INSOLVENCY LAW UPDATES MAY 2022[1]

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

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Re-volt KZN Projects CC v Lallisa Investments (PTY) LTD (11969/18P) [2022] ZAKZPHC 17 (11 May 2022)

[45] There is an argument whether evidence and documents obtained during the aborted s417 enquiry are admissible to be used in this application. Both parties when it suited them referred to the aborted s417 enquiry. The fact that the aborted enquiry took place and the issues around it, including the reasons for it to be aborted are common cause. In my view, no general rule relating to admissibility need to be founded, it depends what piece of evidence and for what purpose is being introduced and the basis it is objected to. In this matter, nothing much turns on that. The aborted enquiry is a nullity and the record of the said inquiry can prove nothing. It is inadmissible to prove a fact by a transcript of the record of the enquiry of what a person said at the enquiry. However, evidence presented before the enquiry, which existed it, does not become inadmissible because it was presented in the aborted enquiry. In terms of s417 (4) of the Act, the enquiry is private and confidential except if the court or master has ordered otherwise. Therefore, a witness or any other person cannot waive the privacy and confidentiality of the s417 enquiry. Reddy had not completed giving evidence before the enquiry when it was aborted. Therefore, no excerpts of his incomplete evidence can selectively be used.

[46] The Intervening Parties make a case that no proper case has been made for the relief obtained in the ex-parte application. The Master did not support the application

for the relief and neither did all the joint liquidators. There was also no creditors' resolution in support for the relief. There is also no evidence of the either the Master, all joint liquidators or the creditors being approached and requested to give consent to the one creditor to approach court and seek relief sought in the ex-parte application.

[47] The enquiry in terms of s417 read with s418 has as its primary purpose to assist the liquidators of the company to determine its assets and liabilities in a way, which will best serve the interests of the company's creditors. Section 417 provides :

[54] The application for a s417 enquiry , ordinarily, will be made to the Court or the Master, by the liquidator who is best suited to know why the effective administration of the wining-up necessitates that being an examination or enquiry, although such an application may also be made by any person having an interest in the company in liquidation. The applicant was entitled to make an application to Court for s417 enquiry. In the same breath, the applicant as a major creditor was entitled to demand that the liquidators hold an enquiry as directed by the creditors' resolution.

[59] The ex-parte order granted on 28 November 2019 reads as follows:

' 1. It is ordered that an interrogation in terms of Section 417 read with Section 418 of the Companies Act 61 of 1973 be held in respect of the respondent.

2. The applicant is authorized and granted leave to hold the interrogation in terms of Section 417 read with 418 of the Companies Act 61 of 1973 in respect of the respondent commencing on 8 January 2020.

3. The Chief Magistrate of Durban or his appointee, be and is hereby appointed as Commissioner in the aforesaid interrogation.

4. The interrogation is hereby referred to the Chief Magistrate of Durban or his appointee who shall convene and conduct the same.

5. The costs and expenses incidental to the interrogation shall be paid out of the assets of respondent.

6. The costs of this Application shall be borne by the Respondent.

7. The Registrar is directed to ensure that this file and order remain confidential.'

[62] The applicant has not succeeded to show any need for a Court s417 enquiry. It can still pursue the convening of the liquidators or Master's enquiry. In addition, the order granted on 28 November 2019 is irregular. As a result, the counter application is granted.

Emvest Agricultural Corporation (Mauritius) Ltd v Emvest Evergreen (Pty) Ltd (Emvest Food Products (Mauritius) Ltd intervening); Emvest Agricultural Corporation (Mauritius) Ltd v Emvest Foods (Pty) Ltd (Pty) Ltd (Emvest Food Products (Mauritius) Ltd intervening); Emvest Agricultural Corporation (Mauritius) Ltd v Emvest Barvale (Pty) Ltd (Emvest Food Products (Mauritius) Ltd intervening); Emvest Agricultural Corporation (Mauritius) Ltd v Superior Macadamias (Pty) Ltd (43756/2016, 43734/2016, 43755/2016, 43757/2016) [2022] ZAGPPHC 350 (24 May 2022):

[1] These are applications for the confirmation of provisional winding-up orders, and for the final winding-up of the respective Respondents.

[2] The Applicant brought four applications for the winding-up of four different companies, namely Emvest Evergreen (Pty) Ltd, Emvest Foods (Pty) Ltd, Emvest Barvale (Pty) Ltd and Superior Macadamias (Pty) Ltd. The matters are similar, and for convenience of the court and the parties the matters were heard together and dealt with.

[3] Provisional orders for the winding-up of each of the Respondents were granted on 19 December 2018, and a *rule nisi* with a return date of 6 March 2019 was issued,

calling on all interested parties to show cause why the provisional orders should not be made final. The return date was postponed several times until the current date of hearing.

[4] The Applications for intervention were then brought by a shareholder of three of the abovementioned companies (Evergreen, Foods and Barvale), in which the shareholder also seeks confirmation of the provisional orders concerned.

[5] On 15 March 2021, the Court granted leave to the Intervening Party to intervene in the three applications concerned, and the Intervening Party thereafter served its three applications on the three companies concerned. The three companies concerned oppose the said applications. They are joined by the Second Intervening Applicant in their opposition.

APPLICANT'S APPLICATIONS AS CREDITOR:

6.1 The Applicant brings its applications for the final liquidation of the Respondents.

6.2 The Applicant's cases are that the Respondents are indebted to it in terms of four Service Level Agreements ("the SLAs") and that this debt remains unpaid.

6.3 The only issue to be determined by this Court is whether the Applicant has *locus standi* to apply for the winding-up of the Respondents.

6.4 This turns on whether, on the established tests, the Applicant has established that the Respondents are indebted to the Applicant in terms of the SLAs upon which the Applicant itself relies.

6.5 The extent of the discretion of the Court to not grant the relief in the event that the Applicant's *locus standi* is established.

[7] SHAREHOLDER APPLICATIONS (BY THE INTERVENING PARTY):

7.1 The Intervening Party seeks the final winding-up of the three Respondents concerned in its capacity as a shareholder of these Respondents on the basis that the three Respondents are unable to pay their debts and that it is just and equitable to wind-up these Respondents.

7.2 As the Intervening Party indisputably has *locus standi*, the issue that must be determined in this application is whether the Intervening Party has met the other requirements for the winding-up of the three Respondents concerned.

7.3 In relation to the intervening applications, the issues that must be determined are:

7.3.1 In respect of the commercial insolvency ground: whether, having regard to section 346(2) of the Companies Act, 1973, a shareholder is entitled in law to rely on section 344(f) to windup the Emvest respondents on the basis of commercial insolvency.

7.3.2 In respect to the just and equitable ground:

7.3.2.1 First, whether the Intervening Party has established that these respondents are commercially insolvent as absent such commercial insolvency, the Companies Act, 1973 does not apply at all;

7.3.2.2 Second, and in any event, whether the Intervening Party has established the requirements for a just and equitable winding-up.

