was declared insolvent. Mr and Mrs Louw were trustees of the HNP Trust together with Mr Cronje who also happened to be Mr Louw's business partner. This Trust held some shares in two companies, Pholaco and Quintado. The other shares in Quintado were held by Mr Kellerman's family trust, who is Mr Louw's brother-in-law. The Trust was used to launder the stolen money and advanced R62 790 451 to Pholaco and became insolvent.

The trustees of the Louw insolvent estate launched an application in the High Court for the sequestration of the Trust. They alleged that approximately R70 million from the R110 million was advanced by Mr Louw to Pholaco through the Trust. Thus, the Louw insolvent estate had a claim against the Trust. Further, the Trust's liabilities exceeded its assets, and it had no underlying commercial activities or sources of income. The trustees of the Louw insolvent estate contended that Mr Kellerman, transferred an amount of R17 680 000 to the Trust in December 2018, allegedly at Mr Louw's request. The Trust agreed to assume liability for this amount, and Mr Kellerman obtained as security the 50% shares in Quintado that the Trust held. After this transaction, Mr Kellerman owned 100% of Quintado's shares. According to the trustees of the Louw insolvent estate, this was a fraudulent transaction. The Trust denied the allegations and contended that it was only indebted to the Louw insolvent estate for R150 000 which it received from Mrs Louw and that it would be able to repay it. Based on this evidence, the High Court granted an interim sequestration order and issued a rule nisi calling on interested parties to show cause why the order should not be made final on 7 September 2019.

On the return date, the High Court first considered an application by Mr Kellerman for intervention and granted him leave to intervene. Thereafter, the Court determined the application for the final sequestration of the Trust in terms of sections

9(1) and 12 of the Insolvency Act. On assessing the evidence, the High Court concluded that the Trust was indeed used as a conduit to disguise the source of the misappropriated funds. This was borne out by the lack of evidence on the indebtedness of the Trust to the Louw insolvent estate. Thus, the funds flowed from Mr Louw's bank account to Pholaco's bank account and were recorded as a loan from the Trust to Pholaco. The Court then held that the Trust was insolvent and that the Louw insolvent estate had established its standing to apply for a sequestration order in terms of section 12(1)(a) of the Insolvency Act. A final order of sequestration of the Trust was issued. An application for leave to appeal was dismissed.

The Trust's application for leave to appeal to the Supreme Court of Appeal suffered a similar fate. Its application for reconsideration of the order was also dismissed.

The joint trustees of the HNP Trust approached this Court for leave to appeal. They submitted that the trustees of the Louw insolvent estate lacked locus standi to apply for the sequestration order. Further, Mr Louw was not authorised to bind the Trust as all three trustees are required to approve the transactions. Therefore, if a loan was advanced to the Trust from Mr Louw for Pholaco's benefit, it was unauthorised. The loan must have come directly from Mr Louw, and the creation of a loan account in favour of the Trust against Pholaco was a fiction to hide the origin of the money.

The trustees of the Louw insolvent estate opposed the application on several grounds. First, the Court lacks jurisdiction to hear the matter as the Trust is raising points of fact rather than law. Second, the respondents submitted that the R150 000 owed is sufficient to establish locus standi. In addition, the trustees of Louw insolvent estate relied on an act of insolvency by the Trust in terms of section 8(c) of the Insolvency Act to establish locus standi, this was based on the agreement and subsequent transfer of Quintado shares between Mr Kellerman and the Trust.

Regarding the authority to oppose the sequestration application, the trustees of the Louw insolvent estate submitted that Mr Cronje had the necessary authority to oppose the provisional sequestration application from a common sense reading of the Trust Deed. Further, Mr Cronje was cited as a party in the proceedings and when a party is cited, they are entitled to participate in those proceedings. Although no money entered the Trust's bank account, the trustees of the Louw insolvent estate argue that the Trust was used as a vehicle for fraudulent activities as a borrower can conclude a loan agreement with a lender on the basis that the money be paid to a designated third party – in this instance Pholaco was the designated third party. Finally, on remedy, the trustees submitted that should the appeal be upheld; the matter should be remitted back to the High Court for admission of oral evidence which surfaced during the section 152 of the Insolvency Act inquiry of the Louw insolvent estate and the Trust.

In a unanimous judgment penned by Mhlantla J, the Constitutional Court refused to grant leave to appeal on the basis that this Court's jurisdiction was not engaged. Mhlantla J held that because the applicants had not contended that any constitutional issue was raised, they were obliged to demonstrate that there were arguable points of law of general public importance that ought to be considered by this Court. In that regard, the applicants had been unable to establish the existence of arguable points of law as the questions raised were riddled with factual disputes. In this case, there were two factual disputes, namely, (a) whether the Louw insolvent estate loaned various monies to the Trust and whether the Trust, in turn, advanced those monies to Pholaco; and (b) if so, whether Mr Louw was authorised to conclude the alleged loan agreements on behalf of the Trust. These do not ordinarily engage the jurisdiction of this Court.

In relation to the question whether Mr Louw had the authority to unilaterally bind the Trust in a loan agreement, the Constitutional Court held that the law on this point was well-settled and remains uncontradicted. Mhlantla J further emphasised that the application of a settled legal principle does not engage this Court's jurisdiction. The powers of trustees are located within the four corners of the trust deed. Therefore,

nothing more need be said about the requirements to bind a trust. The argument that the High Court misdirected itself in concluding that Mrs Louw and Mr Cronje acquiesced to Mr Louw's administration of the Trust also does not assist the applicants as a challenge to a finding of fact by the court a quo does not engage this Court's jurisdiction.

In the result, because the application did not engage this Court's jurisdiction, the application for leave to appeal was dismissed with costs.

Bester N.O. and Others v Quintado 120 (Pty) Ltd (CCT160/21) [2021] ZACC 49 (13 December 2021):

Wounding up application- — factual enquiry — directing mind of the company test — misapplication of legal test — no jurisdiction

[1] This is an application for leave to appeal against a judgment and order of the High Court of South Africa, Western Cape Division, Cape Town (High Court)**[1]** which discharged the provisional order of liquidation in respect of the respondent, Quintado 120 (Pty) Limited (Quintado).**[2]**

Background

[2] The applicants are the trustees of the insolvent estate of Mr Petrus Serdyn Louw and Mrs Martha Maria Sophia Louw (Louw insolvent estate). Mr Louw, a chartered accountant, was the co-founder of Louw & Cronje Incorporated, a successful accounting firm conducting its business in Porterville, Vredendal and Strand in the Western Cape. He practised as an auditor and financial adviser for over 30 years and had a very loyal client base.

[3] Mr Louw was the manager of Quintado while his brother-in-law, Mr Markram Jan Kellerman, was the sole director. Louw & Cronje acted as Quintado's accountants. In 2010, an agreement was concluded between Mr Louw and Mr Kellerman, in terms of which Mr Louw could conduct a "separate" farming enterprise

in the name of Quintado on its property, using its bank account and value added tax registration number. This arrangement was, according to Mr Kellerman, not *per se* unlawful. In 2013, Mr Louw was appointed as a co director of Quintado, and he assumed full control of the company.

