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It is Ordered:

1. The First Respondent is placed in final winding up in the hands of the Master of the High Court.

2. The Second Respondent personally *(de bonis propriis*) is ordered to pay the costs of the application from 5 March 2021 to date of judgment on the scale as between attorney and client save as set out in 3 below.

3. The Second Respondent personally *(de bonis propriis)* and the intervening party is ordered, jointly and severally, the one paying the other to be absolved, to pay the costs for 23 and 24 February 2022 on the scale as between attorney and client.

4. Save as set out in paragraphs 2 and 3 above and not already provided for in the court orders granted on 4 May 2018 and 4 March 2021, all costs are to be costs in the liquidation.

1. The applicant ('SARS') seeks an order for the final winding up the First Respondent, Louis Pasteur Investments (Pty) Ltd ('LPI'). It is not disputed that LPI is presently insolvent and unable to pay its debts. This notwithstanding, this Court was also called upon to decide an application for intervention, an application for rescission of the order converting the business rescue proceedings into liquidation proceedings and also the discharge of the provisional winding up order.

2. During June 2012, LPI was placed in business rescue**[1]** and a formal business rescue plan adopted on 15 November 2012. From this date onwards, the Fourth Respondent ('Mr. Naude') the business rescue practitioner, proceeded with the business rescue. It is a particular feature of business rescue proceedings that for so long as those proceedings endure, there is, in terms of section 133(1) of the Act, a general moratorium on all legal proceedings.

3. Notwithstanding the general moratorium, various legal actions were brought against LPI by secured creditors, being mainly commercial banks in whose favour mortgage bonds had been registered over immovable properties owned by LPI.

4. In each instance where there were such proceedings, Mr. Naude was able to take steps to settle the liabilities and the litigation. The present application was brought on 20 February 2017, 5 years into the business rescue plan. SARS brought the application in 2 parts and initially sought leave to serve the application by way of substituted service on all the affected persons**[2]** and having obtained an order on 4 May 2018, served on the affected parties and then proceeded to set the matter down for an order converting the business rescue to liquidation proceedings and for the winding up of LPI.

5. On 16 October 2018, a few months after the order authorizing service on the affected parties was granted, Mr. Naude resigned as the business rescue practitioner of LPI. His resignation had as its direct consequence, a delay in the proceedings.

6. Although Mr. Naude had resigned as business rescue practitioner on 16 October 2018, it was not until 11 February 2019 that the board of directors of LPI had resolved to appoint the Second Respondent ('Mr. Prakke') as business rescue practitioner - this notwithstanding the fact that he was not an accredited business rescue practitioner at the time.

The present application is now in its 5th year from the time that it was instituted. After the granting of the order on 4 May 2018 and Mr. Naude's resignation on 16 October 2018, there ensued a number of entirely avoidable delays before the hearing of the application in October 2020. These delays are not germane to the present matter save that bears mentioning that Mr. Prakke's appointment and investigation and delay in reporting to the court contributed significantly to this.

90. Despite having investigated and initially correctly identified that:

90.1 the business rescue plan was nothing more than a sham**[41]**

90.2 designed or at the very least in effect perpetuated so as to keep creditors at bay; and

90.3 to allow the former director a free hand to continue to use LPI and its funds for his own benefit and for the benefit of members of his family,

He then, rather than making common cause with the order sought by SARS, made a volte face and chose to oppose the granting of a final winding up order**[42]**.

91. The opposition was ill considered and deliberate in flagrant disregard of his obligations. The eleventh-hour application for intervention by Ms. Mia and the spurious basis on which it was made make it clear that it was contrived and designed to put the creditors and in particular SARS to unnecessary and costly further litigation.

92. In so doing, many hundreds of pages of affidavits and annexures (many of which were already before the court) were filed. They contained circuitous and repetitious argument, with no substantive basis, the tenor of which that SARS was bringing the application in a ‘predatory’ fashion and in order to steal a preference was made.

93. This served no purpose other than to burden the papers to such an extent that the application could not be heard on the ordinary opposed

motion roll but had to be set down for hearing as a special motion – causing a further delay. All of this has as its consequence substantial and additional unnecessary costs to SARS and LPI while Mr. Prakke stands behind the statutory preference**[43]** for payment of his own remuneration and expenses.

94. The way in which Mr. Prakke, after he had reported to the court the state of the affairs of LPI, conducted himself was neither *bona fide* nor reasonable**[44]**.

95. The Supreme Court of Appeal**[45]** held in circumstances similar to the present case that:

'All of that constituted an abuse of the process of the court and an abuse of the business rescue procedure. It has repeatedly been stressed that business rescue exits 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 I will lead to creditors receiving an enhanced dividend. Its use to delay a winding-up, or to afford an opportunity to those who were behind its business operations not to account for their stewardship, 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 order is appropriate.'

96. In the circumstances, I make the following orders: -

96.1 The First Respondent is placed in final winding up in the hands of the Master of the High Court.

96.2 The Second Respondent personally *(de bonis propriis*) is ordered to pay the costs of the application from 5 March 2021

to date of judgment on the scale as between attorney and client save as set out in 96.3 below.

96.3 The Second Respondent personally *(de bonis propriis)* and the intervening party is ordered, jointly and severally, the one paying the other to be absolved, to pay the costs for 23 and 24 February 2022 on the scale as between attorney and client.

96.4 Save as set out in paragraphs 96.2 and 96.3 above and not already provided for in the court orders granted on 4 May 2018 and 4 March 2021, all costs are to be costs in the liquidation.

QS Online (Pty) Ltd v Minister of Public Works (24718/2021) [2022] ZAGPPHC 236 (13 April 2022)

Company-liquidated-former director changes name to carry on-fraudulent

[1] This opposed application was initially set down for hearing in the Urgent Court where it was struck from the roll for lack of urgency on the 20 July 2021.

[2] At the heart of the dispute between the parties is the ownership of certain literary work that was created by the Applicant, a company the Respondent had perceived to be Ramabodu and Associates (R & A) whom the Respondent had appointed to the panel of its service providers on 11 February 2008 and 21 February 2011, (Annexures ‘’DPW1.2’’ and ‘’DPW1.2’’), for the construction of an abattoire and a prison. The terms and conditions of the appointment were set out in the letter of appointment which the deponent to the founding affidavit and sole member of (R & A) had agreed to and signed. Amongst the terms and conditions was a clause that upon the completion of the projects, the copyright to the literary work shall vest in the Respondent and may be used by the Respondent in other projects of the Respondent even when the Applicant was not involved therein.

[3] On the 22 February 2013 the Applicant wrote to the Respondent advising that it had changed its name from Ramabodu and Associates (‘’R & A’’) to QS Online

(Pty)Ltd (‘’QSO’’) and that it would thenceforth operate under that name (‘’Annexure DPW3’’). The Respondent took no exception and assumed that by the change of name, the Applicant was assuming the obligations set out in the letter of appointment. No formalities were followed consequent to the change of name. The deponent to the founding affidavit, Mr Ramabodu is a qualified and registered Quantity Surveyor and presently the sole shareholder and director of the Applicant.

[4] During the period February 2017 to October 2019 the Applicant rendered the services referred to in paragraph 2 which required the creation of the literary work in dispute. Mr Ramabodu created the original work and registered a copyright thereon which he subsequently assigned to and in favour of the Applicant, thus the latter became the proprietor of that copyright**.** The copyright remains extant.

[5] The literary work entailed the;

5.1 preparation of the tender documents for the Grootvlei Abbatoir Chicken project;

5.2 preparation of the Bill of Quantities (for building work, electrical and mechanical work) for stage 3 of the Abbatoir chicken project, and,

5.3 preparation of the elemental estimate for stage 4 of the Kagisanong Police Station project.

[6] R & A was liquidated in 2015, that is, two years after its appointment but before it was assigned to do the work. The liquidation of R & A was conveyed to the Respondent in an email sent by IDT, who had investigated and established that QSO was not in the panel that had been appointed to the Respondent (Annexure ‘’DPW4). The Respondent concluded that the appointment of Ramabodu had terminated upon its liquidation.

[7] The Respondent further alleges that at this stage it had paid for all the services that had been rendered by the Applicant. The Respondent wrote to the Applicant on 28 September 2020, (Annexure ‘’DPW7’’), advising it that it was not prepared to continue working with the Applicant as a result of the misrepresentation.