[8] Due to the similarity of the four matters, the parties agreed that only one of the four applications, namely, the Barvale matter should be used as a central point in the hearing of the applications.

[9] It is common cause that the Applicant and the Respondents were previously companies within the same group up until the Respondents were sold off to a Canadian Company.

[10] The founding affidavits in all the four applications were all deposed to by Ms. Susan Margaret Law Payne, formerly a director of all the Respondents but currently a director of the Applicant.

[11] According to Ms Payne, when one distils information from the four founding affidavits for the sake of brevity, the Respondents owed the Applicant as follows:

11.1 Emvest Evergreen: USD 233 177

11.2 Emvest FOODS; USD 152 087

11.3 Superior MACADAMIAS: USD 478 634 and

11.3 Emvest Barvale: USD 287 304

[12] Ms Payne has attached in each instance copies of the SLA's and the respective invoices.

[13] Now that the provisional order has been granted, the Respondents who seek to discharge the provisional order, bear the onus to do so. In this case the Respondents strive to do that by once again disputing the existence of the debts on which the Applicant creditor relies.

THE CASE FOR THE RESPONDENTS

[14] *Mr Miller* submitted that there were disputes of fact arising from the papers of both the Applicant and the Respondent.

[15] The Respondent's main contention is that the debts do not exist or there is no proof that anything is owing to the Applicant; and therefore the Applicant has no *locus standi* to bring the application in the first place.

[16] If the debts exist, it was submitted, they are not enforceable.

[17] Factual insolvency was not a ground for winding up a company, commercial insolvency is required.

THE APPLICANT'S CASE

[18] The Applicant had delivered its letters of demand as contemplated in section 345 (1) (a) (i) of the Companies Act, 1973, which elicited no discernible response from the Respondents. The debts remain unpaid.

18.1 On 26 November 2015 and on 1 June 2016 the Applicant caused a letter of demand to be served on the Respondent (EMVEST EVERGREEN) at the Respondent's registered address.

18.2 On each occasion the return of service by the sheriff who effected service of the letter of demand concerned recorded that the company closed down and premises were empty and that there were no employees at the given address.

[19] The issue of *locus standi* is a question of law which has for ages been governed by the principle that an unpaid debtor has a right *ex debito iustitiae* to a winding up order against a company that is unable to pay its debts. This was recently confirmed by the Supreme Court of Appeal in *Afgri Operations Ltd v Hamba Fleet (Pty) Ltd* **2022 (1) SA 91** *(SCA) at para 12.*

[20] The respondents' submissions are denials of indebtedness, suggestions that the invoices relied upon by the applicant are not real. Respondents even take issue with Ms. Payne's allegation that the facts she deposed to fall within her personal knowledge, having been a director of the Applicant and the Respondent companies themselves.

[21] Respondents make suggestions that the property where the sheriff could not effect proper service due to abandonment has some intrinsic value, and that should this provisional order not be confirmed, it could somehow realize and pay off its indebtedness (which it denies!) with the proceeds.

[22] Once a creditor has satisfied the requirements of a liquidation order, the court has a narrow discretion to refuse the relief sought. In fact, the court may not on a whim decline the order.**[1]**

[23] The respondents' answering affidavits contain broad denials of each and every averment by the applicant's deponent with a view to put forward artificial disputes of fact which are not borne out by any real proof.

ANALYSIS AND CONCLUSION

[24] Winding-up proceedings ought not to be resorted to as a means to enforce payment of a debt which is contested by the respondent company on bona fide reasonable grounds. The winding-up procedure was not designed to resolve disputes as to the existence or non-existence of a debt. This is the core of the so-called *Badenhorst* rule.**[2]**

[25] Where the existence of the debt is bona fide disputed by the respondent on reasonable grounds a winding-up order, provisional or final ought to be refused.**[3]**

[25 In *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* **[1984] ZASCA 51***;* **1984 (3) SA 623** *(A)* Corbett JA had occasion to state that: "In certain instances the denial by the respondent of a fact alleged by the applicant may not be such as to raise a real, genuine or bona fide dispute of fact." In such an instance the court is entitled to grant a final order.

[25] The debts owed to the applicant remain unpaid to this date. The respondents have not succeeded to discharge the burden of proof, on a balance of probabilities, that they are not indebted to the applicant. Neither did they successfully dispel applicant's allegations that they are not in a state of solvency and are unable to pay their debts.

[26] The above considerations are applicable similarly to the application by the intervening parties.

[27] I accordingly grant the following order:

That: in cases No: 43756/2016, 43734/2016, 43755/2016 and 43757/2016 the respondents be and are hereby placed under final winding-up

The applicant is entitled to its costs of this application which are to be costs in the winding-up.

Standard Bank of SA Ltd vs Tsheola Dinare Tours and Transport Brokers (Pty)Ltd (22011/2021) [2022] ZAGPJHC 311 (6 May 2022):

Application for a final winding-up. *Plea lis pendens*- the requirements restated- not applicable because the causes of action in the two applications are different. In the first application the cause of action based *rei vindication* and the second application is based on final winding-up for inability to pay debt. Court has discretion to refuse the granting of *lis pendens* even when the requirements thereof are satisfied.

[1] This is an application in which the applicant seeks an order for the final winding up of the respondent on the ground that the respondent is unable to pay its debts in

the course of its business. As will appear below, in addition to these proceedings the applicant has instituted other proceedings which are still pending before this court for amongst others the return of the goods that are the subject of the dispute between the parties. Those proceedings will be referred to as “the first application” and the present as “the second application.”

[2] The respondent, whose answering affidavit was filed late, opposed the application. There appears to be no reason why the late filing of the answering affidavit should not, in the interest of justice, be condoned.

The background facts

[3] The dispute between the parties arose from the written instalment agreements concluded between them from 12 September 2017 to 24 July 2019. The respondent purchased certain vehicles from the applicant in terms of the agreements. The conditions of the sale of the cars are set out in the instalment agreements and includes the following:

(a) The applicant was and would remain the owner of the vehicles for the duration of the instalment sale agreement.

(b) Ownership of the vehicles would pass to the respondent only once the respondent had paid the applicant all amounts owed to it and had complied with its obligations in terms of the instalment sale agreement.

[4] Furthermore, the instalment agreements set out the circumstances under which default of the terms of the agreement would occur, and that included the following:

“13.6.1. The respondent was to fail to make payment of any amount payable to the applicant under the instalment sale agreement on the due date for such payment;

13.6.2. The respondent was to breach any of the terms and conditions of the instalment sale agreement and fail to remedy such breach within the time period specified in the applicant's written notice to do so.