[4] Mr Louw ran a fraudulent business of, amongst others, the bogus purchasing and selling of livestock in order to perpetrate tax fraud. Email exchanges between Mr Louw and Mr Kellerman with the subject matter of "smokkels"**[3]** contained information about the fraudulent business, but Mr Kellerman stated that he believed the company was in fact selling and purchasing real livestock. Mr Louw defrauded his clients and transferred their funds into the bank account of Quintado. During the period from January 2015 to November 2018, money was transferred from Mr Louw's bank account to Quintado and vice versa.

[5] In 2018, a newspaper article reported that a liquidation application had been brought against Louw & Cronje for the failure to pay its debts. After the publication of the article, several clients of the accounting firm started enquiring about the status of their investments and it became clear that Mr Louw had, unbeknown to his clients, been operating, amongst others, an immense fraudulent investment scheme. Beyond swindling his clients, Mr Louw also had a family trust**[4]** and shares in several companies. He used the family trust and the companies in the course of the fraudulent activities. He confessed to the fraudulent schemes, and the joint estate of Mr and Mrs Louw was provisionally sequestrated. The applicants, who are insolvency practitioners, were appointed as trustees of the Louw insolvent estate.

[6] On the applicants' version, approximately R31 million flowed from Mr Louw into Quintado, and approximately R17 million was returned to Mr Louw. Ultimately, the amount transferred back from Quintado to Mr Louw had a shortfall of approximately R13.7 million. Therefore, Quintado owed the Louw insolvent estate R13.7 million.

[7] After the fraud came to light, Mr Kellerman had Quintado's financial statements restated for the periods from 2015 to 2019. According to Mr Kellerman, he had previously only cast an eye over the farming operations and Mr Louw was in complete control of the company. During the sequestration investigation into the Louw insolvent estate, Mr Kellerman presented the redrawn financial statements which showed that Quintado only owed the Louw insolvent estate R606 047, and not the much larger amount averred by the applicants.

The first issue to be determined is whether the application engages this Court's jurisdiction. This Court has jurisdiction to hear constitutional matters and any other matter provided that it raises an arguable point of law of general public importance that ought to be considered by this Court.**[34]** If this Court's jurisdiction is engaged, the next question is whether it is in the interests of justice to grant leave to appeal.

[28] The applicants seek to establish jurisdiction on both legs of section 167(3)(b) of the Constitution. They submit that the constitutional issue raised is that the directing mind doctrine should be developed to a flexible test in line with the Constitution. This doctrine or test is used to determine whether, in law, the acts of those who purport to represent a company can be attributed to the company. In *Boesak*,**[35]** where this Court had to determine whether the applicant's right to freedom and security of the person and fair trial rights were infringed, it held that "the question whether the interpretation of any legislation or the development of the common law promotes the spirit, purport and objects of the Bill of Rights" is a constitutional matter.**[36]** However, as held in *Loureiro*:**[37]**

> "[T]he mere fact that a matter is located in an area of the common law that can give effect to fundamental rights does not necessarily raise a constitutional issue. It must also pose questions about the interpretation and development of that law and not merely involve the application of an uncontroversial legal test to the facts."**[38]**

Therefore, this matter must pose questions concerning development of the common law and not be a mere application or misapplication of a settled or uncontroversial legal test.

[29] The High Court held that the test developed in *Canadian Dredge* should be applied in the context of a particular case and that a pragmatic approach is necessary.**[39]** As mentioned, the Court also endorsed other decisions of foreign jurisdictions which emphasise that a case by case, flexible approach to the doctrine ought to be followed.**[40]**

[30] The High Court also relied on *El Ajou*, in which the plaintiff unknowingly invested money into a fraudulent scheme, which ultimately ended up in the bank account of Dollar Land Holdings Limited. The England and Wales Court of Appeal held that to determine the directing mind of a company, it is necessary to look beyond the "formal position" – for example, who is the director of the company on paper – which might not be decisive.**[41]** It overturned the trial court's order dismissing the plaintiff's claim for £1.3 million and remitted the matter for the determination of quantum. The Court of Appeal recognised that the trial court, in determining the test, adopted a "pragmatic approach" and held that although the two courts reached a different conclusion, the trial court was "right to do so".**[42]**

[31] In *Simon N.O.*,**[43]** the High Court endorsed an approach where the question is "one of construction rather than metaphysics".**[44]** Our courts, by considering the useful jurisprudence of foreign jurisdictions, have therefore recognised that to determine the directing mind of the company, a rigid and inflexible test is inappropriate.**[45]** Rather, a test that is pragmatic and determined on a case by case basis is appropriate. In fact, the applicants themselves have argued that in the application of the doctrine "each case must be read in context" and "it calls for a pragmatic approach". This is exactly the approach proposed and followed by the

High Court in this matter. Accordingly, there is no merit in the applicants' argument for the development of the directing mind of the company test into a "flexible test", because the test is already flexible.

[32] The applicants rely on *K* to argue that the issue relating to vicarious liability is a constitutional issue. In *K*, the applicant sought damages in delict against the Minister of Safety and Security after being raped by three police officers while they were on duty. This violation gave rise to a grievous infringement of her constitutional rights. The High Court and the Supreme Court of Appeal dismissed Ms K's claim for damages. The Supreme Court of Appeal held that on the existing principles of vicarious liability, the Minister of Safety and Security was not liable for the damages suffered by Ms K.**[46]** Before this Court, it was argued that if the Supreme Court of Appeal applied the common law rule correctly, the rule should be developed by taking into consideration the applicant's constitutional rights.**[47]** In *K*, the rights in the Bill of Rights that gave rise to the necessity to develop the common law were the applicant's right to freedom and security of the person, her right to dignity, right to privacy and right to substantive equality.**[48]** Therefore, the need to develop the common law was undisputedly linked to Ms K's constitutional rights.

[33] During the hearing of this matter, counsel for the applicants contended that the directing mind of the company test had to be developed in line with the Constitution, specifically the right of access to courts in section 34. I do not agree that section 34 necessitates the development of the doctrine. It cannot be said that the applicants did not have access to the courts merely because the High Court applied the *Canadian Dredge* test in a manner that excludes the application thereof in this case. Further, the applicants' reliance on *K* for the development of this rule is misplaced. As stated above, in *K* there was a clear infringement of constitutional rights which necessitated the development of the common law. In this matter, the applicants were unable to direct this Court to any constitutional rights, other than the purported infringement of section 34, which have been violated.