The Applicant’s failure to disclose the liquidation of R & A and, instead allege a change of name from R &A to QSO was a calculated misrepresentation by Mr Ramabodu to fraudulently render the services to the Respondent on the basis of the contract between R & A and the Respondent. The possibility that R & A was going through liquidation at the time advice of the purported change of name was given cannot be excluded. What the facts clearly establish is that R & A had long been liquidated and, therefore, non – existent when the tenders for the two projects were awarded. The Applicant /Mr Ramabodu, fraudulently exploited the circumstances to benefit the Applicant and now seek to disavow its misrepresentation by admitting that there was no contract between the Applicant and the Respondent.

Mercantile Bank Limited v MMR (MBR intervening) (2020/19791) [2022] ZAGPJHC 199 (5 April 2022)

Sequestration-intervening creditor-when can a creditor intervene

1. In this application, the intervening party, who is the ex-wife of the respondent, seeks leave to intervene in the main sequestration application brought by the applicant against the respondent, in order to oppose the grant of a final order.

2. On 13 August 2021, the respondent’s estate was provisionally sequestrated by order of court, per the judgment of Weiner J. **[1]** The learned Judge found, amongst others, that that the applicant had *prima facie* proven the requirements for the grant of a provisional sequestration order, *inter alia,* the indebtedness owed to it by the respondent; the act of insolvency committed by the respondent; and the requirement of advantage to creditors, such as to justify the grant of a provisional order. A rule nisi was granted, returnable on a specified date, for a hearing to determine whether a final order should be granted.

3. In the main application, as is apparent from the judgment of Weiner J, the applicant relies on the fact that the respondent committed an act of insolvency in terms

of s 8(c) of the Insolvency Act, in that he disposed of his immovable property (referred to in the papers as 'the Gallo Manor property') to the prejudice of his creditors, at a time when he was insolvent. The applicant has also alleged that the respondent is factually insolvent.

4. It is not in dispute that the Gallo Manor property was transferred by the respondent to his then wife (the intervening creditor) in settlement of the latter's claim for maintenance, including a proprietary claim in terms of s7(3) of the Divorce Act, pursuant to an action for divorce between the respondent and his then wife, instituted on 11 November 2019. On 22 January 2020, the court granted a decree of divorce incorporating the settlement agreement concluded between such parties, *inter alia*, pertaining to such claims. Pursuant to that order, on 19 March 2020, transfer of the Gallo manor property was registered in the name of the present intervening creditor.

5. The disposal of the Gallo Manor property (hereinafter referred to as 'the property') is dealt with in paragraphs 22 to 27 of the judgment of Weiner J. The judgment records, in paragraph 22(g) thereof that the applicant contended that the divorce between the respondent and his wife was one of convenience, with the main purpose of disposing of an unencumbered immovable property to prevent creditors from laying claim to it. In paragraph 27 of the judgment, the learned judge concluded that the 'disposition of the property obviously caused prejudice to the respondent's creditors, because it resulted in the respondent's financial position deteriorating, and rendering him insolvent. This directly affects the creditors and the applicant's prospects of recovering the debt due to it appear minimal.

An intervening creditor may be given leave to intervene at any stage, either to oppose a sequestration or to have a rule nisi discharged.**[4]** A creditor may also intervene when an applicant for a sequestration order does not proceed with his application or does not succeed therein. The court takes a practical view in these matters and also bears in mind the interests of the general body of creditors.**[5]**

9. The practice in insolvencies is unique, however, as it is neither a pure intervention nor a substitution and is *sui generis* from a procedural point of view.**[6]**

10. One of the issues the court hearing the application for a final sequestration order will be required to consider, is whether or not the respondent committed an act of insolvency in terms of s 8(c)**[7]** of the Insolvency Act when he caused the property

to be transferred to the intervening party in terms of a valid court order.**[8]** The applicant alleged in its founding papers that the property was not *bona fide* disposed of but that it was the result of collusive dealings by the respondent and the intervening creditor (his then wife) to prejudice the applicant in pursuing its claim; that the purpose of the divorce was to commit a voidable disposition**[9]** of the immovable property to the prejudice of the applicant and other creditors; that the divorce between the respondent and the intervening creditor was one of convenience with the main purpose of disposing of an unencumbered immovable property to prevent creditors from laying claim to it; and that the advantage to creditors in sequestrating the respondent's estate lies in the fact that it will enable the appointed trustee to recover disposed of assets to the benefit of creditors, including that the appointed trustee would have greater flexibility in disposing of assets which may be found and/or recovered at the best value obtainable.

11. The intervening party seeks to protect her interest in the property and to rebut obviously prejudicial allegations pertaining to the alleged collusion between herself and the respondent in 'orchestrating a divorce of convenience', with the alleged main purpose of disposing of the property to prevent the respondent's creditors from laying claim to it, or with the purpose of committing a voidable disposition of the property to the prejudice of the applicant and any other creditors.

12. The papers reveal that the intervening party is and will remain a creditor in the estate of the respondent vis-a vis her ongoing claim for maintenance, not only in so far as the respondent's obligation for payment of the monthly monetary component of R10,000.00 is concerned, but also in relation to the monetary shortfall that could not be met by the respondent at the time,**[10]** the value of which - computed over the lifetime of the claimant, - was covered, together with the accrual/redistribution claim, by the value of the property that was transferred to her pursuant to the divorce, i.e., the property was transferred in lieu of a monetary payment of the shortfall apropos her maintenance claim, and in satisfaction of her patrimonial claim. In her capacity as creditor, the intervening party has locus standi to intervene in the sequestration application and need not establish an additional legal or other interest. **[11]** As pointed out in *Levay* at para 15:

> "Over the years it has been accepted without argument in a number of cases and textbooks that creditors have a right to intervene in sequestration or

winding-up applications in order to oppose the application.**[12]** Catherine Smith expressed the opinion that creditors in insolvency proceedings may be added to joint owners, joint contractors and partners as parties who are allowed as of right to intervene in proceedings.**[13]**"

13. The applicant opposed the intervention application based on applicable principles governing applications under Rule 12. The applicant submits that that any appointed trustee will investigate and decide whether he will apply to set aside the transfer of the property to the intervening party on the basis that it amounts to a voidable disposition. Thus, so it was submitted, even if the intervening party's evidence were to be accepted, it would not serve to affect the outcome of the main application which can still be pursued on the ground of actual insolvency of the respondent. The applicant submits that the case of *Maritz,***[14]** which is relied on by the intervening creditor, is distinguishable on its facts, does not constitute binding precedent and should therefore not be followed.

The court dealt with such arguments as follows:**[16]**

" Moreover, as pointed out by Catherine Smith in *The Law of Insolvency* 3rd ed at 79, there is nothing in the Insolvency Act which in any way limits the common-law powers of the Courts in respect of intervention in sequestration proceedings. See also Meskin *Insolvency Law* at 2-37 para 2.1.11

In these circumstances **I am of the opinion that it can hardly be said that the intervening respondent does not have an interest in the present litigation where the expressly stated purpose of the litigation is to have a trustee appointed so that he can set aside the transaction which the intervening respondent seeks to protect**.

While this may be correct, the fact is that the Court has a discretion to allow the intervention of a party on the grounds of convenience and in my opinion this is clearly a matter in which I should exercise such a discretion in the intervening respondent's favour and allow him to join in the proceedings notwithstanding the defects in the formulation of this claim. See *Ex parte Pearson and Hutton NNO* **1967 (1) SA 103** (E) at 106H -

108H; *Rabinowitz and Another NNO v Ned-Equity Insurance Co Ltd and Another* **1980 (3) SA 415** (W) at 419D - F; *Hetz v Empire Auctioneers & Estate Agents* **1962 (1) SA 558** (T); *Holzman NO and Another v Knights Engineering and Precision Works (Pty) Ltd* **1979 (2) SA 784** (W) at 796H." (emphasis added)

17. Albeit that the facts in *Martiz* are not exactly the same as in *casu*,**[17]** the fact remains that the court in that case dealt with a similar argument to that proffered by the applicant in the present application. In paragraphs 44 and 45 of the Maritz judgment, the argument was recapped and dealt with as follows:

"…Indeed it is the applicant's and the intervening creditor's argument that it is only upon the appointment of a trustee that the trustee will investigate and decide whether he will apply to set aside the sale in execution.

