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Cash Paymaster Services (Pty) Ltd and Others v Freedom Under Law NPC and Others (CCT 48/17) [2022] ZACC 2 (11 February 2022):

Provisional liquidators — section 359(1)(a) of Companies Act 61 of 1973 — company remains bound to comply with previous order despite the fact that final liquidators not yet appointed- Variation of order

Words ”in liquidation”-The Court held that in respect of the variation of CPS’ name in the April 2021 order, the addition of the words “(in liquidation)” wherever its name appears would have no substantive effect. CPS as a company had not ceased to exist because it was in final liquidation, nor had it been divested of its assets and liabilities. Furthermore, the provisional liquidators had not sought to have themselves joined in their official capacities and the proposed variation did not involve a substitution of parties as envisaged in rule 7(1) of the Rules of the Constitutional Court.

Held that in respect of the joinder of SARS, the applicants' case was no more than an assertion that it would be convenient for the RAiN verification and the SARS audit to proceed in parallel in accordance with a common timetable. This failed to show that SARS had a direct and substantial interest in the relief sought by FUL or in the relief granted by the Court in the April 2021 order. The April 2021 order did not affect SARS' rights, obligations or duties in any way, and effect could be given to the order as it stands without any cooperation from SARS. Furthermore, the Court had no jurisdiction in the tax dispute between CPS and SARS. Accordingly, the prayer for SARS' joinder was refused, and with it those variations of the April order making reference to SARS.

The Court held that in respect of the variation of CPS' name in the April 2021 order, the addition of the words "(in liquidation)" wherever its name appears would have no substantive effect. CPS as a company had not ceased to exist because it was in final liquidation, nor had it been divested of its assets and liabilities. Furthermore, the provisional liquidators had not sought to have themselves joined in their official capacities and the proposed variation did not involve a substitution of parties as envisaged in rule 7(1) of the Rules of the Constitutional Court.

The Court then addressed the relief sought that the April 2021 be varied pursuant to section 359(1)(a) of the 1973 Act on the basis of the deferral of CPS' obligation to furnish documents to RAiN, and CPS' right to make submissions to National Treasury, until final liquidators are appointed, and to impose the obligation and confer the rights in question not on CPS but on its final liquidators. The effect of such variation would also be to defer the obligations of KPMG and Mazars. The Court held that the applicants had not made out a case for a variation and that, in any event, section 359(1)(a) was not a legal basis for varying a valid order, rather it was a basis for staying civil proceedings. The Court pointed out that the applicants appeared to accept that if they have not made out grounds for a variation, the April 2021 order stands and remained binding. The Court then went further to hold that since the present applicants may or may not receive appointment as final liquidators, the imposition of obligations on the final liquidators that the applicants sought was untenable as the Court cannot grant orders against absent persons. The true position is that the April 2021 order was directed at CPS, the company.

In the result, the Constitutional Court dismissed the application for joinder and variation of the April 2021 order with no order as to costs, on account of there being no formal opposition.

[1] This is an application, brought by the provisional liquidators of the sixth respondent in the main case, Cash Paymaster Services (Pty) Limited (CPS), to vary this Court's order of 1 April 2021 (April 2021 order) and to join the South African Revenue Service (SARS). The only party which has responded to the variation application is Freedom under Law NPC (FUL), the applicant in the main case. FUL, while abiding this Court's decision on the variation application, has filed an affidavit setting out various circumstances said to militate against the granting of the relief claimed by the provisional liquidators.

[2] The variation application, though dated 11 May 2021, was filed on 23 May 2021. Due to a regrettable administrative lapse, the application did not find its way onto this Court's weekly agendas, and it lay unprocessed until a letter dated 16 November 2021 from attorneys representing the provisional liquidators brought the omission to light.

Litigation background

[3] The April 2021 order gave effect to earlier judgments of this Court which required a determination to be made of the profits earned by CPS from the payment of social grants on behalf of the South African Social Security Agency (SASSA) over the period 1 April 2012 to 30 September 2018. On 17 April 2014 this Court declared the initial five-year contract between SASSA and CPS invalid, but suspended the declaration of invalidity on certain terms. The suspension of invalidity was twice extended, by orders dated 17 March 2017 and 23 March 2018,to ensure that social grants would continue to be paid, such extensions being on the same terms as the initial contract.

[4] The orders of 17 April 2014, 17 March 2017 and 23 March 2018 required CPS to file with the Court an audited statement of the expenses incurred, income received and net profit earned in the relevant periods (profit statements); and required SASSA to obtain and file with the Court an independent audited verification of the profit statements. The second and third orders added a requirement that the audit verification be approved by National Treasury before it was filed with the Court. These provisions were informed by the statement in the judgment of 17 April 2014 that, while the invalidation of the contract should not result in any loss to CPS, the company also had "no right to benefit from an unlawful contract", so that any benefit CPS derived "should not be beyond public scrutiny".**[4]**

[5] CPS filed profit statements audited by KPMG Services (Pty) Limited (KPMG) in respect of the initial five-year period and by Mazars Incorporated (Mazars) in respect of the two extensions. SASSA engaged RAiN Chartered Accountants Incorporated (RAiN) to verify the profit statements. In October 2019 RAiN furnished its review report. National Treasury issued a letter approving the report but noted certain shortcomings. In November 2019 SASSA filed the RAiN report and the National Treasury letter with the Court.

[6] In its report, RAiN explained that there was a crucial outstanding issue, namely whether CPS had engaged in cost-shifting and profit-shifting. RAiN said that it needed more information to get to the bottom of this. In April 2020 FUL launched an application to ensure that RAiN was given the necessary information. The only opposition was from CPS, and the only relief which it opposed was an order declaring that it was liable to repay all profits to SASSA. On 1 April 2021 this Court granted, with some modifications, the relief which was unopposed.**[5]** In summary, the April 2021 order required the following steps to happen in accordance with a timetable: RAiN to submit lists of required documents to CPS, KPMG and Mazars; the latter to supply the listed documents to RAiN; RAiN to submit an updated verification report to National Treasury; National Treasury to permit CPS and SASSA to make representations on the updated report; and National Treasury to approve the updated

report and file such approval with this Court, alternatively to file an affidavit explaining why it could not approve the updated report.

The variation application

[7] The provisional liquidators seek relief based on two circumstances, namely that CPS is in liquidation, and final liquidators have not yet been appointed; and that SARS is engaged in an audit of CPS' tax affairs which involves similar issues (particularly a potential over-statement of expenses) to those involved in the updated RAiN verification. The relief claimed is in summary the following: (a) that SARS be joined and that the April 2021 order be varied to align SARS' audit process with the updated RAiN verification process; (b) that the description of CPS in the April 2021 order be amended to add "(in liquidation)"; and (c) that the rights and obligations contained in the April 2021 order in so far as CPS is concerned (i.e. the obligation to supply documents to RAiN and the right to make submissions to National Treasury) be varied so as to refer not to CPS but to the company's final liquidators.**[6]**

[8] CPS was placed in final liquidation on 16 October 2020. This was at SASSA's instance, which had an unsatisfied judgment against CPS for R316 447 361. The present applicants were appointed as CPS' provisional liquidators on 30 October 2020. On 23 December 2020 FUL's attorneys, Nortons, wrote to the Registrar to notify this Court of the liquidation and the appointment of the provisional liquidators. Nortons stated that the liquidation had heightened the need for this Court to deliver judgment in FUL's application. Nortons added that they had, to the extent necessary, notified CPS' joint liquidators in terms of section 359(2)(a) of the Companies Act**[7]** (Act or 1973 Act) of FUL's intention to continue with the application. Nortons added that SASSA supported the continuation and determination of FUL's application.

Van der Westhuizen N.O and Another v The Land and Agricultural Development Bank of SA and Others [2022] ZALMPPHC 11 (14 February 2022)

Trustees-sale of property-subject to Master's consent-granted-sale valid

[1] On the 24th June 2021 this court granted a final order of sequestration against Sweet Home Mountain Lodge Trust. The order resulted in the trust being divested of its rights to manage its assets and same were placed in the hands of the trustees duly appointed by the Master of the High Court.

[2] At the time of sequestration, the trust was the registered owner of an immovable property described as Farm Sweethome 322, Registration Division KQ, Limpopo Province, in extent 1729, 0445 hectares. It is the transactions relating to this farm which are at the centre of this litigation. This is how it happened.