[34] Counsel for the applicants was invited to address this Court on the difference between a pragmatic approach and a flexible approach. Counsel stated that the High Court, relying on several authorities,**[49]** acknowledged that the test was pragmatic, however it failed to apply it flexibly. This concession does not assist the applicants as it is trite that the wrong application of a settled or uncontroversial legal test does not constitute an arguable point of law.**[50]** Therefore, no constitutional issue is raised as the directing mind of the company doctrine is already recognised as a flexible, pragmatic doctrine. As held by this Court in *Fraser*,**[51]** "[a]n issue does not become a constitutional matter merely because an applicant calls it one".**[52]**

[35] Further, the issue regarding the development of the common law was raised for the first time in this Court. Counsel for the applicants conceded that in the High Court, this case was not approached from a constitutional perspective. If there was a need for the development of the common law, this Court would have benefitted from the views of the High Court and Supreme Court of Appeal. This Court is reluctant to entertain a case involving the development of the common law as a court of first and last instance. It is only in exceptional circumstances that this Court would do so.**[53]** This case does not fall into that category.

[36] The arguable points of law of general public importance that this Court ought to consider, according to the applicants, are all related to whether the directing mind of the company doctrine has been met. Quintado submits that the arguable points of law fail on a factual basis, making the main basis for the application wholly academic and abstract. It is trite that an arguable point of law must not be one based on facts, and a totally unmeritorious point cannot be said to be arguable.**[54]** An arguable point of law must be exactly that – it must be a point of *law* and it must be *arguable*.**[55]**

[37] This matter, on the applicants' own version, contains three fundamental disputes of fact. The disputes of fact are material to the issues, they concern whether Quintado was in fact enriched by the payments or whether it was used as a mere conduit. This Court's jurisdiction cannot be established based on the necessity to determine facts.**[56]** To engage with the alleged arguable points of law, this Court would be required to determine the factual dispute: whether Quintado was enriched by the channelling of money through its bank accounts, and whether the Louw insolvent estate was impoverished. Therefore, this Court would first have to determine the factual disputes before determining whether its jurisdiction is engaged. This will be putting the cart before the horse.

[38] This is not to say that factual disputes can never be resolved by this Court. In *Rail Commuters***[57]** this Court held that "[w]here, however, a separate constitutional issue is raised in respect of which there are disputes of fact, those disputes of fact will constitute 'issues connected with decisions on constitutional matters'".**[58]** The factual disputes in this matter are not connected to a separate constitutional issue. Instead, before this Court can even consider whether arguable points of law have been raised, it will be required to consider material factual disputes. This matter, in reality, turns on factual disputes and accordingly does not engage this Court's jurisdiction.

Conclusion

[39] It follows that the applicants have failed to establish that this Court's jurisdiction is engaged. As the threshold requirement has not been met, it is not necessary to consider the second leg of the enquiry, that is, whether it is in the interests of justice to grant leave to appeal. Accordingly, this Court is unable to determine the issues raised. Leave to appeal must be refused.

[40] The applicants sought condonation for the late filing of this application. As this Court lacks jurisdiction to entertain the matter, the condonation application does not bear consideration.

Costs

[41] There is no reason to deviate from the ordinary rule that costs follow the result.

Order

[42] The following order is made:

1. Leave to appeal is refused.

2. The applicants must pay the respondent's costs, including the costs of two counsel.

De Wet NO v Barkhuizen and Others (CA61/2020) [2021] ZAECGHC 113 (7 December 2021)

Affidavit- attesting to an affidavit, before the receipt of his letters of curatorship-

[1] Do the provisions of s 71(1)**[1]** of the Administration of Estates Act, 66 of 1965 (the Act) prevent a duly appointed *curator bonis* from attesting to an affidavit, before the receipt of his letters of curatorship, issued by the Master of the High Court (the Master) pursuant to s 72 of the Act, in support of an application commenced thereafter? The court *a quo* held that it did and, accordingly, it declared the affidavit to be *void ab initio* and dismissed the application. It also made a punitive costs order against the *curator bonis* and his attorney of record in the application. The appeal to this court against the finding of nullity is with leave of the judge *a quo,* who specifically limited the scope of the appeal to his finding that the founding affidavit had been *void ab initio*. The appeal against the costs order is with leave granted, on petition, by the Supreme Court of Appeal.

[2] On 27 February 2018 the appellant, Mr Jan Abraham De Wet, was appointed by the High Court, Eastern Cape Division, Grahamstown, as the *curator bonis* to the property of Christo Jacobus Kleinhans (Christo), who had been declared incapable of managing his own affairs. He had been given the power, in terms of the court order, amongst others, to institute any proceedings which may be necessary in the interest of Christo and the due and proper administration of his property. After his appointment, but before the Master had issued letters of curatorship, he decided that it would be necessary to institute proceedings in order to set aside the sale by Christo of his farm, Kaalsfontein, in the district of Jansenville in the Eastern Cape. Kaalsfontein had been a family farm which Christo had inherited from his late father and he had sold it, in 2013, to the first respondent, Ms Maritsa Barkhuizen, who is his niece. Other members of the family contended that Kaalsfontein had been sold under value and that Christo did not have the mental capacity to enter into a legal contract at the time. In anticipation of the issue of his letters of curatorship, Mr De Wet proceeded to prepare the application and attested to the founding affidavit therein on 29 June 2018. Letters of curatorship were issued by the Master on 2 July 2018. Accordingly, on 3 July 2018, Mr De Wet launched the application. The first and second respondents entered an appearance to oppose. The second respondent, Mr Deon van der Merwe, is a duly admitted and practising attorney who had drafted the Agreement of Sale in respect of Kaalsfontein and witnessed the signature thereof.

[3] Prior to the hearing of the application the first and second respondents delivered a notice in terms of rule 6(5)(d)(iii) of the Rules of Court (the rules).**[2]** After referring to the content of s 71(1) the notice proceeded to record:

> "2. Any conduct or act/s carried out or otherwise performed by a *curator bonis* who has been appointed by the Court, but who was yet in receipt of letters of curatorship issued by the Master, are nullities and of no legal force or effect.
>
> 3. There can be no ratification of an act which a statutory prohibition has rendered *void ab initio,* therefore such acts are not capable of being resuscitated by subsequent ratification.
>
> 4. The Applicant deposed and executed the founding affidavit on 29 June 2018.

5. At the time that the Applicant deposed to and executed the founding affidavit … the letters of curatorship had not yet been issued.

6. The letters of curatorship were issued on 2 July 2018.

7. The Applicant had no authority to act or to depose to the founding affidavit on 29 June 2018 and the founding affidavit is accordingly [a] nullity and *void ab initio*, for being in contravention of **section 71** of the **Administration of Estates Act.**

8. The application is premised on an action (the founding affidavit) taken before the issue of the Master's letters of curatorship and is therefore fatally defective and stands to be dismissed with costs."

[4] At the hearing of the application Ms *Morgan*, who appeared on behalf of the first and second respondents, argued that the factual support for the application was found only in the affidavit of Mr De Wet, which she contended was *void ab initio.* She contended that any act performed by Mr De Wet prior to the issue of letters of curatorship had been null and void by virtue of the provisions of s 71(1) of the Act. As I have said, the court *a quo* upheld her argument and dismissed the application on that ground only.

[5] The material portion of s 71(1) of the Act provides that:

> "No person who has been … appointed**[3]** … as provided in section *seventy-two* shall take care of or administer any property belonging to the … other person concerned, or carry on any business or undertaking of the … other person, unless he is authorised to do so under letters of … curatorship, … granted**[4]** or signed and sealed under this Act, or under an endorsement made under the said section."