Moreover, the intervening respondent when seeking to intervene need provide no more than *prima facie* proof of his interest, albeit in a sale which may be set aside, and his right to intervene, which in my opinion the intervening respondent has done. See *Elliott v Bax* **1923 WLD 228**; *Ex parte Marshall: In re Insolvent Estate Brown* **1951 (2) SA 129 (N)**." (emphasis added)

18. For all the reasons given, I am inclined to exercise my discretion in favour of the intervening party. The general rule is that costs follow the result. I see no reason to depart therefrom. In her notice of motion, the intervening party gave notice that she would seek costs against any party who opposed the intervention application.

19. Accordingly, the following order is granted:

ORDER:

1. M[....] B[....] R[....] (the intervening party) is granted leave to intervene in the application brought by Mercantile Bank Limited against Michael M[....]3 R[....] under case no. 19791/20 (the main application) and to join the main application as the second respondent.

2. The applicant is ordered to pay the costs of the intervening party in the application for intervention.

Dunn-Blatch and Another v Parry and Another (A5068/2020) [2022] ZAGPJHC 209 (8 April 2022)

Company - sections 163(1)(a), 163(1)(b) and 163(2)(h) of the Companies Act No. 71 of 2008-relief from oppressive or prejudicial conduct or from abuse of separate juristic personality of company

[1] The appellants appeal the whole of the judgment and order of Twala J delivered on 4 April 2019. This appeal is with the leave of the Supreme Court of Appeal ("*SCA*"). The first appellant ("*Ms Dunn-Blatch*") is a director of the second appellant, ITRISA NPC ("*ITRISA*"). ITRISA was established on 30 August 1996 and is a non-profit company having an educational objective. ITRISA is entirely reliant on the revenue it generates from services rendered and *ad hoc* sponsorships it may receive from time to time. It receives no government subsidies.

[2] ITRISA is currently registered with the Department of Higher Education and Training to offer three qualifications that are aligned to the international accreditation system of the UK registered International Association of Trade Training Organisation. ITRISA is the only provider of these qualifications in South Africa.

[3] The first respondent ("*Ms Parry*") was an employee and director of ITRISA. She resigned as an employee on 31 December 2011 and as a director of ITRISA on 30 May 2012.

[4] The second respondent ("*TRADSA*") was cited by Ms Parry as the third respondent in the court *a quo*. TRADSA is a private company and both Ms Parry and Ms Dunn-Blatch are directors of TRADSA, each holding 50% of the shareholding.

[5] In the Court *a quo*, Ms Parry sought and was granted relief in terms of the provisions of **sections 163(1)(a)**, **163**(1)(b) and **163**(2)(h) of the **Companies Act No. 71 of 2008**, as amended ("*the* **Companies Act**;), which provides:

> '163 **Relief from oppressive or prejudicial conduct or from abuse of separate juristic personality of company**
>
> (1) A shareholder or a director of a company may apply to a court for relief if -

(a) any act or omission of the company, or a related person, has had a result that is oppressive or unfairly prejudicial to, or that unfairly disregards the interests of, the applicant;

(b)
the business of the company, or a related person, is being or has bee n carried on or conducted in a manner that is oppressive or unfairly prejudicial to, or that unfairly disregards the interests of, the applicant; or

(c) the powers of a director or prescribed officer of the company, or a person related to the company, are being or have been exercised in a manner that is oppressive or unfairly prejudicial to, or that unfairly disregards the interests of, the applicant.

(2) Upon considering an application in terms of subsection (1), the court may make any interim or final order it considers fit, including

……

(h) an order varying or setting aside a transaction or an agreement to which the company is a party and compensating the company or any other party to the transaction or agreement…'

[51] Ms Jackson argued that there was no facts set out by Ms Dunn-Blatch in her answering affidavit regarding any alleged transfer of income or assets from ITRISA to Ms Parry. The point of Ms Cirone's argument is that the effect of the order granted by the Court *a quo* would be to transfer income to Ms Parry who was an incorporator of ITRISA and that is what is prohibited in terms of **section 1(3)** of schedule 1 of the **Companies Act.**

[52] Ms Jackson further argued that the exceptions provided for in the prohibition set out in **section 1(3)** of schedule 1 of the **Companies Act have** application and therefore the prohibition does not have application. The first such exception is to be found in subsection (b) and provides:

> "As a payment of an amount due and payable by the company in terms of a *bona fide* agreement between the company and that person or another".

[53] Ms Jackson argued that the order granted by the Court *a quo* embodies such a "*bona fide* agreement". Ms Cirone countered, in our view correctly, that the original agreement concluded in June of 2015 did not make provision for any royalty fees to be paid. The *bona fide* agreement contended for is the one which the Court *a quo* concluded on behalf of the parties and is the one which is the subject matter of this hearing, as such, the exception cannot be found to have application. This reasoning appears to be sound.

[54] The exception in subsection (c) provides:"as payment in respect of any rights of that person, to the extent that such rights are administered by the company in order to advance a stated object of the company."

[55] Ms Jackson argued that the licensed rights to the intellectual property are administered by ITRISA and are used to advance the stated object of ITRISA. The intellectual property she contended forms the very cornerstone of ITRISA's business. In our view, Ms Parry has no rights that could fall within the scope of this exception. None of Ms Parry's rights are administered by ITRISA and this exception does not qualify to assist Ms Parry.

[56] The exception in subsection (d) provides:"in respect of any legal obligation binding on the company".

[57] Ms Jackson submitted that a legal obligation such as the payment of a royalty fee in terms of a licence agreement would be included as such an exception. But that is the very point of this hearing. No legal obligation exists because Ms Parry voluntarily relinquished the rights.

[58] We therefore find that none of the exceptions to the application of **section 1(3)** of schedule 1 to the **Companies Act has** application and that the dismissing of the appeal would countenance the contravention of this section of the **Companies Act.[59]** For all these reasons we conclude that the appeal should be upheld.

[60] We accordingly grant the following order:(a) The appeal is upheld with the First Respondent to pay the costs of the appeal including those ordered by the Supreme Court of Appeal to be costs in the appeal.(b) The Order of the Court *a quo* is set aside and replaced with the following:"The application is dismissed with costs."

Bennett Attorneys Inc v Pro-Prop Construction & Civils (Pty) Ltd (2021/37739) [2022] ZAGPJHC 212 (11 April 2022)

Winding-up application-respondent wants documents-rule 35 –court does not see the relevancy of it being asked-company placed in liquidation

1. In this interlocutory application, which is opposed, the applicant applies in terms of Rule 35(13) for an order declaring the provisions of Rule 13(14) to be applicable in motion proceedings instituted by the applicant for the winding-up of the respondent. The applicant ultimately seeks to compel the respondent to produce a document described as a 'statement of funds' (relating to funds held in trust by the respondent's attorneys) for use by the applicant in the pending winding-up application (hereinafter, 'the main application').

2. In a notice dated 17 September 2021 (hereinafter, 'the rule 35(14) notice'), the applicant requested the respondent to make available for inspection, '*a statement of the funds held in trust on behalf of the Respondent for the period from 1 April 2021 to date hereof*.' As appears from its papers in the present application, the applicant wants to know what amounts were paid by the respondent into its attorney's trust account and on what date. The respondent refused the applicant's request, amongst

other reasons, on the basis that the applicant's notice constituted an irregular step, given that leave of court had not been sought or granted for the rules relating to discovery to apply in the main application at the time the notice was delivered. The applicant thereupon launched the present application on 13 October 2021.

3. In this application, the applicant seeks an order to the following effect, namely, that:

(i) the provisions of rule 35(14) be declared applicable to this matter; and

(ii) the respondent be ordered to deliver a statement of the funds held in trust on behalf of the respondent for the period from 1 August 2021 to date of the notice (17 September 2021), within 5 days of the order.