[3] Jan Kruger Robbertse concluded a credit loan agreements with Unigro Financial Services Proprietary Limited for a total sum of R20 million. These loans were taken in 2013 and 2014 respectively. As security for his indebtness, the trust entered into an unlimited suretyship agreement with Unigro Financial Services (Pty) Ltd (Unigro) and committed itself to pay for Mr Robbertse should he default in his repayment. In 2013 the trust hypothecated the property (Farm) as security for Mr Robbertse`s debt by registering a mortgage bond for R15 000 000-00. In 2014, a second mortgage bond was registered for R5000 000-00.

[4] The credit loan agreements were later ceded to the Land and Agricultural Development Bank of South Africa (Land Bank). When Mr Robbertse defaulted on his repayment, Land Bank instituted legal proceedings for the repayment of all balance owing on various accounts as well as cancellation of the agreements. It also instituted sequestration proceedings against the trust and obtained a provisional order on 27 October 2020. It is this provisional sequestration order which was confirmed as final on 24 June 2021 by Makgoba JP.

[5] Upon receipt of the final sequestration order and their appointment as trustees of the insolvent estate of the Sweet Home Mountain Trust, the trustees took over the management of the farm and placed it on sale. I interpose to state that the trustees, Mr Robbertse and Van Der Westhuizen had on 06 April 2021 appointed Mr Deon Marius Botha, the fifth respondent and the provisional trustee at the time; their lawful agent and nominee to act on their behalf and sign documents relating to the sale of the farm Sweet Home. Notably the Power of attorney further states that “We tender to

unconditionally support and not oppose the transfer of the Sweet Home Farm in our personal capacities."

[6] On the 19th June 2021, the trustees accepted an offer of R23 000 000-00 to purchase the farm property. The acceptance was subject to the Master of the High Court extending their powers. The Master approved the sale on 24 August 2021.

[7] The applicants in their capacities as the trustees of the trust launched an application for rescission of the "default judgment" granted by Makgoba JP on 24 June 2021 placing the trust under final sequestration. This application is opposed by the first, fifth and sixth respondents and is still pending before this court. Pending rescission of the default judgment, the applicants requested written confirmation from the first respondent that she will not proceed with the sale of the immovable property. No such written confirmation was made and instead the first respondent filed an opposing affidavit to the rescission application wherein the sale of the farm was confirmed.

he respondents argue that given the conduct of the applicants it will not be in the interest of justice that the sequestration proceedings be stayed pending rescission. They submit forcefully that the applicants are the authors of their own misfortune by disregarding the rules and deliberately failing to comply with the Judge President's Directives. Their conduct does not deserve of their protection by this court.

[16] I agree with the respondents submission that the applicants are solely to blame for the quandary they find themselves in. Any seasoned litigation practitioner knows that an applicant for postponement seeks an indulgence. The Constitutional court, per Mokgoro J, authoritatively put it as follows:

"*The postponement of a matter set down for hearing on a particular date cannot be claimed as of right. An applicant for a postponement seek an indulgence from the court. Such a postponement will not be granted unless this court is satisfied that it is in the interest of justice to do so…whether a postponement will be granted is therefore in the discretion of the court and cannot be secured by mere agreement*

between the parties." **National Police Service Union and others v Minister of Safety and security and others, 2000 (4) SA 1110 (cc) at para 4.**

[17] Once a postponement is refused, the party asking for a postponement should be able to proceed. In **Take and Save Trading CC and others v Standard bank of South Africa Ltd, 2004 (4) SA 1 (SCA)** Harms JA in a case similar to the present this one where counsel withdrew after the court refused a postponement, said the following: Fairness of court proceedings requires of the trier of fact to be actively involved in the management of the trial, to control the proceedings, to ensure that public and private resources are not wasted, to point out when evidence is irrelevant, and to refuse to listen to irrelevant evidence. A supine approach towards litigation by judicial officers is not justifiable either in terms of the fair trial requirement or in the context of resources. **One of the oldest tricks in the book is the practice of some legal practitioners, whenever the shoe pinches, to withdraw from the case (and more often than not to reappear at a later stage), or of clients to terminate the mandate (more often than not at the suggestion of the practitioner) to force the court to grant a postponement because the party is then unrepresented. Judicial officers have a duty to the court system, their colleagues and the parties to ensure that this abuse is curbed by, in suitable cases, refusing postponement. Mere withdrawal by a practitioner or the mere termination of a mandate does not, contrary to popular belief, entitle a party to a postponement as of right."**

[18] The applicants do not dispute that they failed to comply with the directives issued by the Judge President with regard to filing of their heads of argument and appearing in court on the 24 June 2021 for the hearing of the matter. This admission weighs heavily with me in the determination of the relief the applicants seek. I find it opportunistic for a party to walk away from a court constituted to give him a fair hearing on an existing dispute and later turn around and claim that he was not afforded an opportunity to state his case. The machinery of justice must, according to the applicants, grind to a halt whenever it suits them. They and they alone determine when will the respondents and the creditor's interest they have been

appointed to protect receive justice from this court. This attitude is repulsive to good order and the administration of justice. It should not be tolerated in the name of access to justice. Every person including the respondents have a right of access to justice and when they litigate their expectations are that their matters will be adjudicated in accordance with the rules and justice will be dispensed speedily. It is unfair for the applicants to spurn the court, violate its rules and still seek its protection relying on the rules they have violated.

[19] The applicants are clearly malicious in their intent and their application for rescission of judgment lacks the hallmarks of honesty and sincerity. Whilst it is true that I am not called upon to make a determination on the prospect of their success, I am justified to take into account the circumstances which led to the "default Judgment" being obtained against them. In this regard I am duty bound to make an assessment of the bona fides of the applicants in their rescission application and the grounds they rely upon. I do so not to pre-empt the outcome or to pre-judge it but to assess their sincerity. Applicants have a benefit of legal representation and would have been aware by now what the consequences of their walk away from the court proceedings on 24 June 2021 was. Their legal counsel would have by now advised them that the constitutional court said: "the words granted in the absence of any party affected thereby as they exist in Rule 42 (1) (a) exist to protect litigants whose presence was precluded, not those whose absence was elected. Those words do not create ground of rescission for litigants who, afforded procedurally regular judicial process, opt to be absent……. I do not, however accept that litigants can be allowed to butcher, of their own will, judicial process which in all other respects has been carried out with the utmost degree of regularity, only to then, ipso facto (by the same act), plead the "absent victim". If everything turned on actual presence, it would be entirely too easy for litigants to render void every judgment and order ever to be granted, by merely electing absentia (absence**)" Zuma v Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of the State [2021] ZA CC 28.**

[20] The Constitutional Court is the highest court in the land and the views expressed therein constitute good law in the administration of justice. Justice is best served when all parties to the litigation are governed by the same rules and play by them. It is denuded of its value and purpose when others deliberately ignore the rules and frustrate the system. In time, it will collapse and the social order upon which it is predicated will be adversely affected. The court has a duty to protect its own processes against those who seek to abuse it for their own selfish ends. I conclude with the words of the Supreme Court Justices of Zimbabwe who 30 years ago said the following:

"It is the policy of the law that there should be finality in litigation. On the other hand, one does not want to do injustice to litigants. But it must be observed that in recent years, applications for rescission, for condonation, for leave to apply or appeal out of time, and for other relief arising out of delays either by the individual or his lawyer, have rocketed in numbers. We are bombarded with excuses for failure to act. We are beginning to hear more appeals for charity than for justice. Incompetence is becoming a growth industry. Petty disputes are argued and then re-argued until the costs far exceed the capital amount in dispute. The time has come to remind the legal profession of the old adage: *(vigilantibus non dorminientibus jura subveniunt)*- roughly translated the law will help the vigilant but not the Sluggard: **Ndebele v Ncube, 1992 (1) ZLR 288 S**

[21] Having perused the papers filed, it is clear that at the heart of the applicant's apprehension for injustice is the sale of the farm. This fear is unfounded and unjustified on the facts of this case as the trustees have voluntarily and without coercion signed a power of attorney authorising the fifth respondent to conclude an agreement for the sale of the farm. This power of attorney has not been revoked. At the time the applicants signed the power of attorney, they knew that the fifth respondent had been appointed a provisional liquidator and they had filed their opposing papers to the sequestration proceedings. Taken in context, the sale of the farm cannot be a reason justifying the institution of the Rule 45A application. I am therefore not persuaded that there will be any substantial injustice if the sale of the

farm is proceeded with. This would of necessity mean as well that no case has been made out for the stay of the sequestration proceedings.

[22] In the circumstances the application is dismissed with costs including the costs of one senior counsel.