Section 102(1)(g) stipulates that anyone who contravenes the provisions of s 71 shall be guilty of an offence.

[6] As adumbrated earlier, the affidavit of Mr De Wet constituted the founding affidavit in proceedings launched after the issue of the letters of executorship. Ms *Morgan* referred to three paragraphs in the founding affidavit which recorded:

> '3. In terms of a Court Order, dated 27 February 2018 under case number 4760/2017 of the High Court of Grahamstown, I was duly appointed as

Curator Bonis to the estate of Christo Jacobus Kleinhans …. At the date of signature hereof the Master had not yet issued letters of curatorship. My attorney of record will however file same as soon as it comes to hand.

4. In terms of paragraph 1.2 of the aforesaid order … I was inter alia granted the power to "*institute any proceedings that may be necessary in the interest of the patient, and of the due and proper administration of the patient's property*."

5. … I accordingly aver that I have the requisite locus standi to bring this application.'

[7] She contended that these paragraphs demonstrated that Mr De Wet was acting in his capacity as *curator bonis* in attesting to the affidavit. The crisp issue for determination in the appeal is whether, in deposing to the affidavit, the appellant contravened the provisions of s 71(1) by "taking care of" or "administering" Christo's property, or by "carrying on any business or undertaking" of Christo's. This requires a consideration of the terms of s 71.

[8] In the interpretation of statutes, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. When more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective, not subjective. A sensible meaning is to be preferred to one which leads to insensible or unbusinesslike results or undermines the apparent purpose of the provision.**[5]** The approach requires that "from the outset one considers the context and the language together, with neither predominating over the other".**[6]**

[11] So, did Mr De Wet contravene s 71(1) by deposing to an affidavit, prior to receipt of his letters of curatorship, in preparation for the commencement of proceedings after the issue of his letters of curatorship? By attesting to an affidavit Mr De Wet did not purport to take care of or to administer property belonging to Christo, nor did he carry on any business or undertaking of Christo. The preparation and attestation of an affidavit has no legal consequence and does not, of itself, place any property of Christo at risk. Until such time as the application, duly supported by the affidavit, is commenced, Christo's estate can incur no liability. Deposing to the

affidavit was no more than a preparatory step taken in anticipation of the later commencement of an application. What s 71(1) sought to prevent is conduct which may have some legal consequence for the estate of the *de cujus,* such as the payment or receipt of money, the purchase or sale of property or the initiation of legal proceedings. To hold otherwise would lead to an insensible or unbusinesslike result which would serve to undermine the purpose of s 71(1) of the Act. I can find nothing in the language of s 71(1), nor the context in which it appears, that suggests otherwise.

[12] When confronted with this difficulty, Ms *Morgan* was constrained to argue that by deposing to the affidavit in the terms recorded earlier Mr De Wet had started the application, which concerned the sale of the farm. He did so, or so the argument went, in his capacity as *curator bonis*. The submission cannot be sustained. A witness requires no authority to attest to an affidavit and no ratification of their conduct is required.**[12]** In law, application proceedings are, generally, commenced by service of the notice of motion upon the respondents.**[13]** It has been held that where a necessary procedural step is required to precede the commencement of litigation, for example an application for edictal citation,**[14]** or an attachment to found jurisdiction**[15]**, proceedings may be deemed to have been initiated by the taking of such a step. However, the collection, or preparation, of evidential material cannot be equated to the commencement of proceedings. Before some procedural step has been taken in the process the litigation has not begun. The issue of the application on 3 July 2019, after receipt of the letters of curatorship, was the first act of legal consequence which Mr De Wet performed in order to take care of or administer the property of Christo. Accordingly, Mr De Wet did not contravene the provisions of s 71(1) of the Act by deposing to the affidavit on 29 June 2019 and the affidavit was admissible as evidence in the application.

[13] I turn to consider the appeal against the costs order granted. When the application was initially launched it was intended to serve a dual purpose. First, (Part A of the notice of motion) it sought to obtain relevant information pertaining to the purported Deed of Sale entered into between Christo and Ms Barkhuizen. Second, (Part B of the notice of motion) sought a declarator that the sale was null and void as Christo had not had the mental capacity to enter into a valid Agreement of Sale. The application was launched on a semi-urgent basis with Part A to be enrolled for

hearing on 26 July 2018. However, it was not accompanied by a certificate of urgency as required in terms of rule 12 of the Joint Rules of Practice of the High Courts of the Eastern Cape.**[16]** Prior to 26 July 2018, the respondents provided the documentation requested in Part A of the notice of motion thereby rendering the relief sought therein moot. Accordingly, on 25 July 2018 the applicant removed the matter from the roll for 26 July, but did not tender the costs occasioned by the enrolment. Simultaneously with the removal Mr De Wet's attorneys of record, Ms J Lötter filed a "Note To The Presiding Judge" in the following terms:

> "(1) The application was not intended to be set down on an urgent basis and therefore the provisions of paragraph 12 of the Eastern Cape practice directives were not complied with;
>
> (2) The papers were drafted according to Western Cape practice directives [for] motion court proceedings.
>
> (3) The application should not have been placed on the opposed roll for 26 July 2018 by the Registrar.
>
> (4) The application will be brought on an amended notice of motion in the ordinary course in terms of the rules of court."

[14] Notwithstanding para [4] of the note, an amended notice of motion was not filed. However, as I have said, the first and second respondents opposed the application and lengthy answering and replying papers were filed before the application was ultimately heard on 14 March 2019. In dismissing the application, for the reasons adumbrated earlier, the judge *a quo* ordered:

> "The costs in respect of *Part A* and *Part B* of the notice of motion are to be paid by the Applicant and Ms Johannie Lötter jointly and severally, *de bonis propriis* on an attorney-client scale, the one paying the other to be absolved."

[15] By virtue of the conclusion to which I have come in respect of the declaration of nullity the costs order, at least in respect of Part B of the notice of motion, cannot be sustained. However, Ms *Morgan* argued that the costs order as framed by the court *a quo* should remain in force in respect of Part A of the notice of motion.

[16] As a general principle it is unusual to order an unsuccessful litigant in a fiduciary position to pay costs *de bonis propriis*. There must be good cause for such

an order, such as improper or unreasonable conduct or lack of *bona fides*.**[17]** The basic notion behind awards of costs *de bonis propriis* is a material departure from the responsibility of office, which would include absence of *locus standi*.**[18]** An order of costs *de bonis propriis* is made against attorneys where a court is satisfied that there has been negligence in a serious degree which warrants an order of costs being made as a mark of the court's displeasure.

[17] In arriving at its costs order the court was clearly influenced by its finding in respect of the standing of the founding affidavit. In addition the judge held:

> "The applicant, by profession, is a practising attorney and so is Ms Johannie Lötter of Lötter Attorneys who represents him. In instituting these proceedings without the requisite certificate of urgency, it appears that neither one of them had prior recourse to the applicable rule of practice in this division. If they did, they did so irreverently; and to censure the registrar for enrolling the matter is disingenuous.**[19]** Such conduct on their part may be attributed to negligence, unreasonableness or even bad faith."