Background matrix

4. The main application is for the winding-up of the respondent, Pro-Prop Construction & Civils (Pty) Ltd (hereinafter, 'Pro-Prop' or 'the respondent') on grounds that Pro-Prop is unable to pay its debts as and when they fall due, as envisaged in s344(f) read with s345(1)(c) of the Companies Act 61 of 1973 ('the Companies Act'). The main application was launched on 6 August 2021. The applicant alleges that that Pro-Prop, who was the applicant's erstwhile client, is indebted to it in respect of fees and disbursements**[1]** incurred by it in representing Pro-Prop in arbitration proceedings held before Adv Farber SC, the appointed arbitrator. In its founding affidavit filed in the main application, the applicant alleges that the indebtedness owed by Pro-Prop to it is in the sum of R2,104,241.27, '*alternatively, and in the event that the respondent has paid Advocate Farber SC directly, the indebtedness is reduced by R374,928.75 to R1,729,312.52.'***[2]** In paragraph 44 of the founding affidavit, it is alleged that '*on 3 August 2021 Mr Marks* (Pro-Prop's attorney of record) *addressed an email to me asking if his client could pay the arbitrator directly. Accordingly, at the time of launching this application, the fees of the arbitrator may have been paid directly, although this has not been confirmed as at the date of the signature hereof.'* The applicant further alleges that Pro-Prop has, despite statutory demand, failed to raise a *bona fide* defence to the applicant's claim for payment, despite having admitted its liability to pay; that Pro-Prop has not paid the outstanding indebtedness amounting to either R2,104,241.27 or R1,729,312.52; and that Pro-Prop has failed to secure or compound the outstanding indebtedness,**[3]** by virtue of which, the applicant avers

that Pro-Prop 'is unable to pay its debts as contemplated in section 345(1)(c)of the 1973 Companies Act.'**[4]**

5. The disbursement pertaining to the arbitrator's fees was not disputed by Pro-Prop in the main application, however, the fees charged by the applicant and the counsel who represented Pro-Prop at the arbitration, remains a point of controversy therein.**[5]** A request to submit the fee accounts for taxation was refused, leading to an impasse, which ultimately culminated in the liquidation application being launched on 6 August 2021. Pro-Prop has denied that it is factually or commercially insolvent and has alleged that the liquidation application is an abuse in circumstances where the applicant has refused to have its fees, including those of its appointed counsel, taxed.

22. I am therefore inclined to agree with the submission of the respondent's counsel that it is patent from the wording of the notice that it contains a generic reference in relation to the document sought. It seems fairly clear from what is stated in paragraphs 5 and 19 of the founding affidavit in the present application, that the applicant does not refer to a specific document that it knows exists, but really seeks any form of information that will tell it what it wants to know, namely, what funds the respondent's attorneys held in trust for it over the period in question. This too, is evident from the applicant's heads of argument, where the following is submitted:

"…the fact that Pro-Prop has not yet received the statements does not mean they do not exist. There can be no doubt that Larry Marks Attorneys keeps some form of a record regarding the funds which it holds in trust on behalf of its clients. Those records may take the form of written financial records, but are more likely to be kept electronically on a computer system. If the former, then those written financial records will constitute a statement of account, which must be provided. If the latter, then Rule 35(15)(a) stipulates that '*a document includes any written, printed or electronic matter, and data and data messages as defined in the* **Electronic Communications and Transactions Act, 2002***…and ought to be discovered.*' … All that Bennett Attorneys requires is the documentary evidence confirming what amounts were paid by Pro-Prop into its attorneys trust account, and on what date…." (emphasis added)

23. Significantly, during oral argument presented at the hearing of the matter, the applicant's counsel submitted that a '*statement of funds'* is a *summary* of what has been paid in *and* what has been paid out of the attorney's trust account in relation to monies held by the respondent's attorneys on its behalf.

24. But, as pointed out by the respondent's counsel, the applicant seeks a document that it argues is in the possession of the respondent's attorneys and not the respondent itself. Until such time as an attorney has created a statement and presented it to his client, any records (be it banking records or records reflected in its books of account, whether electronically stored or otherwise) that the attorney keeps in respect of monies paid to him, are the attorney's records, and he does not hold such records on behalf of his client. Any such document is thus held by a third party, not the litigating party. As such, I am inclined to agree that the request falls foul of the third requirement mentioned in paragraph 17 above.

27. The arbitrator was paid within 17 calendar days from the undertaking to do so in the answering affidavit in the main application. No indication was given by the applicant as to why the lapse of such a period would in and of itself speak to the respondent's inability to pay its debts. It seems to me that the applicant seeks to 'fish in the hope of catching something useful' in order to discredit the respondent's deponent or its attorney, which the court in *The MV Urgup* case *supra* cautioned was not the purpose of **Rule 35(14).** At best for the applicant, it seeks a basis to fish for information to ground an inference - based on its subjective belief that a delay ensued in the payment of the arbitrator's fees - that the respondent was unable to pay an admitted debt (i.e., that portion pertaining to the arbitrator's fees) as and when it fell due. Ultimately, the applicant hopes to learn something useful from the information it seeks, which it cannot articulate until it has the required information. In my view, that amounts to a fishing expedition which **Rule 35(14)** does not permit.

28. Finally, the applicant has in my view not shown that the desired document is material to the outcome of the main application or its determination. The requirement of materiality goes to the necessity of the document for a successful outcome. Implicit in the argument that the document is necessary or essential or material to the outcome of the main application, is the acknowledgment that the founding affidavit in the main application otherwise falls short of making out a proper case.

29. For all these reasons, I am not persuaded that the applicant has established the requirements of **Rule 35(14)** or its entitlement in terms of **Rule 35(13)** to the relief sought herein.

30. The general rule is that costs follow the result. I see no reason to depart therefrom.

31. Accordingly, the following order is granted:

The interlocutory application is dismissed with costs.

Erickson N.O. and Others v Kgatontle Satelite Operations (Pty) Ltd (26883/2021) [2022] ZAGPJHC 231 (11 April 2022)

Liquidation versus business rescue-competing rights in one application Section 344 (f) of the Companies Act -a shareholder that the Respondent should be placed under supervision and that business rescue proceedings be commenced.

[1] This is an application to place the Respondent company under a final winding up. The basis of the application is that:

i) The company is presently indebted to the Applicant in the sum of R34 266 393,00 and is unable to make payment in accordance with the agreement and unable to meet its obligations.

ii) Further that it is just and equitable to place the company under liquidation as the two directors of the Respondent namely Ms Mothibe and Mr Phillip Seleke are at loggerheads and are in a deadlock situation which has destabilised the business of the Respondent to the extent that it is no longer operational.

[2] It is common cause that the Respondent has only two members each of whom owning 50% members interest and who are the only two directors namely Mr Sephiri Phillip Seleke (Phillip) and Ms Thandeka Mothibe. Phillip supports the application. Ms Thandeka Mothibe has filed an opposing affidavit and maintains that the Respondent company should be placed under business rescue as contemplated in **Section 131** (4) of the **Companies Act 71 of 2008**.

[3] It is not in dispute that the Respondent is indebted to the Applicants in the amount set out above. It is also not in dispute that Ms Mothibe is an affected person as envisaged in **Section 128(1)(a)** of the **Companies Act 71 of 2008** and so is entitled to seek that the Respondent be placed in business rescue.

[4] The Applicants are the duly authorised Trustees of Multichoice Enterprise Development Trust and are cited in their capacities as such.

[5] On the 30th October 2018 the Trust entered into a loan agreement with the Respondent in terms of which the Trust loaned and advanced to the Respondent an amount of R34 266 393.00 which amount was to be repaid by the Respondent in monthly instalments of R6 853 278.60 with effect the 31st March 2021. That date was extended to 30th September 2021 by agreement.

[6] This matter is about the competing rights of a creditor who seeks relief in terms of Section 344 (f) of the Companies Act 1973 on the basis that the Respondent is unable to pay its debts as envisaged in Section 344(f) read with Section 345 (i) alternatively on the basis that it is just and equitable to place the Respondent under a winding up order an envisaged in Section 344 (h) of the 1973 Companies Act.

[7] Competing with the creditor's rights stated above is the right asserted by Mr Mothibi in her capacity as a shareholder that the Respondent should be placed under supervision and that business rescue proceedings be commenced.

am persuaded that Ms Mothibi has failed to establish any grounds to support her contention that there are reasonable prospects that the Respondent will be rescued. She as a director and Shareholder and employee of the company should have been in a position to set out in her founding affidavit facts including financial information to demonstrate that there are reasonable grounds for rescuing the Respondent. She has failed to do so and her application falls to be dismissed.

[33] The common cause facts in fact point out to the contrary and demonstrate that there is no point of return for the Respondent it is headed for liquidation. Such common cause facts include this deadlock situation between Mothibi and Seleke, criminal charges have been laid on the basis that she contends that Seleke fraudulently removed her as a director, the ongoing high court litigation between the two directors does not augur well for the Respondent continuing to be in business, the Respondent has not conducted any business transaction since March 2021 and

all the employees have left the company. The company has no work streamlined for it to survive.