Gefen and Another v De Wet N.O. and Another (A5037/21) [2022] ZAGPJHC 23 (1 February 2022)

Liquidators-applying for eviction orders-opposition-what criteria

[1] This is a full court appeal which came before this court pursuant to leave to appeal being granted by the Supreme Court of Appeal against the judgment and order of Bhoola AJ (the court *a quo*) sitting in this division.

[2] The appellants were the first and second respondents (hereinafter referred to as the appellants) in an eviction application brought by the two joint liquidations (the respondents) of Sehri Trading (Pty) Ltd (in liquidation) (the company) for the eviction of the appellants who were in occupation of the immovable property owned by the company, Unit 5, The Grove, 119 Linden Street, Sandton (the property)

[3] The court *a quo* granted an order striking out the defence of the appellants and proceeded to grant an eviction order against the appellants. This order was granted on 28 October 2019 in the following terms:

> "1. The defence of the first and second respondents is hereby struck out;
>
> 2. That the first and second respondents and all persons occupying the property through and under the respondents, are in unlawful occupation of the property situated at Unit 5, The Grove Complex, 119 Linden Road, Cnr Daisy Road, Sandown, Sandton ('the property');
>
> 3. The first and second respondents and all persons occupying the property through and under the first and second respondents are hereby evicted from the property;

4. The first and second respondents and all persons occupying the property through and under the respondents are to vacate the property on or before 29 November 2019

5. Should the first and second respondents and all persons occupying the property through and under the first and second respondents fail to vacate the property on or before 2 December 2019, the Sheriff of the above Honourable Court or his duly appointed deputy together with the assistance of the South African Police Service or a private security company, is hereby authorised to evict the first and second respondents and all persons occupying the property through and under the first and second respondents;

6. The first and second respondents are to pay the costs of the interlocutory application;

7. The first and second respondents are to pay the costs of the eviction application."

[4] The appeal is aimed at setting aside the whole order which includes the striking out of the defence of the appellants, their eviction and the costs orders.

[5] The appellants' defence to the eviction application was struck pursuant to an application brought by the respondents on the basis that the appellants had not complied with the order of Fisher J granted on 14 August 2019. In terms of this order the appellants were to serve their heads of argument and practice note in the eviction application within 14 days of the order (the compelling order).

[6] The striking out application was brought by the respondents in terms of the provisions of clause 9.8.2.12 of the Practice Manual of this Division which reads as follows:

"12. Where a party fails to deliver heads of argument and/or a practice note within the stipulated period, the complying party may enrol the application for hearing. Such party shall simultaneously bring an application on notice to the defaulting party that on the date set out therein (which shall be at least five days from such notice), he or she will apply for an order that the defaulting party delivers his or her heads of argument and practice note within three days of such order, failing which the defaulting party's claim or defence be struck

out. Such application shall be set down on the interlocutory roll referred to in 9.10 below."

[7] Despite the reference to the three-day period in the Directive, Fisher J afforded the appellants 14 days to file their heads of argument and a practice note. This they failed to do and this caused the respondents to file a further application for the striking of the defence of the appellants and, if not complied with, for their eviction.

This matter has been in the court process for far too long for various reasons. I do not intend to refer to these reasons in this judgment suffice to say that the order this court intends to make would hopefully expedite this matter to its conclusion. The appellants remain in occupation of the property without paying rental, levies, for water and electricity. The liquidation process cannot be finalized whilst this matter has not been resolved. From the perspective of the appellants they have to live with the uncertainty of what the future holds for them as far as housing is concerned. It is about time they also get certainty.

[39] As far as costs of this appeal and the application to lead further evidence on appeal are concerned, I am of the view that these costs should be in the cause of the eviction application. In my view costs should not follow the result as I took the view that the appellants did not raise a *bona fide* defence against the striking out application in so far as their explanation for non-compliance is concerned.

[40] The following order is made:

40.1 The appellant's appeal is upheld and the decision of Bhoola AJ dated 28 October 2019 is set aside.

40.2 The order of Bhoola AJ is substituted with an order as follows:

40.2.1 The applicants' application to strike out the defence of the respondent is postponed *sine die.*

40.2.2 The respondents are afforded a final opportunity to deliver heads of argument, a practice note, a list of authorities and a chronology in respect of the eviction application within ten (10) court days.

40.2.3 The costs of the application to strike out are reserved.

40.3 The application to lead further evidence on appeal is dismissed.

40.4 The striking out and eviction applications are remitted back to the High Court before a single Judge.

40.5 The cost of the application for leave to appeal, the cost of the petition for leave to appeal, the cost of the application to lead further evidence and of the appeal are costs in the cause of the eviction application.

Shackleton Credit Management (Pty) Ltd v Ngakatau and Another (2020/38729) [2022] ZAGPJHC 58 (11 February 2022)

Winding up application-companies dormant-provisionallyliquidated

[1] The Applicant seeks an order in terms of which the Respondents are provisionally sequestrated.

[2] The Applicant further seeks condonation for the late filing of its replying affidavit.

[3] The Applicant is Shackelton Credit Management (PTY) LTD a private company duly registered and incorporated according to the company laws of the Republic of South Africa and the First and Second Respondents are married to each other in community of property.

Background

[4] On 4 February 2010, at Northcliff Johannesburg the First Respondent and BMW duly represented by an authorised employee, concluded a written instalment sale agreement. The First Respondent failed to comply with its obligations in terms of the

agreement in that he failed to pay the required monthly instalment, as a result BMW terminated the agreement and repossessed the vehicle.

[5] Following the realization of the vehicle a shortfall remained due by the First Respondent to BMW, and BMW instituted legal action against the First Respondent under case number 42166/2011.

[6] On 28 January 2013 default judgment was granted in favour of BMW against the First Respondent. In terms of the Court Order, the first Respondent was ordered to make payment to BMW as follows:

> Payment of the sum of R306 509,66;
>
> Interest thereon at the rate of 15,50% per annum from 5 October 2011 to date of final payment;
>
> Costs of suit on the attorney and client scale to be taxed as provided for in the agreement.

The First and Second Respondents combinedly holds directorship and membership in 18 companies and/or close corporation.

[45] The Respondents contends that the companies and/or close corporations are all dormant and never operated except:

Minatlou Trading 252 CC ("*Minatlou Trading*") which has a bank account but in respect of which the First Respondent is no longer a member; and Sho-Ing Trading Enterprise (Pty) Ltd, owned and controlled by the Second Respondent which company is allegedly worth nothing and only recently "*start[ed] actively trading and is just breaking even".*

[46] First Respondent was up and until 7 October 2020 an active member of Minatlou Trading. First Respondent resigned on 7 October 2020 and was replaced as the sole member by a person named Katlego Keauno Ngakatau. The First

Respondent does not disclose if he received value for the disposal of his membership interest.

[47] The Respondents' bank statements attached to the Applicant's Founding Affidavit as "JB35" which covers the period December 2019 to June 2020 indicate various payments were made with the description "*Minatlou"* indicating that payments were made to the CC. These payments, if it were funds belonging to the First Respondent and advanced to the CC, could possibly be recoverable on loan account.

[48] Sho-Ing Trading Enterprise (Pty) Ltd on the Respondents own version is an actively trading company. Although this is a company owned by the Second Respondent, the Second Respondent's interest in this company is an interest of the joint estate.

[49] Accordingly, I find that an investigation into the Respondents affairs could uncover further assets that could be used to the advantage of creditors.

[50] Various deposits and/or payments made by the First Respondent into the Second Respondent's bank account. The source of these funds is not explained at all, and the absence of a proper explanation is compounded by the First Respondent's suggestion that he is unemployed.

Conclusion

[51] I am satisfied that the Applicant has made out a proper case for the provisional sequestration order of the Respondents' joint estate.

I thus make the following order:

1. The First and Second Respondents' estate be placed under provisional sequestration.

2. The First and Second Respondents and any other party who wishes to avoid such an order being made final, are called upon to advance reasons, if any, why the court should not grant a final order of sequestration of the First and Second Respondents' estate on 11 April 2022 at 10:00 or so soon thereafter as the matter may be heard.

3. That a copy of the provisional order be served on:

3.1. the First and Second Respondents personally;

3.2. the employees of the First and Second Respondents, if any;

3.3. on all trade union of which the employees of the respondent are members, if any;

3.4. on the Master of the High Court; and

3.5. on the South African Revenue Service.