[5] In the event of the respondent defaulting the applicant would be entitled amongst others to give the respondent written notice of such default, requesting them

to rectify the default within ten business days, or commence legal proceedings against the respondent.

[6] The applicant alleges in its founding affidavit that the respondent failed to make payments as required by the instalment agreements. Thus, on 16 July 2020, its attorneys of record demanded payment of the arrears, including availing the vehicles for inspection. The respondent, having failed to rectify its default; the applicant cancelled the agreements on 11 August 2020.

34] In the circumstances the following order is made:

1. The respondent is hereby placed under a final winding-up order in the hands of the Master of the High Court of South Africa.

2. The costs to be in the winding up of the respondent.

Letsobana v Africabin Building Systems (Pty) Ltd (52790/2021) [2022] ZAGPJHC 368 (10 May 2022):

Companies Act-section 26 of the Companies Act-Compliance

[1] This is an opposed motion where in the applicant seeks an order to exercise her rights in terms of section 26 of the Companies Act ("**the Act"**)**[1]**.

[2] The applicant seeks the following order;

1. That the respondent to comply with the applicant's notice in terms of **Section 26** of the **Companies Act 71 of 2008** dated 21 September 2021 and Form CoR 24 of the **Companies Act 71 of 2008** dated 11 October 2021 by providing the following particulars to the applicant, within a period of five (5) days of the order:-

1.1. The reports of annual meetings and annual financial statements as mentioned in **section 24(3)(c)(i)** and (ii).

1.2. The notices and minutes of annual meetings and communications contemplated by **Section 24(3)(d)and** (e) from date of incorporation to date.

1.3. The banking statements of the company.

1.4. Shares certificates for Mathibela John Mogaladi (100 shares), Julia Lerato Mogaladi (200 shares), Petunia Letsobana Mogaladi (100 shares), Lucia Tebogo Mogaladi (100 shares) and Kabelo Gift Mogaladi (400 shares) which were all signed and acquired on 08 July 2010 as part of the 1000 ordinary issued by the company in its Memorandum of Association;

1.5. Notices of Pre-emptive rights and sale of shares notices to the shareholders for the shares sale of Mathibela John Mogaladi and Lucia Tebogo Mogaladi in the company;

1.6. Proof of payment for the purchase of Lucia Tebogo Mogaladi's shares by Kabelo Gift Mogaladi, and the shareholder's meeting minutes or resolution sanctioning the acquisition of Mathibela John Mogaladi and Lucia Tebogo Mogaladi shares in the company.

1.7. Memorandum of Incorporation and the amended Memorandum of Incorporation of the company.

1.8. Shareholders agreements and the amended shareholders agreement, shareholders resolutions for the amendment of the shareholders agreements and notices for the meeting shareholders' meeting to amend the shareholders' agreement as well as the agenda for such meeting.

1.9. Board of Directors authorisation for loans and financial assistance of the company to any of Sepomo Transport Services, Classic Tops, Mathote Contracting, Winnerspark Football Club, Randzanani Trading Enterprises, Springs Industrial Business Park, Komsese Construction and Civils, Best Enough Trading and Projects 217, Kgapa Ya Dikgapa Investment, African Concord Capital Trade, Joint Venture Abacus Modular Mathote Contracting, Mathote Modular Building Systems, Mathote Investment Holdings, Striving Mind Trading 522, Asiziwelele, Kygofor and Bakone Ditau Mineral Resources.

1.10. The company's annual returns filed with South African Revenue Service ("**SARS**") and Companies and Intellectual Property Commission ("**CIPC**") from the date of incorporation to date.

1.11. Loan agreements, and any other agreements between the company with either of the companies Sepomo Transport Services, Classic Tops, Mathote Contracting, Winnerspark Football Club, Randzanani Trading Enterprises, Springs Industrial Business Park, Komsese Construction and Civils, Best Enough Trading and Projects 217, Kgapa Ya Dikgapa Investment, African Concord Capital Trade, Joint Venture Abacus Modular Mathote Contracting, Mathote Modular Building Systems, Mathote Investment Holdings, Striving Mind Trading 522, Asiziwelele, Kygofor and Bakone Ditau Mineral Resources.

1.12. Declaration of the company's dividends and proof of distribution thereof, from date of incorporation to present.

1.13. The minutes of the annual meeting following the audit of financial statements from date of incorporation to date.

1.14. The credit and debt book of the company, the disposal agreements and asset register of the company from date of incorporation to date.

2. Ordering the respondent to pay the costs of this application on scale of attorney and own client's scale.

3. Further or alternative relief.

PARTIES

[3] The applicant a major female, a shareholder, director and employee of the respondent.

[4] The Respondent is African Building Systems Proprietary Limited, a private company registered as such with the Companies and Intellectual Property Commission.

BACKGROUND OF RELEVANT FACTS

[5] The respondent was formed in 2010, by John Mogaladi ("**John"**). John is the uncle of the applicant and the deponent. The respondent was formed based on family dynamics.

[6] The respondent was funded by John with him providing seed capital at inception, as well as him undertaking to provide additional loans. He also offered to sign surety on behalf of the respondent as and when required.

ORDER

[57] In the premises of the above the following order is made;

1. The respondent is ordered to comply with the applicant's notice in terms of **section 26** of the **Companies Act 71 of 2008** dated 21 September 2021 and Form CoR 24 of the **Companies Act 71 of 2008** dated 11 October 2021 by providing the following particulars to the applicant, subject to seven (7) years, within a period of five (5) days of the order:-

1.1. The reports of annual meetings and annual financial statements as mentioned in **section 24(3)(c)(i)** and (ii),

2.75cm; margin-bottom: 1cm; line-height: 150%"> 1.2 The notices and minutes of annual meetings and communications contemplated by **Section 24(3)(d)and** (e) from date of incorporation to date.

1.3 The Memorandum of Incorporation and the amended Memorandum of Incorporation of the company.

2. Each party to pay their own costs.

The Prudential Authority vs Maimela (31932/2020) [2022] ZAGPJHC 359 (26 May 2022)

[1] In this application, the applicant sought an order against the respondent in the following terms:

1.1 That the estate of Karabo Tshepo Maimela (Identity number: 850819 5917 085) be placed under provisional sequestration;

1.2 That a Rule Nisi be issued calling upon any interested party to appear before the above Honourable Court on a date to be determined by the above Honourable Court to show cause why:

1.2.1 a final sequestration order should not be granted; and

1.2.2 the costs of this application should not be costs in the sequestration of the Respondent's estate.

1.3 Directing that the order be served on:

1.3.1 The respondent at 63 Capricorn Drive, Lone Hill, Gauteng, or in such manner as the Court may direct;

1.3.2 On the employees of the Respondent, if any;

1.3.3 On any registered trade unions which represent any employees of the Respondent, if any; and

1.3.4 The South African Revenue Services at 49 Newquay Road, Alberton, Johannesburg.

1.4 Ordering that the costs of this application be costs in the administration of the Respondent's insolvent estate.

[2] After hearing argument, I granted an order and undertook to furnish my reasons therefore at a later stage. The reasons appear hereunder.