He advanced no reasons for his conclusion of bad faith.

[18] Finally, he reasoned that the "facts indicating that the sale of the farm took place on 26 February 2013, that the applicant was appointed *curator bonis* on 27 February 2018, and that this application was launched on an urgent basis on 3 July 2018, (a period of more than 5 years after the farm was sold and more than 4 months after the *curator bonis* was appointed), should not be overlooked on the question of costs."

[19] It seems to me that the judge *a quo* considered that delay was self-created. In arriving at this conclusion he overlooked the fact that the letters of curatorship were issued on 2 July 2018 so that it was not possible for the applicant to have launched the application at an earlier stage. This, it seems to me, was a misdirection. The only criticism of the conduct of Mr De Wet which remained was that the application should not have been launched as one of urgency. That, on its own, is insufficient to justify a punitive costs order *de bonis propriis* in respect of Part A of the notice of motion.

[20] Once it is accepted, as I have found, that there is no contravention of s 71(1) of the Act, it must follow that the respondents recognised that Part A of the application

had merit. Hence the provision of the required documents. In particular the negligence, such as it was, on the part of Ms Lötter, in this regard, could hardly be categorised as serious. In the circumstances but for the finding that the founding affidavit was a nullity the court *a quo* would probably not have come to the conclusion to which it did in respect of Part A. As I have said, despite the procedural shortcomings, Part A was successful. In these circumstances it would be appropriate for the costs occasioned by Part A to be considered together with the merits of Part B.

[21] In the result:

1. The appeal succeeds with costs and the application is remitted back to the court *a quo* for consideration on its merits.
2. The order of the court *a quo* is set aside and replaced with the following:

"1. The question of law raised in the rule 6(5)(d)(iii) notice is dismissed with costs.

2. Costs occasioned by Part A of the notice of motion are reserved."

CNA Operations (Pty) Ltd and Others v Anglowealth Sharia (Pty) Ltd and Others (48357 / 2021) [2021] ZAGPJHC 767 (2 December 2021)

Business rescue- perfection of notarial bond after rescue- perfection order had been erroneously granted in the absence of "*any party affected"* - parties entitled to notice of the proceedings in terms of the Companies Act, viz. employees, creditors, and the holders of issued securities, had not been given this notice by the former BRP's.

[1] On 4th November 2021, I granted an order rescinding an earlier judgment involving these parties. Now the one party brings two further applications for me to consider.

[2] The first is an application for leave to appeal my rescission judgment. The second, is an application in terms of **section 18** of the **Superior Courts Act, 10 of 2013**, to declare that my rescission order is:

"… *an order envisaged under* **section 18(1)** *of the* **Superior Courts Act 10 of 2013**, *the operation and execution of which is suspended pending the decision of any application for leave to appeal or any appeal; Alternatively*

2. Suspending the operation and execution of the Rescission order pending the outcome and final determination of any application for leave to appeal or appeal in terms of **section 18(2)** *of the* **Superior Courts Act 10 of 2013**;

[3] The parties have retained the same nomenclature as they did in the rescission application. I will follow the same convention.

[4] Thus, Anglowealth continues to be referred to as the first respondent, which is what it was in the rescission application, although it is the applicant in both the application for leave to appeal and the **section 18** application. The applicants in the rescission application will continue to be referred as such, although they are the respondents in both the latter applications. They are variously, CNA Operations (Pty) Ltd (in business rescue) or CNA, the first applicant, Stephanus Steyn N.O. the second applicant, Dallie Van der Merwe, the third applicant, South African Commercial and Catering and Allied Workers Union, the fourth applicant and Johannes Botha, the fifth applicant. For convenience I will refer to them collectively as the applicants and where necessary, to distinguish them, I refer to the first applicant as CNA, and the second and third applicants, who are the current Business Rescue Practitioners of CNA, as the BRP's.

[5] The applicants oppose both applications.

Background

[6] In January 2021, Anglowealth extended R 30million rand as part of a financing agreement to CNA. As security, it registered a general notarial bond over the movable assets of CNA. At that stage CNA was not yet under business rescue. CNA was placed under business rescue on 2nd June 2021.

[7] Anglowealth then brought an application to perfect its security. This application was granted by Keightley J on 15 July 2021 on an unopposed basis, with the consent of the then BRPs (all of whom have since resigned and been replaced by the current BRP's) and CNA's directors. From now on I will refer to the order of Keightley J as the perfection order.

[10] I heard the application on an urgent basis on 28 October 2021 and granted an order to rescind the perfection order on 4 November 2021. In brief, the basis for my decision was that in terms of High Court Uniform **Rule 42(1)(a)**, the perfection order had been erroneously granted in the absence of "*any party affected*". This was because parties entitled to notice of the proceedings in terms of the Companies Act, viz. employees, creditors, and the holders of issued securities, had not been given this notice by the former BRP's.

Segalo v Botha N.O. and Others; Botha N.O. and Another v Segalo and Others (2020/11582; 2019/44572) [2021] ZAGPJHC 770 (6 December 2021)

Section 386 of the Companies Act 61 of 1973 – not unconstitutional and invalid as it fails to provide for judicial oversight over sales of residential immovable properties.

[1] The primary issue in this matter is whether s 386 of the Companies Act 61 of 1973 is unconstitutional and invalid as it fails to provide for judicial oversight over sales of residential immovable properties of the liquidated companies Apple.

[2] The applicants seeks the following relief:

2.1 An order declaring that the failure to provide judicial oversight over sales of residential immovable properties of liquidated companies is unconstitutional and invalid.

2.2 An order declaring it unconstitutional for a Master of the High Court to authorise under s386 of the 1973 Companies Act the sale of immovable property, or any portion thereof, to the extent that this permits the sale of a home of a person.

2.3 An order declaring it unconstitutional for a liquidator of a company to have the power under the 1973 Companies Act to sell any immovable property of the company by public auction, public tender or private contract and give delivery thereof, to the extent that this permits the sale of a home of a person.

2.4 An order to remedy the defect by reading certain words into s386 of the 1973 Companies Act.

2.5 An order declaring that the application of rule 46 is not limited to the immovable property of natural persons but also includes the immovable property of all persons (including companies).

[3] The respondents oppose this application and contend that Section 386 of the Companies Act 61 of 1973 is not unconstitutional and invalid in the respects pleaded by the applicant for the following reasons, among other things:

3.1 The protection afforded by Rules 46 and 46A of the Uniform Rules of Court regarding execution against homes does not apply where a juristic person owns the property.

3.2 The rights conferred by sections 26(1) and 26(2) of the Constitution do not vest in the juristic entity which owns the property;

3.3 The natural person's rights under sections 26(1) and (2) of the Constitution are not threatened or breached by the sale of the property concerned.

Background

[4] The applicant ("Mr Segalo") and his family reside in the property which is owned by Blue Flame Advertising and Marketing (Pty) Ltd (in liquidation) ("Blue Flame"). Mr Segalo was the sole director and shareholder of Blue Flame. Blue Flame purchased the property for R16.5 million.