4. The costs of this application to be costs in the sequestration of the First and Second Respondents' estate.

Courier-IT S.A. (Pty) Ltd v Van Staden and Another (21/6064) [2022] ZAGPJHC 94 (14 February 2022)

Sequestration application- de facto insolvency- nulla bona-advantage to creditors

1 The applicant, Courier-It SA (Pty) Ltd, seeks an order for the provisional sequestration of the first respondent's estate. The applicant bases its claim on section 8(b), (c) and, belatedly, (g) of the Insolvency Act, 24 of 1936 ("**the Insolvency Act&rdquo**;) In argument, it abandoned the **section 8(c)** grounds but sought to further rely on the fact that, based on the evidence advanced by the first respondent in his papers, the first respondent is also *de facto* insolvent.

2 The first respondent in this case is Trevor van Staden and the second respondent in this matter is his wife. The respondents are married out of community of property and no claim is sought against the second respondent.

3 The central issue for determination in this matter is, quite simply, whether the applicant has established that an order of provisional sequestration should be made in relation to the first respondent's estate. The parties have, however, raised a number of preliminary disputes that need to be addressed before this central issue can be determined.

Background facts

4 On 8 October 2020, this Court granted an order under case number 17414/2020 for payment by the first respondent and another, Optimum Express Courier Services CC, to the applicant in the sum of R543 000.00. The payment obligation was joint and several, the one paying the other to be absolved.

5 The 8 October 2020 order followed the institution of a liquidation application brought by the current applicant against Optimum Express Courier Services CC. The order was granted by agreement between the parties and the liquidation application of Optimum Express Courier Services CC was postponed. In the order, the first respondent and Optimum Express Courier Services CC undertook to settle the indebtedness to the applicant. The payment was to be made into the trust account of the applicant's lawyers.

6 The order stated that should there be a failure to pay on the dates that payment was due, the full amount outstanding would become immediately due and payable, with interest. In the event of default, the order stated that the application would be heard unopposed and, additionally, the applicant may apply for a warrant of execution against the respondent.

7 Payment was not made in accordance with that order.

he applicant further submits that the fact that the first respondent admitted his factual insolvency in the respondents' answering affidavit makes redundant the exercise of considering whether there are grounds indicating acts of insolvency. This may well be so. I nevertheless wish to briefly touch on the act of insolvency raised by the applicant in its founding papers.

Non-satisfaction of warrant of execution

59 **Section 8(b)** covers the situation where a Court has given judgment against a debtor and he fails to satisfy that judgment or to indicate sufficient disposable property to satisfy it, or if it appears from the return made by the officer whose duty it was to execute it, that he has not found sufficient disposable property to satisfy the judgment.

60 There are two different and distinct acts of insolvency contemplated in **section 8(b).** The first occurs when, upon the demand of the sheriff, the debtor fails to satisfy judgment debt and thereafter fails to indicate sufficient disposable property to satisfy the warrant. In *casu*, there is no dispute about the fact that the first respondent failed to satisfy the judgment debt on demand of the sheriff.

61 The question whether or not the first respondent indicated sufficient disposable property to satisfy the warrant is also, in my opinion, clear on the facts. Quite simply, the items that the first respondent indicated to the sheriff were not, in fact, his. I do not understand the section to mean, nor could it logically be said to be so, that there would be no act of insolvency is a debtor points out various goods but that these, in fact, do not belong to him. The goods pointed out by the debtor must be goods that are owned by him that could be used to satisfy the debt. In my view, by pointing out goods in the family home that belonged (almost entirely) to the second respondent, I am of the view that the first respondent did *not* indicate to the sheriff sufficient unencumbered disposable assets (that he owned) that would satisfy the warrant. An act of insolvency was therefore committed.

62 I am therefore in agreement with the applicant that this first act of insolvency has been established.

63 Much is made by the respondents that the return of service does not *ex facie* constitute a *nulla bona* execution. In light of my finding above, it is not

necessary to focus on this issue, as I am satisfied that the applicant has shown an act of insolvency on the part of the first respondent.

Written notice of an inability to repay debts

64 For the same reasons, I do not deem it necessary to fully consider the applicant's further act of insolvency under **section 8(g)**, though that was relied on during the hearing. This act of insolvency was not relied upon in the founding papers, although I understand that to be due to the fact that such written notice of an inability to repay his debts only arose when the first respondent admitted as such under oath in his answering affidavit.

65 The first respondent informed the applicant that his mortgage bond payments are in arrears and that, as a result, Nedbank has taken judgment and attached the property.**[15]** This, in my view, is a clear notice to a creditor that he is unable to pay any one of his debts. I do not think that it could be taken to mean anything other than that the debtor cannot pay his debts. That is especially so in light of the answering affidavit as a whole. In the premise, the first respondent has committed an act of insolvency on this ground too.

66 I turn now to consider the third and final requirement – whether the applicant has established that there is reason to believe that it will be to the advantage of the creditors of the debtor if his estate is sequestrated.

Advantage to creditors

67 It is not necessary under this requirement for the applicant to convince this Court either *prima facie* or on a balance of probabilities that there will be some advantage to creditors. All that is required is that it is established that there is *reason to believe* that there will be an advantage to creditors.**[16]**

68 The respondents seek to rely on the statement of assets and liabilities they attached to their answering affidavit**[17]** to show that their liabilities exceed their assets and there would be no pecuniary benefit to the creditors. However, the supplementary replying affidavit filed by the applicant raises the suspicion that at least one of the liabilities on that list, the debt of R1 883 744.57 that has been reflected by the respondents to be owed by the first respondent to Balanced Solutions (Pty) Ltd, is not actually a debt owed by the first respondent. The applicant further notes that the largest liability on that schedule – what appears to be a judgment debt in the amount of R4 581 930 in favour of Gelveno Consolidated Fabrics (Pty) Ltd – may not be accurately reflected as the applicant's research indicated that Gelvenor may itself have been liquidated. These doubts together are sufficient reason for why I cannot place much reliance on this schedule in support of the respondents' allegations that there would, as a matter of fact, be no benefit to creditors.

69 The applicant's calculations place the first respondent's assets at R4 449 000 and liabilities at R2 211 988.60. On these values, there would be some pecuniary value for the creditors upon sequestration, although the first respondent has preferent creditors that would be satisfied first. The applicant supports its allegation that sequestration will be to the advantage of creditors by referring to the non-financial advantages that sequestration would bring, namely, that the trustee will be able to investigate the true state of affairs regarding the first respondent's dealings. The applicant assumes in this regard that the fact that the first respondent owns almost none of the movable property in their home and has been involved in a number of entities which have since been deregistered, in inherently suspicious and that there is reason to believe that an investigation may reveal other suspicious activity. At the start of the application, the applicant also contended that investigations would reveal that dispositions made by the first respondent may be set aside. If true, further assets may become available for distribution amongst creditors and in such an instance an advantage to creditors would be shown to exist.

70 In the overall factual circumstances of this case, and upon the proper legal standard – whether there is *reason to believe* that there will be an advantage to

creditors – I consider it appropriate to exercise my discretion in favour of the applicant's case. Having regard to the facts, it appears to me that there are indeed grounds to believe that the relevant enquiry could be to the benefit of creditors.

Conclusion

71 For the reasons set out above, I find that the applicant has established on a balance of probabilities that there was a liquid claim, the first respondent has committed acts of insolvency, and it would be to the advantage to the creditors for an order of provisional sequestration to be granted.

72 The applicant sought an adverse cost order on a punitive scale against the respondents in light of what it terms "unsubstantiated defences" that were raised in this matter. I am not inclined to grant costs on a punitive scale in light of my finding for provisional sequestration. The costs of this matter will be costs in the insolvent estate and a punitive cost order will only work to disadvantage the creditors.

73 I therefore make the following order:

73.1 the estate of the first respondent is provisionally sequestrated and the assets thereof placed in the hands of the Master of the High Court, Johannesburg;

KIC SA (Pty) Ltd v Edith Venter Promotions CC (2020/9865) [2022] ZAGPJHC 77 (18 February 2022)

Winding-up application-unable to pay debts-granted

[1] This an opposed application for a winding-up order of the respondent. The applicant bases its application on the ground that the respondent is unable to pay its debts in terms of sections 344(f) and 345(1)(c) of the Companies Act 61 of 1973 read with sections 69(1)(c) and 69(2) of the **Close Corporations Act 69 of 1984**.

[2] The relevant facts are largely undisputed. On or about 14 May 2019 Whirlpool SA (Pty) Ltd made a payment of R800 000 plus vat to Edith Venter Promotions CC, the respondent, an event organiser for an event that failed to materialise. Whirlpool and the respondent agreed to cancel the sponsorship agreement on the basis that the respondent would retain R50,000 plus VAT and would return R750,000 plus VAT to Whirlpool. Subsequently, Whirlpool's claim was ceded to the applicant during 2019.