[3] The applicant is the Prudential Authority established and duly registered and incorporated in terms section 32 of the Financial Sector Regulation Act of South Africa, Act 9 of 2017 and having its principal place of business at 370 Church Street, Pretoria.

[4] The respondent is Karabo Tshepo Maimane, an adult businessman who resides at 63 Capricorn Drive, Lone Hill, Gauteng.

[5] It is common cause that on the 18th of March 2011 the Deputy Registrar of the applicant instituted an investigation and appointed investigators to conduct an inspection into the business of the TV1 Scheme in South Africa and several other individuals in terms of **s11** and s**12** of the **South African Reserve Bank Act, 90 of 1989**. The investigation was two-fold: to inspect the conduct of the TV1 Scheme and the several other individuals and to determine whether the respondent carried on the business of a bank or mutual bank. The TV1 Scheme was obtaining money by

conducting the business of a bank or mutual bank without being registered as such and without being authorised to conduct the business of a bank.

[6] The investigators established that there were 5742 members/distributors of the TV1 scheme is South Africa across the nine Provinces with the majority being in KZN. On the 2nd of December 2014 the Registrar appointed an administrator to manage and control repayment of all moneys obtained by the respondent in the alleged contravention of the Bank's Act. It is further common cause that the respondent received moneys from several members and participants of the TV1 scheme in his two bank accounts with Standard Bank which moneys are no longer in the respondent's bank accounts. One of the bank accounts showed sixty-five transactions, sixty of which are inflows totalling five outflows and the other account showed 2849 inflow transactions as against 2693 outflow transactions with amounts totalling over R1 million.

[11] The respondent's case is that he never participated in the business of the TV1 scheme and that all the moneys which were deposited into his bank accounts by members and participants of the TV1 Scheme were channelled into his account for his support by his parents. Furthermore, so the argument went, the applicant has failed to identify and produce the details of the persons who deposited money in his account to enable the Registrar to determine the true amount obtained unlawfully by the respondent.

[12] I do not agree with the respondent's contentions. The respondent does not deny that certain and several investors of the TV1 scheme deposited moneys into his bank accounts. He states that those moneys were paid in multiples of R2 700 on instruction of his parents and were channelled through his bank accounts for the purposes of supporting him. The respondent has allowed his bank account to be used to receive and transact moneys as a bank in the furtherance of the business of the TV1 scheme in contravention of the **South African Reserve Bank Act. Furthermore**, the respondent admitted the amount as claimed by the Registrar to have been deposited in its accounts by the investors of the TV1 scheme in the letter from its attorneys dated the 23rd of October 2018. Nothing turns on the fact that the applicant has to date not been able to establish the identities of the persons who deposited money in the respondent's bank accounts.

[13] Furthermore, the respondent has committed an act of insolvency as provided for in the **Insolvency Act for** it admitted in its answering affidavit that the sum of R195 400 paid in its account could easily be repaid over a period of eighteen (18) months. However, to date hereof the respondent has failed to make payment of the said amount and such an amount is no longer in his bank accounts. Given that the respondent has been afforded an opportunity to place before this court his financial circumstances, his income resources and the properties he owns but failed to do so, and the fact that the moneys claimed by the applicant are no longer in his bank accounts, the ineluctable conclusion is that the respondent is unable to pay its debts. Therefore, the applicant is entitled to the order prayed for in the notice of motion.

[14] In the circumstances, I made the following order:

1. The estate of the respondent is place under provisional sequestration in the hands of the Master;

2. A Rule Nisi is issued calling upon all persons with a legitimate to advance reasons, if any, on the 19th of July 2022 why the order in 1 above should not be final;

3. The applicant is order: –

3.1 To serve a copy of this order to the respondent;

3.2 To serve a copy of this order on the employees of the respondent, if any, and any trade union that may represent them;

3.3 To furnish a copy of this order to the Master of the High Court and the South African Revenue Services;

4. That the costs of this application be costs in the administration of the insolvent estate of the respondent.

Matji vs Van Straten NO and Others (28118/12) [2022] ZAGPJHC 362 (27 May 2022)

[1]. The applicant seeks an order in terms of Section 149(2) of the Insolvency Act 24 of 1936 ("the Act") alternatively Rule 42 of the Uniform Rules, alternatively common law an order setting aside the final sequestration order granted by my brother Sutherland on 1 August 2014 ("the Order").

[.2]. The application is opposed by the first respondent. To date neither the second nor the third respondent has entered the fray. Subsequent to the launching of the application Nedbank launched an application to intervene in the proceedings as creditor.

LEGAL FRAME WORK

[3] Section 149(2) of the act provides as follows:

"(2) The court may rescind or vary any order made by it under the provisions of this Act."

[4]. There are conflicting decisions on the issue whether the applicant can or should rely on Section 149(2) of the Act or the common law. In terms of the *Ward* v *Smit: In re Gurr v Zambia* Airways Co*rporation Ltd**[1]*** (Ward case) decision, it matters not if the order was granted on default or because of subsequent events as a basis for rescission, the order must be set aside in terms of the Act. Judge of Appeal Scott says the following at 180-G

"*The language of the section is wide enough to afford the Court discretion to set aside a winding up order both on the basis that it ought not to have been*

granted at all and on the basis that it falls to be set aside by reason of subsequent events."

[5] However, in *Storti v Nugent* **[2]** the Court stated one can, when the sequestration order should not have been granted in the first place, rely on the common law. However, in *Storti* matter, the Court did not have regard to the *Zambia Airways* decision.

[6]. In terms of the relation between the common law and the Act, Scott JA proceeded to say the following in the Ward case at 181 para A-D:

"*There is nothing in the section to suggest that the Court's discretionary power to set aside a winding-up order is confined to the common-law grounds for rescission. However, in the Herbst case supra, Eloff J expressed the view (at 109F--G) that no less would be expected of an applicant under the section than of an applicant who seeks to have a judgment set aside at common law. I think this must be correct. The object of the section is not to provide for a rehearing of the winding-up proceedings or for the Court to sit in appeal upon the merits of the judgment in respect of those proceedings. To construe the section otherwise would be to render virtually redundant the facilities available to interested parties to oppose winding-up proceedings and to appeal against the granting of a final order. It would also make a mockery of the principle of ut sit finis litium'. (Abdurahman v Estate Abdurahman (supra at 875G--H).) it follows that an applicant under the section must* not only show *that there are special or* exceptional *circumstances which justify the setting aside* of the w*inding-up order; he or* she is *ordinarily required* to f*urnish, in addition, a satisfactory explanation for* not h*aving opposed the granting of a final order or appealed against* the *order. Other relevant considerations would include the delay in bringing the application and the extent* to w*hich the winding-up had progressed."*