[34] I am persuaded that the Respondent should be placed under final liquidation as a result of the following undisputed facts:

34.1 The Respondent is indebted to the Applicant in the amount of R34.2 million which amount became due and payable.

34.2 Despite demand in terms of **Section 345** of the **Companies Act the** Respondent had been unable to pay this debt.

34.3 The fact that Ms Mothibi is applying for business rescue is proof that the company is in financial distress (See: **Trinity Asset Management (Pty) Ltd vs Grindstone Investment 132 (Pty) Ltd [2015] JOL 32886 (WCC)**. Employees have not been paid since March 2021.

34.4 The Respondent is factually insolvent in that its liabilities exceed its assets. This is confirmed by Ms Mothibi herself in paragraph 8.1 of her replying affidavit wherein she says that the Respondent has assets of R26.5 million. This clearly means that the assets are less than the debt due to the Applicants which presently stand at R34.2 million.

34.5 In the circumstances and in my view it is just and equitable to wind up the affairs of the Respondent and as Tsoka J said in **Wellman v Marcelle Props 193 CC and Another 2012 [ZAGPJHC 32 (24 February 2012) paragraph 28**:

> "Business rescue proceedings are not for terminally ill Close Corporations nor are they for the chronically ill. They are for ailing corporations which given time will be rescued and become solvent."

[35] The Respondent company has steadily moved over time from ailing to chronically ill and it is now at its terminal stage and there are no prospects of reviving it.

[36] In the result I make the following order:

[1] The application to place the Respondent under business rescue is dismissed.

[2] The Respondent is hereby placed under final winding up.

[3] The costs of this application shall be the costs in the winding up.

Actom (Pty) Ltd v Acton Repair Services (Pty) Ltd and Another (2022/11271) [2022] ZAGPJHC 235 (19 April 2022)

Business rescue- section 133(1)(b) of the Companies Act 71 of 2008 (“the Act”) for such leave as may be necessary to bring this application for, *inter alia*, a declarator that the lease has been cancelled, and, secondly, for the eviction of the first respondent from the property.

[1] In this application, launched as a matter of urgency on 24 March 2022, and is divided into two parts, the applicant seeks, firstly, an order in terms of section 133(1)(b) of the **Companies Act 71 of** 2008 (“the Act”) for such leave as may be necessary to bring this application for, *inter alia*, a declarator that the lease has been cancelled, and, secondly, for the eviction of the first respondent from the property. In the alternative, the applicant seeks interim relief in the form of an interdictory relief to protect its proprietary rights designed to interdict and restrain the first and second respondents and or any other person acting under their direction and or control from utilizing electricity and ancillary utilities at its premises or in any way causing damage to the property. Broadly stated, the applicant's case is premised on the following facts.

[2] The applicant, Actom (Pty) Ltd, is the owner of an immovable property, Erf 1152 (Germiston Ext. 4 Ptn 182 Farm Elanfontein) at the corner of Branch & Alpha Roads, Driehoek, Germiston, Gauteng ("the property"). The first respondent, Acton Repair Services (Pty) Ltd (“ARS”), in business rescue, from about 2008 has been a lessee of the applicant. There have been several lease agreements, addendums thereto and renewal lease agreements which were entered into between the applicant and first respondent over the years. The rentals and ancillary charges were

always renegotiated and adjusted accordingly by agreement between the parties. During or about May 2019, the first respondent began defaulting on its monthly rental payments as well as its utilities account (electricity, security and other ancillary costs).

[3] During or about August 2021, the applicant and first respondent entered into a new lease agreement effective from 1 August 2021 which would subsist for a period of five years until 31 July 2026. Clause 4.1 recorded that the monthly rent for the premises shall be R215 342.00 per month of the lease period, which amount (and subsequent amounts) will be increased on the first of August of every year by an amount equal to the CPI increase in the immediately preceding year. In terms of clause 4.2 it was agreed that the first respondent shall pay the rent monthly in advance on or before the first day of every month. Clause 4.5 made provision that the first respondent shall not for any reason whatsoever withhold, defer, or make any deductions from, or set off against, any payment due to the applicant in terms of the agreement, whether or not the applicant is or the first respondent alleges that the applicant is indebted to the first respondent, from whatsoever cause arising, or in breach of any obligation to the first respondent from whatsoever cause arising.

[4] Clause 13.1 of the lease agreement reads as follows:

> "Should the first respondent default in any payment due under this Agreement or be in breach of its terms in any other way and fail to remedy such default or breach within seven 7 Business Days after receiving written demand that it be remedied, the [applicant] shall be entitled, without prejudice to any alternative or additional right of action or remedy available to the [applicant] under these circumstances and to cancel this agreement with immediate effect and be repossessed of the Premises with immediate effect and without further notice to the first respondent and recover from the first respondent such damages sustained as a result of the default or breach and the cancellation of this Agreement."

[5] In terms of Clause 19.4; neither party shall be regarded as having waived, or precluded in any way from exercising any right under or arising from the agreement, by reason of such party at any time granted any extension of time for, or having shown any indulgence to, the other party with reference to any payment or performance under the lease agreement, or having failed to enforce, or delayed in the enforcement of, any right of action against the other party.

[6] The first respondent began defaulting again and failed to make regular payments since October 2021.On 5 November 2021, the first respondent was notified by way of email of the outstanding amounts due to the applicant as at that date which was the sum of R484, 460.07. No response to that email was forthcoming from the first respondent. A follow up email was sent to the first respondent again on 19 November 2021 and a further email with updated statements was sent on 25 November 2021. Again, no response was forthcoming from the first respondent.

The second respondent however, did not take any steps to suspend or cancel the lease agreement in terms of section 136 (2) of the Act. It is common cause that neither the first respondent, nor the second respondent had previously suspended or cancelled the lease agreement in terms of section 136(2). This provision was basically never invoked at all by the respondents. Consequently, the first respondent's obligation to pay monthly rentals and municipal utilities had not been suspended prior to the applicant's cancellation. In addition to this, the second respondent accepted on 25 February 2022 that the lease agreement was cancelled and this position was reiterated in the update report of 8 March 2022. This is a very significant consideration.

[20] The applicant has made it explicitly clear that it cannot continue to fund the first respondent by way of post commencement funding engineered through rentals and utilities, against its wishes and consent. The respondents have also been requested to confirm whether they will stop consumption of utilities in circumstances where the lease was cancelled and where such further consumption would be unlawful. They simply refused to do so and ignored the applicant's requests.

[21] Accordingly, the applicant was entitled, in the event of the first respondent's failure to pay the rental and its ongoing breach of the lease agreement, to cancel the

lease agreement if the first respondent failed to rectify the said breach after 7 days' written notice, to claim all outstanding amounts in terms of the lease, and to forthwith evict the first respondent from the leased premises. The applicant seeks an order that both the first and second respondents pay the costs of this application on the scale as between attorney and client. I see no reason to award costs against the second respondent, who has acted throughout the proceedings in an official capacity. I am of the view that the first respondent should pay the costs of the application on the attorney and client scale in accordance with the terms of the lease.

[22] In the result, the following order is made:

(a) The applicant's non-compliance with the Rules of the above Honourable Court in regard to service and time limits is condoned and this application is permitted to be heard as one of urgency in terms of the provisions of Rule 6(12) of the Uniform Rules of Court.

(b) The first respondent and all those occupying through or under it are to be evicted within fifteen (15) days from the grant of this order, from Erf 1152 at the corner of Branch & Alpha Roads, Driehoek, Germiston, Gauteng ("the property").

(c) In the event of the first respondent failing to comply with the order in para (b) above, the sheriff or his deputy is hereby authorised to evict the first respondent and those occupying through or under it from the premises, and to secure the services of a locksmith and the assistance of the South African Police Services, if necessary.

(d) The costs of this application are to be paid by the first respondent on the scale as between attorney and client.

Voltex (Pty) Limited t/a Atlas Group v Resilient Rock (Pty) Limited (2021/29872) [2022] ZAGPJHC 241 (26 April 2022)

Winding up application- section 345(1)(c) of the Companies Act, 1973- *Badenhorst* principle is applicable as much to provisional winding-up as to final winding up.