[3] On 20 November 2019 the respondent sent the applicant a letter giving a clear, unconditional and unequivocal undertaking to repay the applicant R750,000.00 (excluding VAT) by, on, or before 31 January 2020. On 28 January 2020 the respondent sent the applicant a letter wherein she apologised that she was unable to meet her financial commitments as she undertook to do "due to the fact that incoming funds that she was expecting and promised have been delayed". The applicant then engaged its attorneys to send a letter calling upon the respondent to effect payment, and stating that it would be prepared to indulge the respondent if the respondent would pay at least 25% (twenty-five percent) of the indebtedness by 31 January 2020 and the remaining 75% by the last day of February 2020.

[4] On 31 January 2020, the respondent sent a letter to the applicant stating plainly as follows: "I am not able to settle the amount by tomorrow or pay a 25% of the amount due to the fact that I will only be receiving funding the next two weeks or so." Yet again, the applicant, stated that it would indulge the respondent until the end of February 2020, by which date the applicant required payment in full. On 10 March 2020 the applicant's attorney again addressed a letter to the respondent stating that they had received an instruction to institute the present liquidation proceedings. In immediate response, by way of a letter thereto, on the same day, the respondent stated "I have every intention of honouring the agreement and only ask for a little extra time to make sure that funds were secured for payment." Subsequently, the applicant launched its motion on 24 March 2020.

[5] The applicant filed a supplementary affidavit in which it pointed out that Ms. Edith Maybel Venter ("Ms. Venter"), on the 13 July 2020, signed on behalf of the respondent, a Deed of Settlement. The respondent made payments to the applicant as follows in accordance with the deed of settlement: (a) R400 000,00 on 20 July 2020; (b) R115 625,00 on 31 August 2020; (c) R50 000,00 on 30 September 2020; and (d) R65 625,00 on 12 October 2020. No further payments were received from the

respondent in reduction of the debt. As such, the outstanding amount due to the applicant by the respondent is R231 250.00.

[6] The deed of settlement provided that an initial deposit, in terms of clause 4.1.1 of R400 000,00 (four hundred thousand rands) was to be paid on or before 20 July 2020. Four equal instalments of not less than R115 625,00 was payable on or before the last day of August 2020, September 2020, October 2020 and November 2020, in terms of clause 4.1.2.

[7] The interests and costs were payable, in terms of clause 4.1.3. by, on, or before 30 December 2020. The costs, in terms of clause 4.1.4 read with clause 2.5.1 of the Deed of Settlement was payable in the amount of R90 364,22 being the costs incurred up until 30 June 2020, and payable by, on, or before 30 December 2020. Any further costs incurred, from 30 June 2020, until date of finalization of this matter (''additional costs''), were to be paid within 14 days of the taxation or agreement of those additional costs, whichever was to be the sooner.

The respondent in this case made no allegation that it was either factually or commercially solvent. Most significantly, as previously mentioned, the underlying debt, giving rise to the application for the winding-up of the respondent, was not in dispute. Indeed, it was admitted by the respondent in the settlement agreement which it neglected or failed to honour. It has therefore failed to discharge the onus of demonstrating that its indebtedness to the applicant has indeed been disputed on *bona fide* and reasonable grounds. The applicant demonstrated satisfactorily that the respondent is *prima facie* indebted to it.

[15] From a joint practice note filed of record, the respondent continued to trade. This is amplified by an affidavit deposed to by a candidate attorney, Rall, of the applicant who attached a WinDeed Spider Report on the Respondent dated 24 January 2022. In the circumstances, it may indeed be in the interest of a *concursus creditorum* to grant a provisional winding-up order to be served on creditors and published accordingly. Upon reading and considering the affidavits and annexures thereto, and submissions by both parties with reference to relevant case law, I am satisfied that the applicant has made a *prima facie* case, at the very least, for the granting of a provisional order of winding-up of the respondent on the ground that the

respondent is unable to pay its debt. I find the issues raised by the respondent in opposing the claim of the applicant insufficient to constitute a *bona fide* dispute on reasonable grounds.

[16] The following order is made:

1. The respondent is hereby placed under provisional winding-up;

Servilor 70 CC t/a Tyrenology v Natcorp Specialised Logistics Solutions (Pty) Ltd (2021/3712) [2022] ZAGPJHC 80 (18 February 2022)

Winding-up application-unable to pay debts-granted

[1] This is a winding up application in terms of sections 344 (f) and 344(h) read with sections 345 and 346 of the Companies Act, 61 of 1973 ("the Old Companies Act") on the basis that the respondent is deemed unable to pay its debts, alternatively that it is just and equitable to do so.

[2] The facts are largely common cause. The applicant conducts business in wholesale and retail of tyres and tyre related products and 24-hour roadside assistance. On or about 2 August 2012 and at Boksburg, the applicant duly represented by a duly authorised representative and the respondent likewise represented by a duly authorised representative, entered into a credit facility agreement in terms of which the applicant supplied tyre and tyre related products as well as 24-hour mechanical breakdown and roadside assistance to the respondent at the latter's special instance and request during the period approximately March 2019 to February 2020, subject to the terms and conditions of the credit facility agreement. The credit facility agreement contains, inter alia; the following express terms and conditions: all amounts due by the respondent to the applicant will become due and payable within 30 (thirty) days from the date upon which the applicant generates its statement or invoice reflecting the amount due (in terms of Clause 1).

[3] In terms of clause 4 all goods, delivered and service rendered by the applicant (or its service providers, agents, employees, affiliates and assigns) will be deemed to have been correctly delivered and properly rendered free of defects or any problems whatsoever unless the applicant is notified in writing to the contrary by the respondent within 48 hours of the goods being delivered and the services rendered. Clause 5 made provision that the respondent will under no circumstances be entitled to withhold payment for goods received from the applicant pending the resolution of any dispute or complaint whatsoever.

[4] On the applicant's version, the respondent fell into arrears with its payment obligations having made only sporadic and small payments. As at 31 October 2020 the respondent was indebted to the applicant in the amount of R308 097.32. On the applicant's version, the respondent's promises of payment commenced as far back as January 2020 when the applicant began enquiring when payment would be made. For the month of January 2020 alone, 4 promises of payment were made (per email Annexures FA4.1 — FA7.3 respectively.) From Annexures FA6.2 and FA7.2, the respondent admits in writing that it does not have the money available to pay the applicant the amounts that are due and owing to the applicant and that payment would be made as soon as monies reflect in the respondent's bank account. On 7 April 2020 the respondent also admitted its indebtedness to the applicant by presenting the applicant with a reconciliation of the amounts due and owing to the applicant in the amount of R458 923.99. (as per email Annexure FA11).

[5] On or about the 24th day of November 2020, the applicant caused a letter of demand in terms of Section 345 of the old Companies Act, 61 of 1973, to be served via the sheriff at the registered address of the respondent. Subsequent to the service of the Section 345 Notice on the respondent and on 31 December 2020, the respondent through its attorneys of record, directed a letter to the applicant's attorneys of record alleging that various invoices have been placed in dispute and denying that the respondent is indebted to the applicant as claimed.

[6] On 7 January 2021 the applicant's attorneys of record responded to the abovementioned letter, pointing out to the respondent's attorneys of record, amongst others, that the applicant denies that there is any dispute regarding invoicing that numerous promises of payment were made by the respondent and no form of dispute was ever raised in such correspondence; that the respondent admitted indebtedness

to the applicant during April 2020 in the amount of R458 923.99 and that the respondent is clearly trading in insolvent circumstances as it is unable to pay its debts. (as per Annexure "FA15".). There was no response to the applicant's letter.

[7] In its answering affidavit, the respondent denied that it is trading in insolvent circumstances. It denied that the respondent is indebted to the applicant for the amounts claimed, but R202 830.27', as the rest was disputed. The respondent alleged, without more, further that during lockdown from March 2020 until May 2020 and beyond no businesses were generating an income and any debtors owed to any company were not being paid.

It is trite that winding-up proceedings are not to be used to enforce payment of a debt that is disputed on bona fide and reasonable grounds**[2]** This is known as the so-called "Badenhorst Rule". Where, however, the respondent's indebtedness has, prima facie, been established, the onus is on it to show that this indebtedness is indeed disputed on bona fide and reasonable grounds.**[3]**

[11] Ordinarily, an unpaid creditor has a right, ex debito justitiae, to a winding-up order against the respondent company that has not discharged that debt**[4]**. A correct statement of the law is, once the applicant has demonstrated that the respondent was prima facie indebted to it, it was for the respondent to establish that it disputed that indebtedness on bona fide and reasonable grounds.