[37] It is therefore expected of a party in a rescission application to act expeditiously and not to delay the launching of the application, and

by implication, the finalisation thereof. In *Standard General Insurance Co Ltd v Eversafe (Pty) Ltd***[28]** it was held that:

> *"It is well-established that an applicant for any relief in terms of rule 27 has the burden of actually proving, as opposed to merely alleging, the good cause that is stated in rule 27(1) as a jurisdictional prerequisite to the exercise of the court's discretion (Silber v Ozen Wholesalers (Pty) Ltd* **1954 (2) SA 345** *(AD) at 352G). The applicant for any such relief must, at least, furnish an explanation of his default sufficiently full to enable the court to understand how it really came about and to assess his conduct and motives (Silber v Ozen Wholesalers supra at 353A). Where there has been a long delay, the court should require the party in default to satisfy the court that the relief sought should be granted Gool v Policansky 1939 CPD 386 at 390). This is, in my view, particularly so when the applicant for the relief is the dominus litis plaintiff."* [Own emphasis]

And at 94 C-G:

> *"Having regard to what was stated in Silber v Ozen Wholesalers (supra) in relation to the assessment of motive, it seems to me that the explanation of an applicant for relief under rule 27, particularly after an inordinate delay occasioned by the inaction of a dominus litis plaintiff, must be such as to dispel any impression of a reluctance to achieve an expeditious hearing of the true dispute between the parties. In the circumstances of this case it is appropriate that I should have regard to what has been held to be the proper function of a court. That function is encapsulated in the following passage in the judgment of Slomowitz AJ in Khunou and others v Fihrer & Son* **1982 (3) SA 353** *(WLD) at 355G-H:*

> *"The proper function of a court is to try disputes between litigants who have real grievances and so see to it that justice is done. The rules of civil procedure exist in order to enable Courts to perform this duty with which, in*

turn, the orderly functioning, and indeed the very existence, of society is inextricably interwoven. The Rules of Court are in a sense merely a refinement of the general rules of civil procedure. They are designed not only to allow litigants to come to grips as expeditiously and as inexpensively as possible with the real issues between them, but also to ensure that the Courts dispense justice uniformly and fairly, and that the true issues which I have mentioned are clarified and tried in a just manner." [own emphasis]

[38] The applicant has the burden of actually proving, as opposed to merely alleging, 'good cause' for a rescission**[29]**. In *Silber v Ozen Wholesalers (Pty) Ltd**[30]*** the Appellate Division, as it then was, held that the requirement of good cause cannot be held to be satisfied unless there is evidence not only of the existence of a substantial defence but, in addition, the *bona fide* presently held desire on the part of the applicant to actually to raise the defence concerned in the event of the judgment being rescinded.

[39] It is always been the hallmark of a *bona fid*e defence, which has to be established before a rescission is granted, that the litigant honestly intends to place before a court a set of facts, which, if true, will constitute a defence**[31]** or justify the order sought. I am of the view that the application lacks *bona fides* and therefore make the following order.

Order

The application is dismissed with costs.

Kgoro Consortium (Pty) Ltd and Another v Cedar Park Properties 39 (Pty) Ltd and Others (935/2020) [2022] ZASCA 65 (9 May 2022):

Company law – business rescue proceedings – whether reasonable prospect of rescuing company as contemplated in s 131(4)*(a)* of **Companies Act 71 of 2008**.

Costs – costs *de bonis propriis* ordered against attorneys – no opportunity afforded to state case – special costs order set aside.

Kgoro Consortium's application to place the first respondent ("Cedar Park") under supervision and to commence business rescue proceedings was dismissed. The High Court ordered the attorneys for the appellants ("Smit Sewgoolam") to pay second respondent's costs *de bonis propriis* on the attorney and client scale. Appellants appealed against the dismissal of the application and Smit Sewgoolam appealed against the orders against it.

Mbatha JA refers to section 131(1) of the Companies Act 71 of 2008 [para 8].

As Cedar Park was financially distressed in terms of the Act, the question turned on the consideration of whether the appellants made out a case for achieving any of the two objectives set out in section 128(1)*(b)*(iii) of the Act. The applicant in business rescue proceedings bears the onus to prove that the company under consideration would have reasonable prospects of recovery. Kgoro failed to meet the threshold required to put Cedar Park under supervision and commence business rescue.

In the Smit Sewgoolam appeal, it was noted that costs *de bonis propriis* should only be ordered in exceptional circumstances, and may not be made against a party which has not been afforded a proper opportunity to respond to the allegations in question and to state its case in respect of the envisaged costs order. That appeal was upheld on that basis.

Lutchman NO and others v African Global Holdings (Pty) Ltd and others and a related matter [2022] JOL 53093 (SCA)

Business rescue- interpretation of section 131(6) of companies act 71 of 2008- business rescue application is made, read with the provisions of sections 131(1) to (4) and 132(1)(b), had to be interpreted in accordance with the well-known principles of interpretation [para 25].

African Global Operations (“Operations”) was a wholly-owned subsidiary of Global Holdings (previously known as Bosasa). While the Bosasa companies were in a creditor’s voluntary winding-up, Holdings applied for an order placing six of the companies under supervision and commencing business rescue proceedings in terms of section 131(1) of the Companies Act 71 of 2008. Holdings on the other hand, sought to prevent the liquidators auctioning off any further assets of the companies. The High Court granted the relief sought in the auction application and dismissed the business rescue application.

Meyer AJA examines the grounds of appeal in the two appeals facing the court [para 21]; and the provisions of section 131 [para 23]; and considers when a business rescue application is ‘made’ within the meaning of section 131(6). Section 131(6), which provides for the suspension of liquidation proceedings at the time a business rescue application is made, read with the provisions of sections 131(1) to (4) and 132(1)(b), had to be interpreted in accordance with the well-known principles of interpretation [para 25].

The auction appeal is upheld and the business rescue appeal dismissed.

[1] On 30 June 2020, the Gauteng Division of the High Court, Johannesburg (the high court) dismissed an application for the placing of the first respondent, Cedar Park Properties 39 (Pty) Ltd (in liquidation) (Cedar Park), under supervision and commencing business rescue proceedings (para 2 of the order). The application was brought by the first appellant, Kgoro Consortium (Pty) Ltd (Kgoro). The second appellant, Regiments Capital (Pty) Ltd (in liquidation) (Regiments) intervened to support the application. The second respondent, Vantage Mezzanine Fund II Partnership (Vantage), opposed the application. The high court ordered the attorneys for the appellants, Smit Sewgoolam Incorporated (Smit Sewgoolam), to pay Vantage’s costs *de bonis propriis* on the attorney and client scale (para 3 of the order). It also directed the Registrar of the high court to forward a copy of its judgment to the Gauteng

Legal Practice Council for an investigation into the conduct of the responsible attorney at Smit Sewgoolam (para 5 of the order). With the leave of the high court, the appellants appeal against para 2 of the order. Smit Sewgoolam appeals against paras 3 and 5 of the order, with the leave of the court a quo. Regiments did not participate in the appeal.