[5] FirstRand Bank Limited is the bondholder in respect of the property and the only secured creditor in the winding up of Blue Flame. Blue Flame was provisionally liquidated on 13 August 2018 and finally liquidated on 5 December 2018.

[6] On 26 August 2019, the second meeting of the creditors of Blue Flame was held, and resolutions were adopted in terms of which the liquidators, the first and second respondents, were authorised by the company's creditors to dispose of Blue's assets Flame, including its property.

[7] The liquidators brought an application for order amongst others, extending their powers in terms of section 386 of the Act authorising them to take steps to sell the assets of Blue Flame and marketing and selling the immovable property by public auction, public tender or private contract.

[29] In *Mokebe*,**[8]** the full Court of this division held that a preliminary enquiry is necessary to establish whether the judgment debtor is indigent and whether the property is their home. The Court held that the constitutional considerations do not challenge the judgment creditor's right to execute but instead cautions courts to have due regard to the impact that this may have on 'judgment debtors who are poor and at risk of losing their homes.

[30] In *Fraser*,**[9]** the Court held that Rule 46A applies to individuals and natural persons only. That immovable property owned by a company, a close corporation or a trust, of which the member, shareholder or beneficiary is the beneficial owner, is not protected by the rule even if the immovable property is the shareholder's, member's or beneficiary's only residence.

[31] In *Mkhize v Umvoti Municipality & others*,**[10]** the Supreme Court of Appeal said that the object of judicial oversight is to determine whether rights in terms of s 26 of the Constitution (the right to adequate housing) are implicated. Being a juristic person, Blue Flame has no right of access to adequate housing under section 26 of the Constitution and is not a bearer of the right to human dignity.

Order

[32] In the premise, I make the following order:

1. The Application is dismissed with costs.

Keevy NO and Another v Easy Rent Rental Services (Pty) Ltd (53157/2021) [2021] ZAGPJHC 798 (9 December 2021)

Wounding up application-not urgent nor enough proof

1. The applicants seek an order liquidating the respondent (Easy Rent) on an urgent basis.

2. The applicants are the liquidators of a company called China Auto Rental (Pty) Ltd ("CAR"). CAR and Easy Rent are related entities. They are both wholly owned subsidiaries of China Africa Motors (Pty) Ltd ("CAM"). The three companies operate from the same premises and share some directors. The respondent denies the applicants' allegation that the staff and management team are shared.

3. The shared business model was that CAM imported and manufactured minibus taxi vehicles, CAR bought the vehicles and leased them to Easy Rent and also sold them to end users, and Easy Rent in turn leased the vehicles leased from CAR to end users.

4. The applicants contend that it is urgent that Easy Rent be liquidated because Easy Rent is not paying rental for the vehicles to CAR, and the vehicles are depreciating daily. The liquidators bring the application on the basis that the creditors of CAR are losing value daily. According to them the liquidation is necessary because Easy Rent owes CAR money, possibly over R11 million, and because the liquidators have not been able to get sufficient information from Easy Rent.

5. Easy Rent denies that it owes CAR money, contending that CAR's rights have vested in a cessionary as a result of the liquidation. It contends that its non-payment is not an act of insolvency but a dispute of indebtedness. Easy Rent also contends that the application is not urgent.

6. It is obvious that vehicles in use depreciate in value. I accept for purposes of the determination of urgency that that is the case. However that is not the end of the

urgency enquiry. What the applicants have to show is that irreparable harm would result if the application for liquidation that is made out on the papers is not heard on an urgent basis. It is not just that there is something happening which needs to be remedied urgently. Rather, it must be that there is something happening which has already or would result in irreparable harm if the relief sought in the application brought is not dealt with urgently.

7. The applicants do not seek interdictory relief calling upon Easy Rent to pay rental for the leased vehicles, or calling upon Easy Rent to provide information, if Easy Rent is withholding information, or any such specific relief. They seek liquidation. So the question is what harm would result if the liquidation is not dealt with urgently.

8. On the assumption that Easy Rent is eventually liquidated, the *concursus creditorum* would date from the date of the bringing of this application. Easy Rent's liquidators would be able to investigate and find and follow the money, if in fact there is money that is owing to creditors. Dispositions could be set aside. Easy Rent is continuing to lease vehicles and collect rentals, and the collection of the money by Easy Rent means that the vehicles are not depreciating with no consideration. Any harm resulting from the delay of the liquidation application has not, in my view, been established to be irreparable.

9. The liquidation application is therefore not urgent.

10. I do

11. For these reasons, then, I make the following order:

    1. The application is not urgent and the applicants' non-compliance with the rules is not condoned.

    2. The applicants are to pay the costs of the urgent application, in their capacity as the liquidators of CAR.

Mintails South Africa (Pty) Ltd v Mintails Mining SA (Pty) Ltd and Others (2021/39004) [2021] ZAGPJHC 794 (10 December 2021)

Business rescue-application section 131-from liquidation to rescue-refused-actions of provisional liquidators in opposing the main application and in instituting the counter-application hereby ratified

1. This application is brought in terms of section 131 of the Companies Act 71 of 2008 ("the Act") for an order placing the first respondent (Mintails Mining SA (Pty) Ltd) (in liquidation)) under supervision and business rescue, together with ancillary relief.

2. The applicant is an affected party as envisaged in section 128(1)(a) of the Act, being both a shareholder and creditor of the first respondent. The first respondent, represented by its three duly appointed joint provisional liquidators, has opposed the application and has simultaneously filed a counter-application for an extension of the powers of the provisional liquidators, as envisaged in section 386(5) of the Companies Act 61 of 1973 (the 1973 Act), to obtain the court's permission to: (i) sell certain remaining assets of the first respondent, in particular, the movable assets owned by the first respondent in one of its subsidiaries, and (ii). defend the present proceedings and to institute further legal proceedings as may be required.

3. The second and third respondents were cited on account of their interest in the matter. Neither of them have participated in these proceedings.

4. The application was initially launched on an urgent basis and enrolled for hearing in the urgent court. At the hearing of the matter in the urgent court, application for leave to intervene in the main application was made by members of a consortium of investors or financiers consisting of the persons presently cited in the application as the first to third intervening parties (hereinafter jointly referred to as 'the intervening party'), which application was granted by order of that court. The matter was ultimately struck from the urgent court roll for lack of urgency. Thereafter, the applicant successfully applied to the DJP of this division for a special allocation of the hearing of the matter on an expedited basis, with the concurrence of the first respondent (as represented by its joint provisional liquidators, who will hereinafter be referred to as 'the liquidators').

5. The intervening party relies on a cession of the entire unpaid creditor's claim of Black Hawk Business Solutions (Pty) Ltd (Black Hawk), a security company that rendered security services to the first respondent post-liquidation, entitling it to step into the shoes of such creditor. It opposes the relief sought in the application in its alleged capacity as cessionary of Black Hawk's claim against the first respondent.