[12] Most significantly, the underlying debt, giving rise to the application for the winding-up of the respondent, was not seriously put in dispute. Indeed, it was admitted by the respondent in the answering affidavit albeit for a lesser amount. The respondent has therefore failed to discharge the onus of demonstrating that its indebtedness to the applicant has indeed been disputed on bona fide and reasonable grounds.

[13] The applicant demonstrated satisfactorily that the respondent is prima facie indebted to it. In the circumstances, it may indeed be in the interest of a *concursus creditorum* to grant a provisional winding-up order to be served on creditors and

published accordingly. Upon reading and considering the affidavits and annexures thereto, and submissions by both parties with reference to relevant case law.

[14] Accordingly, I am satisfied that the applicant has made a prima facie case, at the very least, for the granting of a provisional order of winding-up of the respondent on the ground that the respondent is unable to pay its debt. I find the issues raised by the respondent in opposing the claim of the applicant insufficient to constitute a bona fide dispute on reasonable grounds.

[15] The following order is made:

15.1 The respondent is hereby placed under provisional winding-up

CAWOOD N.O. v MURRAY N.O. and others Case Number: A127/19 Gauteng Division Pretoria

Business rescue-fees of BRP-possible but not in casu

[1] This appeal raises the central question of whether a court can make an order of forfeiture of a business rescue practitioner's fees in appropriate circumstances. This is not a question that has been previously decided.

[2] The question arose when the business rescue practitioners 'BRP's appointed for two

companies, Phehla Umsebenzi Trading 48 CC (Phehla) and Tiar Construction CC (Tiar), applied in terms of section 141(2)(a)(ii) of the Companies Act, 71 of 2008, (the Act) to discontinue the business rescue proceedings and place the company into liquidation.

Litigation History

[3] The appellant (Cawood) and the fifth respondent (Beer) are the business rescue practitioners in question. The first to third respondents are the liquidators who were appointed following the order of the court a quo.

[4] The applications were brought separately but were consolidated for the purpose of

hearing. The fourth respondent the Commissioner for the South African Revenue Service, (hereinafter referred to as SARS) applied and was given leave to intervene in the proceedings. SARS opposed the relief to convert the business rescue process to liquidation. Nevertheless, it brought a counterclaim that also sought to place the companies in liquidation. The difference between the BRP's relief and that of SARS, is that SARS also sought an order setting aside the resolution that placed the companies in business rescue and an order declaring the BRP's were not entitled to fees. The court a quo awarded the SARS relief and refused the BRP's relief.

[5] Effectively both sets of relief place the companies into liquidation although by different means. The real dispute is over the forfeiture of the fees. That dispute in turn can be broken down further into two aspects: the courts competence to make such an order and, assuming it does, whether such an order is justified on the present facts.

[6] The court a quo refused leave to appeal but the BRP's then successfully petitioned the Supreme Court of Appeal (SCA) which then ordered the matter to be heard by a full bench of this division, hence the current appeal.

Background

[7] It is common cause that Phehla and Tiar are related parties. Within a few days of one another the members placed the two firms in business rescue and Cawood and

Beer were appointed as the business rescue practitioners of both firms. Both resolutions to commence business rescue were taken by the companies on 28th May 2013, and Cawood and Beer were appointed as their BRP's by the CIPC on 3 June 2013.

[8] The business rescue process continued until 29 November 2013, when, at the same time, but in separate applications, the BRP's applied in terms of section 141(2)(a)(ii) of the Act read with section 81(4)(a), to have the business rescue process terminated and for the companies to be placed in liquidation.

[9] These applications were brought almost 2 ½ years after the BRP's were first appointed.

[10] The basis for the applications was that following a longstanding dispute with SARS over outstanding tax liability (for both VAT and income tax) SARS had conducted an audit after which, it in 2015, issued what are termed letters of finding, resulting in huge tax liabilities for both companies.

[11] By way of illustration, in the case of Tiar, the tax liability for VAT for the period of 2009 - 2011 was R21 391 237.00, but SARs also levied an understatement penalty of R 42 782.474.00. The income tax liability was R 40 079 989.00 and SARS levied an understatement penalty of R 80 159 978.00.

[12] But the BRP's say that in their preliminary business plan for Tiar they had expected a SARS claim in the region of R 800 000. In the case of Phehla the outstanding tax liability was set at R 47 million rand.

[13] Both firms were engaged in the construction industry and were largely dependent on winning public sector tenders for which a tax compliance certificate was required.

As a result of these unresolved tax liabilities the BRP's brought an application for the

winding up of each of the companies in November 2015. SARS then applied to intervene in the matters and brought its counter applications in May 2016.

[14] The BRP's argued that SARS' counter applications to liquidate were bad in law because their applications to convert were already pending. They contend that SARS' applications were only brought in this manner in order for it to be able to claim back the BRP's fees.

[15] They complain that what SARS should have done was to bring proceedings in terms of section 139(2) of the Act. Briefly put that section allows an affected person (which SARS is as a creditor) to bring an application to remove a business practitioner. But, they argue, instead of doing so SARS had for several months participated in the business rescue process including attending meetings with them.

[16] SARS' reason for opposing the application and its counterapplication is driven by two considerations – that from the outset business rescue should not have been embarked on as the companies were hopelessly insolvent and second, that the BRP's had colluded with the members of the company to prolong the business rescue process.

[17] SARS highlights the fact that both companies had in their annual financial statements (drawn up by the same firm of accountants) reflected large sums as loans. But it contended, these loans were not genuine transactions and were made to related parties without provision for interest payments. By way of example. in 2012 Phehla had loans to related parties of R 90 million and Tiar R115 million.

[18] Yet later, when it suited the companies, and which the BRP's accepted, these were treated as dividend payments, despite the fact that no Secondary Tax on

Companies (STC) had been paid in respect of them.

[19] SARS contends that the BRP's should have been aware from the outset that the loans were not genuine transactions. At least two of the entities which had received loans were no longer trading. The BRPs took no steps to recover these amounts. Moreover, the BRP's apparent justification for the business rescue – that if the companies could settle their tax affairs with SARS, they could get tax certificates and commence trading again, was specious given the size of their tax bill.

[20] SARS is not certain how much the BRP's have earned from the two firms in fees but based on the one monthly fee it was aware of, which was R 40 000 for the one firm, it estimates that for both, the BRP's had most likely earned R2.4 million over the period. (30 months x R80 000).

[21] SARS concludes that the companies were never candidates for business rescue. The reason they were was because of collusion between the BRP's and the members of the companies. SARS contended that the likely purpose of the business rescue proceedings was "…probably to get rid of the SARS claim."

[22] SARS argues that if the BRP's had properly discharged their functions, they would have on reading the annual financial statements then extant, have called up the loans to satisfy the claims of creditors, but they made no attempt to do so.

[23] As SARS' deponent put it in the one affidavit, "It would appear that their duty to act honestly towards the court and strictly in the best interests of their client was sacrificed on the altar of personal enrichment."

[24] SARS argued that the court should show its disapproval of this conduct by

disallowing the BRP's fees.

[25] The BRP's countered by saying that they did not initially know that some of the entities to whom the loans had been extended were not trading as they did not have access to this type of information. They accuse SARS of not sharing its intelligence with them that these loans were with related parties. They also blame SARS for not providing certainty on the tax liability until early 2015. They contend that until then they had an expectation that they could settle the tax liability with SARS relying on a provision in the Income Tax Act, relating to business rescue. With that done the companies could get their clearance certificates and resume trading, which they anticipated they would be able to, given their good reputation with their public sector client base.

[26] The court a quo did not accept these explanations from the BRP's. The court held:

[27] "The conclusion is inescapable that the applicants failed to fulfil their functions as

business rescue practitioners as set out in the Companies Act. I am of the view that a case for the setting aside of the resolutions has been made and that the applicants conduct is worthy of censure."

[28] The court went on to discuss whether in the light of this conclusion the practitioners were entitled to their fees:

[29] "I am troubled by the fact that the application is brought years after the business rescue practitioners were appointed. This means possibly large fees have been earned and large disbursements have been Incurred. Business rescue practitioners

who do not perform In accordance what their appointment demands, have only themselves to blame when caught out. The flaccid approach which they opted for is to the detriment of the general body of creditors as well as shareholders. The court must show its disapproval through the fees they earned and stood to earn."

[30] The court ordered that they were not entitled to the fees that they had earned.