Kgoro appeal

[2] The background of the matter is as follows. Cedar Park is a wholly owned subsidiary of Kgoro. Regiments is the majority shareholder in Kgoro. Cedar Park was used as a special purpose vehicle for the purchase of the property described as the Remaining Extent of Erf 575, Sandown Extension 49 Township, Gauteng (the property) and the development thereof by the construction of residential units, shops, business premises and hotels. The property was secured from the City of Johannesburg Metropolitan Municipality (City of Johannesburg), the third respondent, for the sum of R280 million, with payment to be made once the property was developed.

[3] On 5 June 2013, Cedar Park concluded a loan facility agreement with Vantage in the amount of R150 million in respect of the development of the property, which became due and payable, together with interest, on 30 June 2018. Kgoro provided a guarantee for Cedar Park's indebtedness to Vantage. As a consequence, Kgoro pledged and ceded all rights, title and interest in its shares in Cedar Park in favour of Vantage as security for the guaranteed obligations. It is common cause that Cedar Park failed to meet its obligations in terms of the loan facility agreement.

[4] As a consequence, on 6 December 2018, Vantage launched an application for the winding-up of Cedar Park for failing to make payment in the amount of more than R300 million that was due and owing. When Cedar Park failed to file an answering affidavit, Vantage enrolled the liquidation application for hearing on the unopposed roll for 18 February 2019. However, three days before, on 15 February 2019, Kgoro lodged the application to place Cedar Park under supervision and commence business

rescue. The application for liquidation, therefore, had to be removed from the court roll.

[5] Vantage consequently brought an application to intervene in the business rescue application and filed an answering affidavit thereto. Kgoro failed to file a replying affidavit thereto within the prescribed time limits, which prompted Vantage to enrol the application for hearing. This was, however, followed by the application to intervene in the proceedings by Regiments. After Kgoro finally filed its replying affidavit to Vantage's answering affidavit in the business rescue application in respect of Cedar Park, the application came before Twala J, in the high court.

[6] Before the high court, the appellants sought to make out a case for placing Cedar Park under supervision and commence business rescue in terms of s 131(4) of the Companies Act 71 of 2008 (the **Companies Act) on** the basis that it was financially distressed, that it was just and equitable that it be placed under supervision, and that there were reasonable prospects of rescuing it. In essence, the appellants' case was that the 'Kgoro Sandton' development was a valuable project with great financial prospects, as the property was situated in a sought after part of Gauteng, namely Sandton. The value of the property on the open market was said to be at least R1,494 billion and the forced sale value R1,046 billion. It was described as a financially viable project which had attracted a lot of interest from potential purchasers, irrespective of the delays in the development of the property occasioned by the late registration of the property in Cedar Park's name, the opposition from neighbouring property owners and the delay in obtaining vacant possession.

In the Kgoro appeal:

1 The second respondent's application for leave to file supplementary heads of argument is dismissed with costs.

2 The appeal is dismissed with costs.

In the Smit Sewgoolam appeal:

1 The appeal is upheld with costs.

2 Paragraph 3 of the order of the court a quo is set aside.

Lutchman N.O. and Others v African Global Holdings (Pty) Ltd and Others; African Global Holdings (Pty) Ltd and Others v Lutchman N.O. and Others **(1088/2020 and 1135/2020) [2022] ZASCA 66 (10 May 2022)**

Business rescue – **Companies Act 71 of 2008** – **s 131(6)** –interpretation – **s 131(6)** provides for the suspension of liquidation proceedings at the time a business rescue application is made – meaning of when business rescue application is 'made' – business rescue application must be issued, served by the sheriff on the company and the Commission, and each affected person must be notified of the application in the prescribed manner, to meet the requirements of **s 131(6)** in order to trigger the suspension of the liquidation proceedings – practice – judgments and orders – interpretation of order – applicable principles – determining the manifest purpose of the order – to be determined by also having regard to the relevant background facts which culminated in it being made.

ORDER

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

1. The auction appeal (case no. 1088/2020) is upheld with costs, including those of two counsel for the first to thirty-ninth appellants and the fortieth appellant.

2. Paragraphs 7, 8, 9, 10 and 11 of the order of the high court are set aside and replaced with the following:

'The application under case no. 44827/19 is dismissed with costs, including those of two counsel for the first to thirty-ninth respondents and the first

intervening party, the Commissioner for the South African Revenue Services.'

3. Save to the extent reflected in paragraph 3.1 hereof, the first, second and third appellants' business rescue appeal (case no. 1135/2020) against paragraphs 16, 17 and 18 of the high court's order is dismissed with costs, including those of two counsel for the first to thirty-ninth respondents and the fortieth respondent.

3.1 Paragraph 16 of the order of the high court is set aside and replaced with the following:

'The business rescue application is struck from the roll.'

3.2 The first to thirty-ninth and the fortieth respondents' appeals against paragraph 17 of the high court's order are upheld.

3.3 Paragraph 17 of the order of the high court is set aside and replaced with the following:

'The applicants are ordered to pay the respondents' costs of the business rescue application, such costs are to include the costs of two counsel.'

[1] The sensational revelations made during the Zondo Commission of Enquiry into Allegations of State Capture, *inter alia* by the former COO of Bosasa, Angelo Aggrizzi, shocked the country. Bosasa is now known as Global Holdings (Pty) Ltd (Holdings). This prompted the bankers of African Global Operations (Pty) Ltd (Operations) - a wholly-owned subsidiary of Holdings that performed all the treasury functions of the Bosasa Group of companies, including receiving payments and making payments on behalf of the various operating companies in the Bosasa Group - to indicate that they would be withdrawing Operations' banking facilities and closing the banking accounts, which was catastrophic for its continued business operations.

[2] After the Bosasa Group had failed to find another bank that would provide Operations with banking facilities, the directors of Holdings and of Operations resolved to place Operations and its ten wholly-owned subsidiaries**[1]** under voluntary winding-up in terms of section 351 of the Companies Act 61 of 1973 (the 1973 Companies Act).**[2]** However, when the joint provisional liquidators**[3]** (the liquidators) started to exercise their statutory powers, Holdings attempted to have the resolutions in which the Bosasa companies were placed under voluntary winding-up (the special resolutions) declared null and void. In addition, and as a consequence of the aforementioned, Holdings attempted to have the appointment of the liquidators declared null and void and of no force and effect. That was the beginning of a litigious battle between the liquidators and Holdings.