1. This is an application for the winding up of the respondent on the basis of the latter's inability to pay its debts. The applicant places reliance on section 345(1)(c) of the Companies Act, 1973.

2. The applicable principles are as follows:

2.1 a liquidation application is not a mechanism to obtain payment of disputed debts. As such, if the respondent shows that the debt is genuinely and reasonably disputed, the application for winding up should generally fail,**[1]** even if it is likely (on a balance of probabilities based on the pleaded cases) that the applicant will succeed in establishing its claim on the merits.**[2]** This is the import of the *Badenhorst* principle or rule.**[3]**

2.2 It has been suggested that the *Badenhorst* principle may only be applicable in applications for provisional liquidation, not final liquidation.**[4]** This is said to be so because in applications for final relief, the *Plascon Evans* principle is applicable. It is indeed trite that a court is obliged to apply *Plascon Evans* and is thus required to decide the matter on the basis of the respondent's factual version together with such facts in the applicant's papers as the respondent does not substantively dispute (unless the respondent's version is palpably implausible, not *bona fide* or clearly untenable).**[5]** But *Plascon Evans* is concerned largely with rules of procedure and evidence; not the substantive requirements for an application to succeed. It seems to me that the *Badenhorst* principle is not a rule of procedure of evidence, but relates to substantive requirements: ie, what a party must establish to make out a claim or establish a defence. In this context, the *Badenhorst* principle is applicable as much to provisional winding-up as to final winding up.

2.3 How one goes about satisfying these substantive requirements and on what evidence the Court can base its conclusions is a matter of process and procedure, including *Plascon Evans*. *Plascon Evans* may, of course, make it more difficult for an applicant to overcome the *Badenhorst* principle on motion. To state that at the provisional liquidation stage the *Badenhorst* principle applies and the application should generally be dismissed if there is a dispute as to liability on *bona fide* and reasonable grounds, but to hold that what is required at final stage is simply proof of the indebtedness on the balance of probabilities (with the possibility of establishing this by way of a referral to oral evidence) may paradoxically impose a *lower* standard

of proof of debt at the final liquidation stage than at the provisional stage. This seems to me undesirable and not consonant with the authorities. At least the same and possibly higher substantive requirement in relation to the debt should be imposed at the final liquidation stage.

2.4 An applicant for liquidation also bears the burden of satisfying the Court that the respondent company is unable to pay the aforesaid debt: that is, it must establish the respondent's commercial insolvency.**[6]** In this regard, a mere failure to pay, without more, is not co-extensive with an inability to pay and, in the absence of a statutory deeming provision such as section 345(1)(a) of the Companies Act, 1973, an inference of an inability from a failure is inherently problematic.**[7]**

2.5 In considering whether to grant a final order of liquidation, the Court should also apply the *Plascon-Evans* principle.**[8]**

2.6 Even where the requisites for a winding-up order are established, the Court retains a discretion to refuse it, but the discretion is a narrow one, to be exercised judicially in "*special or unusual*" circumstances.**[9]**

3. The current liquidation application presents several of the challenges foreshadowed in the authorities. I first set forth the background before analysing how the above principles play out in the case.

Factual background

4. The applicant and the respondent concluded an agreement in or around September 2020. A credit application was filled out by the applicant's representative with the respondent's details and then signed by the respondent's Mr Sam Comfort Mhlaba on 21 September 2020 ("**the credit application**"). That application was not countersigned by the applicant and in fact appears to have no place for counter-signature. The application provided certain terms for the purchase of goods by the respondent from the applicant, including delivery, transfer of risk and payment of the purchase price. Clauses 11 and 12 provided that the payment terms are 30 days from the statement date unless otherwise agreed in writing, and required the respondent to object to any item on a statement from the applicant within 10 days of the statement's dispatch.

5. Clause 19 also provided that the terms set forth in the application contain the entire agreement between the parties which may only be amended by the written and signed further agreement of the parties.

6. Whilst the respondent acknowledges the above context of the credit application, it states in the answering affidavit that it was "*never the intention or agreement of the parties that the respondent would pay within 30 days from the date of the applicant's statements to the respondent*". The applicant alleges that the agreement to supply goods to the respondent was concluded orally on 21 September 2021 at the same time as the credit application was signed and, in this regard, "*it was expressly agreed that the electrical goods to be supplied by the applicant were exclusively for [a property development in Randfontein [("**the project**")] pursued by the respondent, which was a property developer]. [The credit application] was signed on the basis of and pursuant to this [oral] agreement. It was further agreed that any debt due by the respondent to the applicant in respect of such electrical goods as may be supplied and delivered by the applicant to the respondent would not be payable until the monies due to the respondent in respect of the project were released. Such monies are presently being held in Trust by Adams & Adams Attorneys*." "The respondent thus concluded that "*[t]he alleged debt is not due, owing or payable.*"

I do not think it is appropriate or possible for me to resolve the disputes in favour of the applicant on the papers. Although the respondent's version is questionable and improbable in several respects, I am of the view that it is sufficient to constitute a *bona fide* and reasonable basis for disputing the payment terms (and thus the claimability) of the debt. I am fortified in my view by what Megarry J stated in *John v Rees* **[1970] Ch 345:** "*As everybody who has anything to do with the law well knows, the path of the law is strewn with examples of open and shut cases which, somehow, were not; of unanswerable charges which, in the event, were completely answered; of inexplicable conduct which was fully explained; of fixed and unalterable determinations that, by discussion, suffered a change*."**[11]**14. In addition to the above, and importantly, the applicant has presented no direct evidence that the respondent is unable to pay its debts. The onus in this regard (on a balance of probabilities) rests on the applicant. No notice under section 345(1)(a) was sent. The applicant has also not proffered any evidence of the respondent's creditors, debtors, assets or liabilities. 15. All that the applicant mustered in its

founding papers is the allegation that given the facts as set forth above (and in particular the respondent's failure to pay on the instalment dates set out in the 30 April 2021 letter), the Court should draw an inference of an inability to pay the debts. I am not satisfied that the letter is admissible, but I also do not think its content would assist the applicant. The mere failure to pay on agreed dates is in itself not evidence of an inability to pay, particularly where there is no evidence that the *proposed* payment dates set forth in the 20 April 2021 letter were agreed by the applicant. Moreover, while it is debatable whether the respondent's version of the original agreement as to payment terms is probable, I do not think that on the papers it may be concluded that its view of claimability of the debt was not at the relevant times genuinely held. If that is so, then its failure to pay the debt gives rise to no inference of insolvency. After all, it genuinely believed it had no obligation to do so. Drawing a far-reaching inference as to commercial insolvency requires more.

16. In all the circumstances, the liquidation application falls to be dismissed. The applicant, if it believed it was entitled to payment, should have launched court proceedings specifically seeking the enforcement of its debt (by way of action or otherwise). Liquidation proceedings were inappropriate.17. There is no reason why the usual principle concerning costs should not apply, with costs following the result.

18. I thus make the following order: 18.1 the application is dismissed with costs.

Mirchandani v Unica Iron & Steel (Pty) Ltd and a related [2022] JOL 52884 (SCA)

Company-directors-fiduciary duty of company director

Mr Mirchandani, after leaving the employ of Unica Iron & Steel, reported the company to the Gauteng Department of Rural Development (GDRD) for allegedly breaching applicable environmental laws, in particular, the provisions of the National Environmental Management Act 107 of 1998. Unica was consequently fined R5

million, half of which was suspended, plus R3 million in respect of the rehabilitation of the environment. Unica then alleged that it was part of Mr Mirchandani's job to ensure compliance with the relevant legislation, and that he failed to do so in breach of agreement.

Tsoka AJA finds that the agreement did not impose the alleged obligations on Mr Mirchandani. Court concluding that company directors took a conscious decision not to comply with the provisions of the Act.

Nature of fiduciary duty discussed [paras 12-13]; and Mr Mirchandani's claim regarding utilities and bond charges erroneously debited in a loan account as well as damages is confirmed.

PRIDE MILLING CO (PTY) LTD v BEKKER NO AND ANOTHER 2022 (2) SA 410 (SCA)

Company — Winding-up — Unlawful alienations and preferences — Void disposition — Disposition of its property by company being wound up and unable to pay its debts made after commencement of winding-up — Discretion of court to validate such disposition — Nature of discretion — Relevant considerations — Companies Act 61 of 1973, s 341(2).
Company — Winding-up — Unlawful alienations and preferences — Void disposition — Disposition of its property by company being wound up and unable to pay its debts made after commencement of winding-up — Discretion of court to validate such disposition — Whether court may validate disposition made after granting of provisional winding-up order — Companies Act 61 of 1973, s 341(2).