[31] The learned judge did not set out the legal basis for why the court had such a power in his original decision. But in the judgment in respect of the application for leave to appeal, he developed this further saying the court had an inherent power to do so. As his authority he cited the Supreme Court of Appeal's (SCA) decision in the case of Diener N.O. v Minister of Justice and Others.1 There the court had to decide whether BRP's fees were entitled to a preference on their remuneration. The SCA held they were not. Although the learned judge acknowledged that the judgment was not directly in point, he relied on it as authority for the proposition:

"to demonstrate that the business rescue's remuneration is not beyond the reach of the court as argued before me."

Arguments on [60] The court's power to convert a business rescue process to liquidation is derived from sub-section 141(2)(a)(ii) of the Act. But this provision must be read with subsection 141(3), which gives the court an additional residual power when considering such an application. In terms of section 141(3):

"A court to which an application has been made in terms of sub-section 2(a)(ii) may make the order applied for, or any other order that the court considers appropriate in the circumstances."

[61] The argument then is that the residual power set out in this subsection, the power to give "any other order," is wide enough for a court to order that a BRP must

repay its fees. But this reads too much into this residual power. The residual power is principally dealing with a situation where the court decides not to convert a business rescue into a liquidation. Otherwise, there might be a lacuna. It could of course be given a wider reading to include a condition attached to the conversion order. But even if that reading is possible, given the way it is drafted, it would be going too far to hold that it includes the power to order a repayment of the BRP's fees.

[62] This does not mean that the conduct cannot be remedied. In terms of section 140(3)(c): "During a company's business rescue process proceedings, the practitioner –

…

(c) other than as contemplated in (b) –

(i) ….

(ii) may be held liable in accordance with any relevant law for the consequences of any act or omission amounting to gross negligence in the exercise of the powers and performance of the functions of the practitioner."

[63] I accept that the standard of gross negligence is not one that is easy to establish. In the Diener case, when it got to the Constitutional Court, Khampepe J remarked:

"It was argued that there are sufficient mechanisms to hold practitioners accountable for incurring fees where there is little chance of the business being rescued. These mechanisms do exist, for example in sections 138 to 141 of the Companies Act. Furthermore, practitioners have the same fiduciary duty to the

company as a director. If they do not exercise their duty properly, they can be removed and held liable for fruitless expenses. However, it must be noted that the standard of gross negligence is a high one and in cases where there is good faith the courts have been reluctant to find that practitioners should be held liable for fruitless expenses." 8

[64] Nevertheless, whilst I accept the correctness of this observation, it does not follow that because recovery may prove difficult that a wider interpretation must be given to the either the court's inherent power or the residual power in section 143(2).

[65] In the same case Diener, both the SCA and the Constitutional Court made decisions about the rights of preference of BRPs' to their fees in cases where the company in question is liquidated. The cases resolve the question by looking at the

Diener N.O. v Minister of Justice and Correctional Services and Others 2019 (4) SA 374 (CC), paragraph 61, interface between the Insolvency Act and the Companies Act. The SCA decision holds that on liquidation, the fees of a BRP become akin to those of a creditor requiring them to be proved as claims in contradistinction to those of a liquidator which do not.

[66] There is no suggestion in either decision that the payment of these fees is subject to some prior inherent power of the court. Rather they are considered the business of the liquidator.

[67] Whilst I accept the cases are not directly in point, they do illustrate that the fees issue is capable of a solution that does not require the invocation of the inherent power of the court.

Remaining relief appealed against.

[68] This then leaves the remaining relief. The court a quo ordered that the resolution

of the companies to place the firms under business rescue should be set aside. However, there is insufficient evidence in the record to justify this. Accordingly, this aspect of the court a quo's order must be set aside.

[69] There is also something irregular, as was argued by the BRP's, for SARS to oppose the conversion to liquidation but at the same time, in their counterclaim, to seek liquidation. This it seems was relief premised on denying the BRP's their fees using another mechanism. However, at best for SARS on this record there is a case for a fee reduction not for setting aside the resolution nor for opposing conversion given both parties wanted the same endpoint namely liquidation. SARS approach in this respect just introduced confusion.

[70] This order too is set aside.

[71] The appellants have made it clear in their practice note that they do not seek to set aside the order of liquidation, and this is left undisturbed. Thus the order placing the firms in final liquidation stands with effect from the date of the court a quo's order namely 6 June 2018.

Costs

[72] Costs must follow cause. The appellant is entitled to his costs.

ORDER

The following order is granted:

Case No.: 93289/2615 (Tiar Construction CC (in business rescue))11

1. The following paragraphs in the order of the court a quo are set aside:

1.1. Paragraph 2, dismissing the application to convert the business rescue proceedings to liquidation;

1.2. Paragraph 3, setting aside the resolution to place the respondent under

business rescue;

1.3. Paragraph 4, declaring that the applicants in the court a quo (the BRP's)

are not entitled to their fees earned during the business rescue process.

2. The remaining paragraphs of the order of the court a quo are confirmed.

3. SARS is liable for applicant's costs including the costs of the application for

leave to appeal in the court a quo and in the Supreme Court of Appeal.

Case No.: 93289/2015 (Phehla Umsebenzi Trading 48 CC (in business rescue))

1. The following paragraphs in the order of the court a quo are set aside:

1.1. Paragraph 2, dismissing the application to convert the business rescue

proceedings to liquidation;

10 See Case Lines 030-9 where counsel for the appellant states in his practice note: "The Appellant

appeals the whole of the judgement, safe(sic) the liquidation order. Leave to appeal was granted by the

SCA under case number 012/2019 and 023/2019, the court a quo having denied the initial application for

such leave to appeal."

11 The court a quo, granted separate orders in respect of each application for conversion.

1.2. Paragraph 3, setting aside the resolution to place the respondent under

business rescue;

1.3. Paragraph 4, declaring that the applicants in the court a quo (the BRP's)

are not entitled to their fees earned during the business rescue process.

2. The remaining paragraphs of the order of the court a quo are confirmed.

3. SARS is liable for applicant's costs including the costs of the application for

leave to appeal in the court a quo and in the Supreme Court of Appeal.

Gore and another v Ward and another [2022] JOL 52068 (WCC)

Impeachable transactions-fraudulent acts done in name of company and dispositions without value

As liquidators of a company, the applicants sought the setting aside of payments of R250 000 made to each of the respondents; alternatively, for a declaration that the payments were made sine causa.

Binns-Ward, J explains that a company is treated as the principal in relation to actions undertaken in its name and on its behalf and the persons acting for it as its agents [para 25]; and considers where loss should fall where agent acts dishonestly in name of company. Issue of authority, and nature of dispositions without value discussed.

Payments set aside as dispositions without value in terms of section 26 of the Insolvency Act 24 of 1936.

DE BRUYN v STEINHOFF INTERNATIONAL HOLDINGS NV AND OTHERS 2022 (1) SA 442 (GJ)

Company — Directors and officers — Directors — Liability — To shareholders for breach of duties under Companies Act — Section 218(2) not imposing general liability — Shareholders must prove breach of duty under substantive provision of Act — Section not imposing common-law liability for such breach — Companies Act 71 of 2008, s 218(2).

Company — Shares and shareholders — Shareholders — Proceedings by and against — Action under common law against directors for breach of duty resulting in drop in value of shares — Directors liable to company, not shareholders — In absence

of special relationship between shareholder and company, directors not liable to shareholders or prospective shareholders for loss in share value.

On 5 December 2017 the value of shares in the Steinhoff companies * crashed after Steinhoff issued a press release disclosing accounting irregularities. The applicant (De Bruyn), a Steinhoff shareholder, sought authorisation to institute a class action on behalf of various groups of Steinhoff shareholders. The respondents opposed certification on several grounds.

In the class action De Bruyn intended holding the Steinhoff companies, their directors and their auditors, Deloitte (who allegedly failed to conduct a proper audit), liable for the shareholders' losses caused by the fall in value of their shares. ‡ De Bruyn's application was the first shareholder class action brought for certification in South Africa. The parties disagreed, inter alia, on the proper way to decide whether a triable issue was raised; the sufficiency of the class definitions proposed by De Bruyn; whether De Bruyn was a suitable representative plaintiff; the acceptability of the third-party funding arrangements; ‡ and, crucially, whether the proposed class action indeed raised triable issues.

De Bruyn alleged (i) that the directors had incurred *common-law delictual liability* by breaching their duty of care to shareholders by making loss-causing negligent misstatements in the companies' financials; and (ii) that the directors and Deloitte had incurred *statutory liability* to shareholders by breaching various provisions of the Companies Act 71 of 2008 (the Act), including s 22 (reckless trading), ss 28 – 30 (financial information), and s 76 (directors' standards of conduct).