[3] Holdings did that by initiating an application as a matter of extreme urgency in the Gauteng Division of the High Court, Johannesburg (the high court). The case was argued before Ameer AJ on 13 March 2019. The following day judgment was delivered, granting Holdings the relief it had sought and ordering the liquidators to pay the costs of the proceedings in their personal capacities. However, the high court granted the liquidators leave to appeal to this Court against that order. On 22 November 2019, this Court delivered its judgment, upholding the appeal and altering the Ameer AJ order to one dismissing the application with costs, including those of two counsel.**[4]** Therefore, the effect of this Court's order is that the Bosasa companies remained in a creditor's voluntary winding-up. On 3 December 2019, Holdings**[5]** caused an application to be issued by the Registrar of the high court. This was for an order placing six of the eleven Bosasa companies**[6]** (the six Bosasa companies) under supervision and commencing business rescue proceedings in terms of s 131(1) of the Companies Act 71 of 2008 (the **Companies Act). During** 4-6 December 2019, the liquidators caused most of the assets of the six Bosasa companies to be sold by public auction.

[4] Holdings**[7]** responded by launching what is referred to as the 'auction application'.**[8]** Therein they sought an order against the liquidators: (a) interdicting them from selling any further assets owned by the six Bosasa companies before the

final adjudication of the business rescue application and/or before the second meeting of creditors, without the written consent of Holdings; (b) a declaration that the sale of assets before the final adjudication of the business rescue application and/or before the second meeting of creditors, without the written consent of Holdings, to be null and void; and (c) interdicting them from delivering the movable assets to, and cause transfer and registration of ownership of the immovable assets into the names of, anyone who had purchased the assets of the six Bosasa companies before the final adjudication of the business rescue application and/or the second meeting of creditors, without the written consent of Holdings.

[5] The auction and business rescue applications (and another application which is presently not relevant) were argued before the high court (De Villiers AJ) in a consolidated hearing. In one judgment, the high court granted the relief sought in the auction application and dismissed the business rescue application. It gave the liquidators and SARS leave to appeal its order in the auction application. It also gave Bosasa, Sun Worx, and Kgwerano leave to appeal its order in the business rescue application. The liquidators and SARS were also granted leave to appeal one of the costs awards made in the business rescue application. In each case, leave was given to appeal to this Court.

Imobrite (Pty) Ltd v DTL Boerdery CC (1007/20) [2022] ZASCA 67 (May 2022)

Winding up- Close corporation - winding-up – proper interpretation of s 69 of Close Corporation Act 69 of 1984 - whether application for winding-up brought by secured creditor constituted abuse of court's processes – unpaid creditor generally entitled to winding-up *ex debito justitiae* against corporation unable to pay its debts – discretion to nevertheless refuse winding-up order – whether discretion not to grant the winding-up order was properly exercised – appeal upheld.

[1] Central in this appeal is the question of whether the North West Division of the High Court, Mahikeng, correctly refused the appellant's application for the winding-up of the respondent close corporation.

[2] The appellant, a private company, agreed to lend an amount of R2 750 000 to the respondent, a close corporation, and the respondent's sole member, Mr Tielman Kotze (Mr Kotze). This agreement was recorded in an acknowledgement of debt (AOD) signed on 15 May 2018. The AOD inter alia acknowledged that the respondent and Mr Kotze had procured a loan from the appellant for the capital amount of R2 750 000 and that they would repay the capital plus interest thereon in ten yearly instalments of R791 495.95. In addition to interest, the respondent and Mr Kotze also agreed to pay a 'facilitation fee' to the appellant. It was agreed that the first instalment would be payable on or before 7 May 2019 and thereafter on or before 7 May of each consecutive year. The AOD also stipulated that in the event that the debtor remained in default 10 days after receiving notice to repair the breach, then the appellant, as the creditor, would be entitled to exercise any remedy at its disposal in terms of the law, including to cancel the agreement and retain all payments already made.

[3] It is common cause that the appellant was a secured creditor of the respondent and held a special and general notarial bond over the respondent's movable assets for an amount of R2 750 000, together with an additional amount of R540 000 in respect of costs. In addition, a first ranking covering mortgage bond had been registered in favour of the appellant over the respondent's farm.

[4] It is also common cause that the respondent failed to pay the first instalment by the due date, namely 7 May 2019. As a result, the appellant delivered a letter of demand to the respondent. On 20 May 2019, the appellant sent a letter to the respondent, drawing its attention to its failure to pay the first instalment in accordance with the AOD. In its response dated 3 June 2019, the respondent called for a statement of account and intimated that upon receipt thereof, the respondent and Mr Kotze would proceed to apply for alternative funding from a third party in order to liquidate their indebtedness. In the same response, the respondent disputed the date from which interest was payable and queried the facility fee computation.

[5] On 21 June 2019, the appellant issued a statutory demand as contemplated in **s 69** of the **Close Corporations Act, 69 of 1984**. The Sheriff properly served the

demand. On 5 August 2019, the attorneys for the respondent sent a letter to the appellant's attorney, referring to previous correspondence and recording that it was disputing any indebtedness to the appellant. It was also contended that the provisions of the National Credit Act 34 of 2005 (the NCA) were applicable, but that the appellant had failed to comply with its requirements. Lastly, the letter stated that any application seeking the winding-up of the respondent would be opposed.

[6] It is against the aforesaid background facts that the appellant, on 13 September 2019, launched an application for the winding-up of the respondent in the North West Division of the High Court, Mahikeng (the high court) on the basis that DTL was unable to pay its debts. In the answering affidavit, the respondent raised a number of defences. However, not all of the defences raised persisted when the application came before the high court. Two points *in limine* were raised. The first point *in limine* was that the respondent disputed that it alone was a debtor of the appellant and, on that basis, contended that the appellant had no *locus standi* to bring the winding-up proceedings against it individually. The argument was raised that the debtor, as described in the acknowledgement of debt, referred not only to the respondent but to both the respondent and Mr Kotze. On this basis, it was contended that the acknowledgement of debt had created a special *sui generis* kind of debtor which can only be held jointly liable and as the appellant had not joined Mr Kotze, the appellant was not entitled to pursue the proceedings against the respondent. The second point *in limine* was to the effect that the acknowledgement of debt was a written record of a loan agreement where the appellant had granted credit recklessly and in violation of the relevant provisions of the NCA).

Audacia Stellenbosch Market (Pty) Ltd v Downing Investments CC and Another (8552/21) [2022] ZAWCHC 66 (3 May 2022):

[1] Ordinarily it is not desirable, in my view, for judicial officers to make a statement in respect of criticism of their judgments, even in the context of an application for leave to appeal. Judicial Officers should speak once, for as long as it is necessary and as short as possible, on the issues relevant for the just determination of the case, in

pronouncing their judgment. This application for leave to appeal is a classic example of why it is sometimes impossible not to speak, and in fact necessary for one to speak, on the issues after judgment.