6. The notice of motion and founding papers were served on 'all known affected and interested parties' as listed in annexure 'NOM1' to the notice of motion, which list included Black Hawk as one of the affected parties. Black Hawk opposes the relief

sought in this application in such capacity, alleging that the cession relied on by the intervening party is invalid and that it remains an administration creditor in the estate of the first respondent.

26. In terms of section 131 (4) of the Act, a court may make an order placing the company under supervision and commencing business rescue proceedings on application by an affected person if it is satisfied, *inter alia,* that the company is financially distressed *or* it is just and equitable to do so for financial reasons, *and* there is a reasonable prospect of rescuing the company.

27. In terms of section 128(h) of the Act, 'rescuing' the company entails achieving either of the goals set out in the definition of business rescue in s 128(b) of the Act.**[18]** Two objects or goals are envisaged in that section: The first or primary goal is aimed at facilitating the continued existence of the company and its recovery to a state of solvency. If the ultimate rescue of the company is not possible in the sense that achievement of the primary goal is not viable or is infeasible, then the second or secondary goal, which is aimed at achieving an outcome that ensures a higher return for creditors or shareholders than they would otherwise receive under liquidation, may be relied on.

28. The purposes or objectives of the Act are set out in section 7. As regards business rescue proceedings, the stated objective expressed in section 7(*k*) is to 'Provide for the efficient rescue and recovery of financially distressed companies in a manner that balances the rights and interests of all relevant stakeholders.'

29. In the seminal case of *Oakdene*[19] (per Brand JA), the Supreme Court of Appeal stated that the court's discretion to grant an order commencing business rescue is bound-up with the question of whether there is a reasonable prospect for rescuing the company, which involves a range of choices that the court can legitimately make, of which none can be described as wrong. Ultimately, it involves making a value judgment.**[20]**

30. Brand JA went on to say that an applicant who seeks an order for business rescue is required to establish a reasonable prospect of achieving any one of the two goals contemplated in s 128(1)(b) of the Act.**[21]** It must be a reasonable prospect, that is, a prospect based on reasonable grounds. Something more than a prima facie case or an arguable possibility is required. Mere speculative suggestion is not

enough. Moreover, because it is the applicant who seeks to satisfy the court of the prospect, it must establish those reasonable grounds in accordance with the rules applicable to motion proceedings, which generally speaking require that it must do so in its founding papers.**[22]** In par 30 of the judgment, Brand AJ approved of what was stated in *Propspec*,**[23]** namely, that 'in order to succeed in an application for business rescue, the applicant must place before the court a factual foundation for the existence of a reasonable prospect that the desired goal can be achieved.'

31. Subsequent to Oakdene *supra,* in *Kariba,*[24], the Supreme Court of Appeal affirmed that any belief by an applicant that reasonable prospects of rescue exist, must be based on a concrete foundation.**[25]** Stated differently, a cogent evidential foundation to support the existence of a reasonable prospect that the desired object can be achieved must be placed before the court.**[26]**

Submissions of the parties

32. All opposing parties essentially contend that the applicant has failed to make out a proper case, based on a concrete foundation, that there are reasonable prospects for rescuing the company in liquidation by means of ensuring a higher return for creditors or shareholders than they would otherwise have received under liquidation, more particularly, having regard to the history of the matter and the peculiar facts; that it has not in any event been demonstrated that the company in liquidation is a suitable candidate for business rescue; and that the application for business rescue was instituted for an ulterior and improper purpose to benefit the applicant exclusively at the expense of or without regard to a balancing of the interests of all other stakeholders, including creditors holding preferent claims under the relevant insolvency precepts. All opposing parties thus seek the dismissal of the application with punitive costs.

63. At the risk of repetition, it bears stressing that in *Van Staden and Others NNO v Pro-Wiz (Pty) Ltd* (412/2018) **[2019] ZASCA 7** (8 March 2019) at para [22], Wallis JA cautioned as follows: 'It has repeatedly been stressed that business rescue exists for the sake of rehabilitating companies that have fallen on hard times but are capable of being restored to profitability or, if that is impossible, to be employed where it will lead to creditors receiving an enhanced dividend. Its use to delay a winding up…should not be permitted. When a court is confronted with a case where it is

satisfied that the purpose behind a business rescue application was not to achieve either of these goals a punitive costs order is appropriate. ' (emphasis added)

64. In the circumstances of this case and in the light of the conclusions reached, as outlined earlier in the judgment, I am persuaded that a punitive costs order is warranted. The opposing parties ought not to be out of pocket for successfully opposing the application.

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

ORDER

1. The main application is dismissed with costs on the scale as between attorney and client.
2. The counter-application succeeds and it is ordered that:
   (i) The first respondent (represented by the joint provisional liquidators of Mintails Mining SA (Pty) (in liquidation)) Ltd is authorised to sell the shares and claims on loan account which Mintails Mining SA (Pty) Ltd (in liquidation) owns in Luipardsvlei Estates (Pty) Ltd ('the asset'), subject to reasonable consultation with Mintails Outh Africa (Pty) ltd, alternatively by public auction.
   (ii) The actions of the duly appointed provisional liquidators of of Mintails Mining SA (Pty) (in liquidation) in opposing the main application and in instituting the counter-application is hereby ratified or confirmed;
   (iii) The costs of instituting the counter-application will be costs in the winding-up of Mintails Mining SA (Pty) (in liquidation).

South Cables and Electrical (Pty) Ltd and Another v Walro Flex (Pty) Ltd and Others (2021/49669) [2021] ZAGPJHC 824 (20 December 2021)

Business rescue- section133-General moratorium on legal proceedings against company— business rescue conversion into liquidation proceedings- business rescue practitioners opposed it-de boniis costs against them

[1] The applicants seek leave to bring this application as contemplated by section 133(1)(b) of the Companies Act, 71 of 2008 *("the* **Companies**

Act'') and the termination of the first respondent's business rescue and its conversion into liquidation proceedings in terms of section **132(2)(a)(ii)** of the **Companies Act.**

[2] The first, second and third respondents *("the respondents")* oppose the application. **[WALRO FLEX (PTY) LTD and the two BRP's]**

[3] The first respondent placed itself into business rescue ("BR") on 22 December 2020. This application is therefore launched some 9 months after the commencement of the business rescue proceedings *("the proceedings").*

[4] The business rescue plan *("BR Plan"* or *"Plan")* defines *"Commencement Date"* as meaning 22 December 2020, being the date upon which BR commenced in accordance with section 129(1), read with section 132(1)(a)(i) of the Companies Act.