In terms of s 341(2) of the Companies Act 61 of 1973, '(e)very disposition of its property (including rights of action) by any company being wound-up and unable to pay its debts made after the commencement of the winding-up, shall be void unless the Court otherwise orders'. The present matter addressed the question of the circumstances in which it would be appropriate for a court to validate a disposition otherwise void in terms of s 341(2); and, more particularly, whether a court may validate dispositions made after a provisional winding-up order had been granted but prior to the grant of a final order. The background follows. Liquidation proceedings

were commenced in the Pretoria High Court, on 5 May 2017, against Irfan Sohail Trading (Pty) Ltd (Irfan) — a private company carrying on business as a general trading store at Ga-Masha Village in Limpopo — at the instance of a creditor, Eendag Meule Bothaville (Pty) Ltd. A provisional winding-up order was granted on 29 June 2017, and a final order on 14 September 2017. The present matter concerned four payments totalling R295 000 Irfan made to Pride Milling Company (Pty) Ltd (Pride Milling), the appellant, in settlement of amounts owing in respect of goods sold and delivered by Pride Milling to Irfan. The first of such payments took place in the time period between the commencement of liquidation proceedings and the granting of provisional liquidation; the other three payments took place in the period between the granting of provisional liquidation and final liquidation. The first and second respondents, the liquidators of Irfan, contended that these four payments constituted void dispositions liable to be set aside under s 341(2) of the Companies Act 61 of 1973, having taken place after the commencement of liquidation proceedings. They accordingly instituted an application, in the Pretoria High Court, against Pride Milling for an order directing it to repay the amount of R295 000, together with interest, and ancillary relief. Pride Milling opposed such relief, and also launched a counter-application seeking an order that the impugned payments be validated in accordance with the rider to s 341(2) of the Companies Act. The High Court granted the liquidators their application, and refused Pride Milling its counter-application. The Supreme Court of Appeal granted Pride Milling leave to appeal to it. Before the SCA, there was no dispute that the payments at issue were made after the commencement of liquidation proceedings and therefore hit by s 341(2). The only question was whether they should be validated in accordance with the rider to s 341(2). (See [10] and [12].) Pride Milling, in support of its case that they should be, alleged that the payments: *(a)* were made in the ordinary course of business and in good faith; *(b)* were not to the 'detriment of the general body of Irfan's creditors'; *(c)* had 'the effect of increasing the asset value of Irfan to the benefit of the body of the creditors'; *(d)* were received at a time when Pride Milling was not aware that Irfan was in financial distress; and *(e)* were made when it had no knowledge of the fact that Irfan was being wound up.

Held, that, in terms of s 341(2) of the Companies Act, every disposition of its property by a company being wound up was void. The default position ordained by this section was that all such dispositions had no force and effect in the eyes of the

law, ie the disposition was regarded as if it had never occurred. (See [30 and [31].) Nevertheless, a court may depart from the statutorily ordained position and order otherwise in appropriate circumstances (see [25] and [31]). In determining whether to direct otherwise, a court exercised an unfettered discretion (see [22]), and had to decide what would be just and fair in light of all the relevant circumstances of the case in question. Factors which a court would have regard to included the underlying purpose of s 341(2) in the context of winding up a company unable to pay its debts, ie to prevent such a company from dissipating its assets and thereby frustrating the claims of its creditors; the interests of creditors and those of the beneficiary of the disposition (see [23], [26], [30] and [31]).

Held, however, that a court's discretion to validate void dispositions under s 341(2) *was only exercisable in relation to payments made between the date of lodging of the application for winding-up and that of granting of a provisional order* (see [24] and [31]), at which point concursus creditorum was reached (see [18] and [19]). Accordingly, a court had no discretion to validate the three dispositions in this case made after 29 June 2017.

Held, as to the single disposition made on 7 June 2017, ie before the provisional order was granted, Pride Milling had failed to discharge the onus which rested on it to persuade the court with clear evidence that it should depart from the statutorily ordained default position and 'otherwise order'. (See [36].) There was accordingly no tenable reason to interfere on appeal with the manner in which the High Court exercised its discretion in relation to this disposition (see [37]). Appeal dismissed (see [41]).

DU TOIT AND OTHERS v AZARI WIND (PTY) LTD AND OTHERS 2022 (2) SA 510 (WCC)

Company — Business rescue — Effect on contracts — Suspension of 'any obligation' arising from contracts — Obligation must arise before, and become due during, business rescue proceedings — Obligation not due if not yet determined/quantified — Obligation must be discrete and identified — Companies Act 71 of 2008, s 136(2)*(b)*.

Section 136(2)*(a)* of the Companies Act 71 of 2008 allows business rescue practitioners to *suspend*, during business rescue proceedings, 'any obligation' of the company that 'arises under an agreement to which the company was a party at the

commencement of the business rescue proceedings' and 'would otherwise become due during those proceedings'. Under s 136(2)*(b)* business rescue practitioners may 'apply urgently to a court to . . . *cancel*, on any terms that are just and reasonable in the circumstances, any obligation of the company contemplated in paragraph *(a)*'. The first and second applicants, joint business rescue practitioners charged with the business rescue of the third applicant, Tsoma, approached the court under s 136(2)*(b)* for the cancellation of Tsoma's obligations under two construction subcontracts concluded between it and the first respondent, Azari. While Tsoma had performed the services it was contracted to perform and the contracts had ended, Azari paid only some of the invoices Tsoma issued to it. In addition to immediate payment of the invoices, the practitioners sought the cancellation of Tsoma's contractual obligations relating to stoppages, delay, disruption, indemnification, warranties, performance bonds and insurance. The practitioners submitted that if the requested urgent relief were not granted, the business rescue process would fail.

Held

The purpose of s 136(2)*(b)* was to empower business rescue practitioners, through the court, to extricate the company from contractual obligations that would prevent it from becoming a successful concern. Since cancelled obligations could not be revived if business rescue failed, practitioners had to identify precisely which obligations needed to be cancelled and explain why such a drastic measure was necessary. (See [14], [27].)

Practitioners had to show, in addition, that the obligations sought to be cancelled would otherwise (ie if uncancelled) become due during business rescue. This entailed sifting through the contracts, ascertaining extant obligations, and determining which of them would become due during business rescue. Because business rescue was intended to be a brief process, practitioners had a definite period to use as a frame of reference when deciding which obligations would become due and ought to be cancelled to assist the rescue of the business. (See [29].)

Here, the principal difficulty for the practitioners was that they failed to demonstrate that the obligations sought to be cancelled would have fallen due during business rescue. For example, the stoppages claims would all have arisen during the course of the contract period, ie prior to the business rescue process, even though not all of them had yet been quantified. (See [31].)

The applicants, while contending that the obligations were not due because amounts to be paid in respect of the stoppages claims had not yet been determined, at the same time failed to indicate that they *would become due during business rescue*. The claims were indeed disputed and unresolved, and according to the applicants, 'remain[ed] the subject of . . . construction adjudication processes and [were] incapable of speedy resolution'. The obligations were therefore, on the applicants' own version, not due. If Tsoma was not liable for the stoppages claims, or the stoppages claims were not yet due, or there was no indication that these claims would become due during the business rescue proceedings, then there was no legal basis for the court to cancel them, and this argument applied equally in respect of the other obligations sough to be cancelled. (See [32] – [35].)

Since the applicants failed to discharge the onus of demonstrating that the obligations sought to be cancelled would otherwise become due during the business rescue proceedings, the application would be dismissed (see [36]).

As to the application for an order for payment by Azari of the amounts claimed by them, the court found that, uncoupled from the claims under s 136(2)*(b)*, it was simply a request for a money judgment on an urgent basis in motion proceedings and in circumstances where the respondents contended that they had a contractual defence to the order sought. Azari had put up a robust defence and in the circumstances the applicants had failed to make out a case for the grant of the order sought. (See [44] – [46].)

INTONGO PROPERTY INVESTMENT (PTY) LTD AND ANOTHER v GROENEWALD AND OTHERS 2022 (2) SA 543 (WCC)

Company — Proceedings by and against — Institution of proceedings by company — Director who is member of board may institute proceedings or authorise their institution by agent — Companies Act 71 of 2008, s 66.