[2] In the judgment on 7 February 2022 the court found that the onus was on Hendrikse to establish his authority to act on behalf of the applicant in bringing the application and that in the absence of a resolution of the company, it was impossible to find that the company authorized Hendrikse to institute the proceedings. The court was unable to conclude that Hendrikse had the mandate to depose to a founding affidavit on behalf of the company and held that the *locus standi* of Hendrikse was not established. The court concluded that Hendrikse failed to show that the institution of the proceedings had been duly authorised by the company. For the same reasons, the court found that it could not be said that the confirmatory affidavit of Strydom was sufficient to conclude that the second intervening party was a shareholder of the company, and thus entitling the second intervening party to bring the application in that capacity.

[3] The second intervening party had passed a resolution which authorized it to intervene in the liquidation application and the appointment of the attorneys in furtherance thereof and authorized Strydom to sign all and any documentation relating to the application to intervene. In considering the resolution, the court found that the second intervening party at the time, was already aware that the authority of Hendrikse, Strydom and their attorneys to represent the company was disputed. A notice in terms of Rule 7 to this effect had been prepared on 21 July 2021 and served on them and they had already replied thereto in a reply dated 16 August 2021 and filed at court on 17 August 2021. The court found that the second intervening party did not authorize Strydom to seek the intervention in order to secure a provisional order of liquidation in its own name.

[4] In the application for leave to appeal, the applicant said that the application was brought in the name of the company by the one director, Hendrickse, and by the other shareholder, the second intervening party who was also a director. It is argued in the application for leave to appeal, that the extended *locus standi* provisions of section

157 (1) of the Companies Act, 2008 (Act No. 71 of 2008) (the Act) permitted an application for the winding up of the company by any party directly contemplated in the Act (the second intervening party both as creditor and shareholder) and secondly Hendrikse as director, being parties contemplated in section 81 of the Act and the deponent to the founding papers in the application for the winding up of the company. It was further argued that section 157 (1) of the Act also permitted any party (Hendrikse as director of the party) acting on behalf of a party directly contemplated in the Act (in *casu* the company) who cannot act in their own name because of the deadlock, to bring the application on behalf of that party, being the company.

[5] The case was that on any basis, there was an application for the winding up of the company before the court, whether:

(a) by the company which could not act in its own name as it was not possible to pass a special resolution due to the deadlock, hence the need for Hendrikse, as one of the directors and the second intervening party as shareholder and creditor, to bring the application on its behalf; or

(b) by these two parties in their own rights.

[6] The case is that the Act in any event permitted one or more directors or one or more shareholders to bring the application and that is what Hendrickse and the second intervening party were doing, if not in form, in substance. It is argued that section 81 of the Act specifically provided for the winding up application to be brought and the situation was the one directly contemplated in section 81 and fell within the first category of standing contemplated in section 157(1)(a) of the Act and that section 157(1)(b) was also applicable given that the company could not act in its own name due to the deadlock. It was argued that the court erred in dismissing the application for the winding up of the company on the authority point alone and in not considering the merits of the winding up application and not granting the provisional order sought.

[19] There was no special resolution by the company to be wound up by the court or a special resolution by the company to apply to court as regards its winding up. The court provided reasons I deem adequate as to why it was not established that the company applied for the order sought in the main application. The authority of Hendrikse to act on behalf of the applicant was disputed and the court found that it

was not established. There was no application before the court by Hendrikse as a director or by the second intervening party as a shareholder and creditor of the company. Basic necessaries for such an application, like the Master's report in respect of an application by Hendrikse or the second intervening party were not filed, simply and primarily because they were not necessary for what was before court. This is the reason why the judgment of the court did not pronounce itself on the standing of Hendrikse, in his name as a director, or the second intervening party in its name as a shareholder and creditor, to bring the application.

[20] The fact that the directors are deadlocked in the management of the company or that the shareholders are deadlocked in voting power may be a ground for a court to order that a solvent company be wound-up, but on its own does not confer *locus standi* on a director or a shareholder to unilaterally act on behalf of the company. This is not how I understand section 81(1)(d) of the Act and by extension section 157(1)(a) of the Act. The well- established grounds of *locus standi* should still be met. I understand the sections, read together, to provide for a director or shareholder to bring an application in their own name on behalf of the company. Hendrikse and the second intervening party did not have standing, as envisaged in section 157(1)(a), to act on behalf of the company in the company's name.

[21] I understand section 157(1)(b) to include persons in the position beyond those provided for in section 81 of the Act in respect of the winding up of solvent companies by a court order. What the section envisaged is a departure from the common law approach to this type of litigation which is individualistic, to an African jurisprudential approach which is communal. It is a provision which champions a cause which includes that when a winding-up of a solvent company is considered by the courts, the interests of the applicants should not be narrowly construed but should be widely construed. In other words, the character of a winding-up application of a solvent company must be inclusive and not exclusive. In interpreting standing, I understand this part of our law to favour freedom from technical and formalistic restraints of access to court proceedings through an extended construction of the law. This in my view envisaged the inclusion of any person not covered by section

157(1)(a), who could not ordinarily obtain instructions from or authority from the person envisaged in section 157(1)(a). In the founding affidavit, such person should set forth grounds to the satisfaction of the court explaining:

(a) their relationship with the person envisaged in section 157(1)(a),

(b) why they were acting on behalf of the person contemplated in section 157(1)(a) and

(c) why the person envisaged in section 157(1)(a) cannot act in their own name.

[22] Section 157(1)(b) was not designed to provide a multiplicity of opportunities for persons envisaged in section 157(1)(a) of the Act. It was intended to be an extension of the foundations of *locus standi* to persons not covered by section 81 in respect of applications for winding up of companies that were still solvent. Even if I am wrong on this point, a party purporting to be acting on behalf of a person contemplated in section 157(1)(a) who cannot act in their own name, must clearly identify themselves and it must be clear as to the person in whose stead they are acting, properly, in the citation of the parties including in the particulars of the claim. It must be clear that the party referred to in section 157(1)(b) is a party as envisaged in that section. In my view, a person covered by section 157(1)(a) cannot simply decide to jump out of a provision specifically designed for their *locus standi,* without explaining why that provision is not appropriate in their case. An interested party like the first intervening party deserves, in our law, to have an opportunity to fully engage with the particulars in (a) –(c) as set out in paragraph 21 of this judgment, in assisting the court to determine the issues.

[23] For these reasons I make the following order:

(a) The application for leave to appeal in respect of the company is dismissed. Wynand Hendrikse is to pay the costs on attorney and client scale.

(b) The application for leave to appeal in respect of the second intervening party is dismissed. The second intervening party to pay the costs on attorney and client scale.

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

Company law-fiduciary duty of company director- Court concluding that company directors took a conscious decision not to comply with the provisions of the Act.

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.