Legal framework

[5] Section **128(1**)(b) of the **Companies Act provides** as follows:

[6] The temporary supervision by a Business Rescue Practitioner *("BRP')* to carry out the tasks that are set out in **section 128(1)(b)(iii)** begin when the company finds itself in the circumstances set out in **section 132(1).** In this case it started on 21 December 2020 upon the passing of a resolution in term of section **129.** The applicants seek the bringing to an end the proceedings by converting the proceedings to liquidation proceedings in terms of section **132(2)(a)(ii).**

[30] The respondents counter the applicants' averments by seeking to correct the 2019 Annual Financial Statements by attaching draft Annual Financial Statements for the year ending October 2020. They also challenge the total amounts alleged to have been paid to the directors and/or entities controlled by them as loans and management fees. In both instances even if the purported corrections are accepted as accurate, they do not negate the applicants' complaints that these payments reduce what could be a benefit to creditors. This situation should not be allowed to endure for any significant passage of time after the 3 months life span of the proceedings has been exceeded. This circumstance also lends itself to what the **Companies Act discourages** - that is any suggestion that the

proceedings are being abused for purposes of avoiding winding-up of the company while the potential benefit to creditors is being dissipated.

[31] The prospects of a successful business rescue is dependent on a post-commencement financing *("PCF")* of R7 million which must be obtained. In the BRPs' own plan the rescue cannot commence or be achieved unless the PCF is secured. It is now some 11 months since the proceedings commenced, some 8 months beyond the prescribed 3 months to conclude rescue proceedings, without this investment being secured. It can therefore be concluded that if the PCF and any other capital investment were obtained now, the proceedings would be concluded in a period well beyond 12 months. The fact that the respondents are at the precipice of securing the PCF does not address the fact that the longevity and purpose of BR has already been defeated.

[32] In addition to the securing of the PCF being speculative, so is the securing of capital investment. Meetings with potential capital investors that are *"ongoing and are proceeding well"* does not conjure much hope of the reasonable prospect that were demonstrated at the time BR was applied for as continuing to exist 11 months later. As stated above these prospects have diminished.

[33] The respondents place must reliance on *Oakdene Square Properties (Pty) Ltd v Farm Bothasfontein (Kyalami) (Pty) Ltd & Others,* ***[3]*** a case which dealt with the requirements to place a company into BR, where it is stated:

> *"On the other hand, I believe it requires more than a mere prima facie case or an arguable possibility. Of even greater significance, I think, is that it must be a reasonable prospect - which the emphasis on 'reasonable' - which means that it must be a prospect based on reasonable grounds. A mere speculative suggestion is not enough. Moreover, because it is the applicant who seeks to satisfy the court of the prospect, it must establish these reasonable grounds in accordance with the rules of motion*

proceedings which, generally speaking, require that it must do so in its founding papers."

[34] It is submitted that since the respondents had to show a reasonable prospect of rescuing the company at the time of applying for BR, the applicants must show, in the converse of the standard, reasonable grounds that there is no longer or never was, a reasonable prospect of rescuing the first respondent.

[35] As stated above, securing PCF was a major factor determining the reasonable prospect of rescuing the company. However, since this has not been achieved 11 months after commencement and 8 months since the adoption of the Plan, the prospects have all but diminished. It is now speculation that Standard Bank is on the brink of providing the PCF. Furthermore, the allegations that the continued payment of management fees and loans (to the directors and/or the entities they control) and the deteriorating business health of the company contribute to the reduction of the company's value are based on reasonable grounds. Discontinuation of the BR proceedings is warranted in the circumstances.

[36] The respondents have failed to respond to a direct allegation that two of the directors bought themselves vehicles worthy R3.2 million in February 2019 where they admit that the company was already in financial distress during October 2018. How these acquisitions were made is a matter within the personal knowledge of the directors and should have dealt with this instead of merely confirming the BRPs retort that the applicants have not provided proof that the company purchased them for the directors. This response lends credit to the applicants' submission that the directors not only ransacked the company's coffers when it was clear that it was in financial distress but they used BR proceedings in order to delay winding-up proceedings. As a result they continue to earn an income from the company during prolonged BR proceedings to the prejudice of creditors.

[37] The applicants cannot be bound to their vote in favour of the BR Plan when the circumstances have changed significantly since March 2021.

[38] In the circumstances it is too speculative to project that various classes of creditors will receive better dividends under BR as opposed to under liquidation. These projections were made at the time that the PCF and capital investments were envisaged at the time of passing the BR Plan.

Urgency

[39] I agree with the applicants that these proceedings are inherently urgent. The applicants acted with speed when it became apparent that the PCF would not be secured. It was during October 2021 that the applicants lost faith in the BR proceedings and demanding full reports from the BRPs. This view was preceded by various enquiries and investigations which revealed suspicious business transactions and failure to address them by the BRPs or their attorneys.

Costs

[40] Costs will follow the result and costs *de bonis propriis* are warranted. The benefit to creditors should not be reduced further by the company having to pay these costs when the directors have abused the proceedings and continued to benefit therefrom.

Conclusion

[41] Leave is granted in terms of section **133(1**)(b) of the Company Act for the applicants to bring this application.

[42] The applicants have discharged the onus to prove that there remain no reasonable prospects of the company being saved. Furthermore, the directors engaged themselves in conduct before and during the BR proceedings which amounts to the conclusion that they abused the proceedings after having precipitated the company's financial distress over the preceding year.

Tahilram v Trustees of the Lukamber Trust and Another (845/2020) [2021] ZASCA 173 (9 December 2021)

Company law-sale of shares-Sale – price – to be fixed by third party's valuation – subject to limited exceptions and in the absence of agreement to the contrary or waiver by the parties, whenever parties agree to refer a matter to a valuer, then so long as the valuer arrives at his or her decision honestly and in good faith, the decision is final and binding on them and they are bound by it once communicated to them – valuer is then *functus officio* insofar as the valuation and matters pertaining thereto are concerned – valuer is then not permitted to unilaterally withdraw or cancel the valuation in order to alter or amend it – only a court has the power to interfere with the valuer's decision in review proceedings - judicial ambit of the court's power to interfere is severely circumscribed.

[1] This appeal raises the question, when parties agree to refer a matter to an expert valuer, whether the valuer is legally permitted to unilaterally withdraw the valuation in order to alter or amend it, once the valuer's valuation has been communicated to the parties concerned. The appeal, with leave of the High Court, is against the judgment and order of the Gauteng Division of the High Court, Johannesburg (Sibuyi AJ) delivered on 07 August 2020, dismissing the claim of the appellant, Mr Rajkumar Tahilram (Mr Tahilram), against the first respondent, the three trustees of the Lukamber Trust (the trust), his sole co-shareholder in the second respondent, A & A Dynamic Distributors (Pty) Ltd (the company), for payment of the purchase consideration for his shareholding in the company in the amount of R2 878 574.70 plus interest and costs. In dismissing Mr Tahilram's application, the High Court held that the expert valuer was legally permitted to withdraw his valuation in order to modify and correct it, and that he was not *functus officio* once he had communicated his valuation to the parties.

[2] The facts relevant to the determination of the appeal are straightforward and uncontentious. The business of the company is the sale and distribution of electronic components. Mr Andrew Kayser is one of the trustees of the trust, which holds 70% of the company's issued shares, and Mr Tahilram holds 30% of its issued shares. Mr Kayser is the managing director and responsible for the day-to-day affairs and activities of the company. Mr Tahilram was the sales director of the company until his employment with the company terminated on 27 March 2018. On the termination of

Mr Tahilram’s employment, he was required to offer his shares in the company to the trust.