Company — Shares and shareholders — Shareholders — Lacking locus standi to sue for loss suffered by company.

Company — Shares and shareholders — Shareholders — Nominee shareholder — Appointment — Only registered shareholder may appoint nominee shareholder or director.

Company — Shares and shareholders — Shareholders — Proceedings by and against — Shareholder lacking locus standi to sue for loss of property suffered by company.
Land — Sale — Validity — Fraud — Only victim having locus standi to set aside sale.
Maxims — Fraud unravels everything — Limitation — Contract — Victim must seek to set contract aside for fraud to unravel it — Fraudster or third party cannot rely on maxim.

The applicants, Intongo and one Svensson, approached the court for the setting-aside of a sale of a property in Llandudno by the first respondent, Groenewald, to the second respondent, UVT, on the basis that the transaction was tainted by fraud. The application was opposed only by Groenewald and UVT. The other respondents (a bank, the registrar of deeds, the CIPC) did not participate.
The background facts were that in 2015 one Moller sold his shares in Intongo, which owned the Llandudno property, to Groenewald, who was then — allegedly fraudulently — registered as Intongo's sole shareholder and director. In 2017 Groenewald sold the property to UVT and in January 2018 it was transferred in its name. But Groenewald had not yet fully settled the purchase price on the share-sale agreement with Moller, who learned of the sale of the property to UVT late in 2018. Moller did not initially attempt to set aside the property sale; it was only when his attempts to enforce the share-sale agreement with Groenewald had failed that he directed his attention to reclaiming the property in the name of Intongo by appointing Svensson as his nominee to do so.
In the papers Svensson described himself as 'director and nominee shareholder' and 'duly authorised representative' of Intongo. He claimed his authorisation appeared from a resolution of Intongo's alleged sole shareholder, Moller. It was only in his replying affidavit that Svensson raised the contention that Groenewald had fraudulently appointed himself as shareholder and director of Intongo and that therefore his standing to represent Intongo was impugned.
UVT challenged the locus standi of both applicants on the ground that it was clear (i) that Intongo did not authorise the institution of the proceedings, since its sole director, Groenewald, was the only one that could have done so; and (ii) that Svensson, as self-described nominee shareholder, could also not have done it:

companies concerned themselves only with registered shareholders, and Moller, who was never a registered shareholder of Intongo, could not have appointed Svensson as nominee shareholder or director.

The following provisions of the Companies Act 71 of 2008 were relevant:

Section 1, which defines 'director' as 'a member of the board of a company, as contemplated in section 66, or an alternate director of a company and includes any person occupying the position of a director or alternate director, by whatever name designated', and 'shareholder' as 'the holder of a share issued by a company and who is entered as such in the certificated or uncertificated securities register, as the case may be'. And s 66, which provides that 'the business and affairs of a company must be managed by or under the direction of its board, which has the authority to exercise all of the powers and perform any of the functions of the company'.

Held

Central to the issue of the applicants' standing were the questions as to who in law could institute proceedings on behalf of a company and the purview and position of a shareholder in relation to a company and its assets (see [21]).

The definitions of 'director' and 'board', read with s 66 of the Act, showed that a director who was also a member of the board would be responsible for the decision to institute legal proceedings in the name of the company, so that if a company had just one director, it was only that director who could institute proceedings or authorise their institution by an agent (see [23]). Since it was clear from company documentation that Groenewald was the only active director of Intongo, and since he had not authorised the present proceedings or authorised their institution by Svensson or anyone else, Moller's resolution authorising Svensson to institute proceedings did not clothe Intongo with the requisite standing (see [24]).

The (unsubstantiated) allegations of fraud did not assist the applicants in impugning Groenewald's position as director because the alleged fraudulent representation to UVT contained in the property-sale agreement did not cause UVT to act to its detriment, an essential element of fraud. UVT did not, as alleged victim, seek to set aside the property sale, which limited the applicability of the maxim that fraud unravels everything: whether fraud unravelled a contract depended on its victim, not the fraudster or third parties. In view of the above, Intongo was not entitled to institute the present proceedings and was non-suited. (See [25] – [27].)

Svensson also lacked the requisite locus standi. There was no evidence that Moller was a 'shareholder' as defined, nor any record that he became a registered shareholder. Since he was never a registered shareholder, he could not have appointed Svensson as a nominee shareholder or director of Intongo. And even had they been shareholders as defined, Moller and Svensson would still lack standing because a company's property belonged to the company and not its shareholders, and only the company could sue in respect of loss of property owned by it. As Intongo's shareholders, Moller and Svensson did not own its property. (See [28] – [31].) Application dismissed.

MILLER v NATMED DEFENCE (PTY) LTD AND OTHERS 2022 (2) SA 554 (GJ)

Company — Directors and officers — Directors — Removal — By shareholders — Not obliged to give reasons in advance for removal of directors — Shareholders, in contrast to board, can remove directors at will without giving reasons — Companies Act 71 of 2008, s 71(1).

The requirement that reasons be given for the removal of company directors operates if *the board* intends to remove them, in which case s 71(2) of the Companies Act 71 of 2008 requires that the director be furnished in advance with reasons for the proposed resolution. But where *shareholders* seek the removal of a director, s 71(1) does not require them to be provided with reasons in advance. The shareholders can remove them at will without giving reasons. (See [35] – [36], [39].)

Gore NO and another v Ward and another [2022] 2 All SA 178 (WCC)

Corporate and Commercial – Fraudulent acts committed by company director in name of company – Liability for loss – Authority to act on behalf of company – Actual authority arises from legal or consensual relationship in place between principal and agent and exists independently of third party’s understanding of the facts – Liability thus accruing to company.

As joint liquidators of a company (“Brandstock”), the applicants sought the setting aside, in terms of section 26 of the Insolvency Act 24 of 1936 read

with section 340 of the Companies Act 61 of 1973, of payments of R250 000 made to each of the respondents; alternatively, for a declaration that the payments were made *sine causa*. Orders were also sought directing the respondents to repay the amounts to the applicants, either pursuant to the relief granted in terms of section 26, or on the grounds of their alleged unjust enrichment at the company's expense.

Opposing the application, the respondents contended that the payments were made not by Brandstock but rather by its sole shareholder and director ("Philp"), using funds stolen by him from a third party ("Louw"). The payments had been made to the respondents in satisfaction of a long-standing debt owed to them by Philp, and were made immediately after Philp had secured over R2m from Louw as financing for a sale transaction. Louw had paid the money into Brandstock's account at Philp's request.

The respondents contended that the funds used to make the payments had not become the property of Brandstock, and that the company's banking account had been used as a conduit for the purpose of fraudulently receiving and disposing of the money that Philp had stolen. In other words, the respondents denied that Brandstock had made dispositions to them within the meaning of that word in section 26 of the Insolvency Act. They also denied that they were enriched by the payments.

Held – A company has no mind of its own, and is therefore capable of acting only through a human agency. The law treats the company as the principal in relation to the actions undertaken in its name and on its behalf and the persons acting for it as its agents. A company is therefore bound only by the actions of persons who have authority to represent it. The Court acknowledged the possibility of persons acting, or purporting to act, on behalf of a company, to misuse the opportunity for fraudulent purposes, and to do so entirely for their own dishonest ends to the prejudice of those with whom they purported to transact in the name of the company, and often at the same time also to the prejudice of their supposed principal. That leads to the question of where the resultant loss should fall.

The ultimate control of a company's affairs is vested in its board of directors. Philp, as Brandstock's sole director, fell to be regarded as its authorised agent.

His authority was actual, not apparent or ostensible. Actual authority arises from the legal or consensual relationship in place between the principal and the agent and

exists quite independently of the third party's understanding of the facts. Brandstock was thus accountable to Louw for the money that was stolen by Philp.

The Court rejected the respondents' seeking to resort to the directing mind doctrine to displace the law of agency where those are applicable and available to determine a company's liability in a contractual context.

In the circumstances of this case, the funds received from Louw became Brandstock's property when it received the payment. By disposing of the funds credited to its account as a consequence of Louw's payments, Brandstock exercised the personal right it had acquired against its banker in consequence of the payments.

There being no suggestion by the respondents that the dispositions were for value, the court set aside the payments as dispositions without value.

END-FOR NOW