De Bruyn's statutory claims were based principally on (i) s 218(2) of the Act, which provides that '(a)ny person who contravenes any provision of [the Act] is liable to any other person for any loss or damage suffered by that person as a result of that contravention'; and (ii) s 20(6) of the Act, which confers on each shareholder a claim for damages against 'anyone' who 'intentionally, fraudulently or due to gross negligence' causes the company to do anything inconsistent with the Act or ultra vires the powers of the company.

The claims against Deloitte were also based on both common law and statute. De Bruyn claimed that Deloitte owed shareholders a common-law duty of care not to make negligent misstatements causing loss, while the statutory claim was based on

s 46(3) of the Auditing Profession Act 26 of 2005 (APA), which provides that auditors incur liability to third parties who relied to their detriment on financial statements maliciously, fraudulently of negligently made by the auditors.

Held

Triable issue?

The common-law claims: Liability for negligent misstatements causing pure economic loss required proof of wrongfulness in the sense of an infringement of a right or legally recognised interest. Directors owed their fiduciary duties to the company, not the shareholders, except where there was a special relationship between directors and shareholders (see [134] – [141], [151]). Since no such relationship was pleaded, there was no foundation for the proposition the Steinhoff directors owed a fiduciary duty to the shareholders or prospective shareholders (see [143] – [146]). Given that the requirement of wrongfulness was thus absent, there was no cognisable common-law claim in delict against the directors (see [160]). As to Deloitte, it owed its duty of care to the company, not its shareholders (see [167]).

The statutory claims: Section 218(2) should not be interpreted literally but to chime with the common law and the limitations it imposed on liability. The specific requirements of liability under s 218(2) resided in the substantive provisions of the Act. Since the common law did not hold that company directors owed fiduciary duties to shareholders, the specific contraventions of the Act relied on by De Bruyn did not accord the shareholders a right of action against Steinhoff or the directors. (See [186] – [203].)

Section 20(6) imposed liability on persons who caused the company to act (in particular, its directors), and not on the company itself. It would be discordant with the common law and the rest of s 20 if s 20(6) were to be interpreted to provide shareholders with a claim for pure economic loss caused by the actions of directors. Properly interpreted, s 20(6) required those who caused the company to act ultra vires or unlawfully to make good *to the company*, not its shareholders, the loss caused. In casu, therefore, the shareholders had no claim under s 20(6) for losses suffered because of the conduct of Steinhoff or its directors. (See [225], [230], [232], [236], [246].)

The common-law claim against Deloitte: Since the duty of care of auditors was owed to the company, not its shareholders, the pleadings failed to disclose a common-law cause of action against Deloitte. There was no proximate or special relationship that

would extend to any subset of shareholders a duty of care owed by Deloitte. (See [172], [174].)

The statutory claims against Deloitte: The problem here was that De Bruyn did not plead causation in the form of detrimental reliance required by APA, s 46(3): instead, she relied on the allegation that class members bought shares at inflated prices or held on to shares because of their inflated prices. That being the case, the particulars did not disclose a cause of action against Deloitte. (See [250] – [251], [256].)

Other matters

Certification of class action based on novel point of law: Whether a triable issue was raised was best assessed by the certification court itself on the standard of whether the proposed cause of action was tenable in law. This in turn would be important in deciding whether there were triable issues that warranted a class action. (See [18] – [19].)

Class commonality: Class definition should permit class membership to be determined by recourse to objective criteria. The revised class definitions proposed by De Bruyn adequately cured the concerns raised by the respondents. Despite the multiplicity of claims against different defendants, there was sufficient class commonality for the purposes of certification. (See [27], [37], [45], [257] – [274], [293].)

Suitable representative: While De Bruyn lacked the technical expertise required of an optimal class representative, she was nevertheless a Steinhoff shareholder who had suffered a loss reflecting an identity of interest with the proposed classes she intended to represent. Even in complex cases, ordinary litigants, properly guided by their legal representatives, could make decisions in their own interests and those of their class. While not ideal, De Bruyn was a suitable representative for the proposed classes. (See [61], [64], [291].)

Funding arrangements: The requirements for the acceptance of the third-party funding arrangements were that they (i) were necessary to provide access to justice; (ii) fair and reasonable; (iii) would not overcompensate the funders; (iv) would not interfere with the duty of the class lawyers to act in the best interests of their clients; and (v) would enable class representatives to exercise control over the litigation in the best interests of class members. Here the proposed funding arrangements, being

fair, reasonable and in the interests of justice, ought to be permitted to support the proposed class action. (See [80, [83], [86] – [87], [120].)

In closing, the court pointed out that while there was much to be said in favour of the certification of a class action to compensate buyers of Steinhoff shares that suffered losses, the fact that none of the component parts of the proposed cause of action against the Steinhoff companies, their directors or Deloitte had any basis in law meant that there was nothing to take to trial. Without a cause of action, the application for certification would fail. This did not, however, mean that the shareholders had no remedy: it was for the Steinhoff companies to hold the directors and Deloitte liable for loss resulting from the breach of their duties to the companies, and if they reneged, the shareholders could compel them to act by invoking s 165 of the Act. (See [288] – [289], [298] – [301].)

Department of Agriculture, Forestry and Fisheries and another v B Xulu and Partners Incorporated and others [2022] 1 All SA 434 (WCC)

Piercing the corporate veil – Section 20(9) of the Companies Act 71 of 2008 providing statutory basis for piercing the corporate veil, requiring an unconscionable abuse of the company's juristic personality – Where controller of company uses company for improper purpose, and in that process, treats the entity such that there is no distinction between the separate juristic personality of the entity and those controlling it, that would constitute the required unconscionable abuse.

The first respondent ("BXI") was a firm of attorneys, whose principal member was the fifth respondent ("BX"). Protracted litigation between the applicants and BXI resulted in a judgment in which BXI and BX were held jointly liable to repay over R20m to the applicants, from whose bank accounts the money had been taken. In the wake of that judgment, BX contested his liability to pay the money jointly and severally with BXI.

Held – The fact that BX was the sole director of BXI did not inevitably lead to a piercing of the corporate veil and holding him jointly and severally liable. Lifting the corporate veil entails ignoring the distinction between the company and the natural person behind it, and will happen where it is shown that the natural person has abused the corporate personality of the corporate entity. Section 20(9) of the Companies Act 71 of 2008 is the statutory basis for piercing the corporate veil, requiring an unconscionable abuse of the company's juristic personality. It broadens the basis on

which relief may be granted, so courts will now resort to the remedy where justice requires it and not just where there is no alternative remedy.

Case law shows that where controllers of companies use the companies for improper purpose, and in that process, treat the entity such that there is no distinction between the separate juristic personality of the entity and those controlling it, that would constitute the required unconscionable abuse.

Applying the above principles to the facts of the case at hand, the court found the conduct of BX to satisfy all the requirements for piercing the corporate veil and holding him jointly and severally liable with BXI. The facts showed that he had, under guise of settling BXI's liabilities, appropriated funds from BXI, channelling it to himself, friends, family and entities under his control. In application of the alter ego doctrine, the court found that BX acted not as agent of BXI, but as the company's actual persona. A proper case had thus been made for piercing the corporate veil and for holding BX jointly and severally liable with BXI or repayment of the funds. The Court found further that BX acted wrongfully, with the requisite *dolus*, to warrant being held personally liable with BXI under the *actio ad exhibendum*.

Setting out the principles applicable to applications for joinder, the court also ordered that the sixth to ninth respondents be joined as parties to the proceedings. The fifth to seventh respondents were held jointly and severally liable with BXI for payment of the money to the second applicant.

Ragavan and others v Optimum Coal Terminal (Pty) Ltd and others [2022] JOL 52124 (GJ)

Business rescue: who has the right to vote at a section 151(1) meeting where a business rescue plan is to be considered

The applicants were the directors of Tegeta Exploration and Resources, a creditor of Optimum Coal Terminal (OCT). Both companies were in business rescue. Applicants sought a declarator that they, instead of OCT's business rescue practitioners, should vote on behalf of OCT at any meeting of creditors in terms of section 151(1) of the Companies Act 71 of 2008.

Victor, J highlights "tension between Directors who still want to be in control and view matters subjectively and the BRPs who have a more holistic view of what is good for

the Company in business rescue and want to do things their way and are armed with statutory powers" [para 3].

Court describes objective of business rescue as set out in section 128(1)(b) of the Act [para 5]; source of directors' powers, and their limitations as defined in Chapter 6 of the Act, relating to business rescue; and business rescue practitioners' powers as set out in sections 137 and 140. Act found to give business rescue practitioners full management control. Application dismissed.

END-FOR -NOW