INSOLVENCY LAW UPDATES JUNE 2022[1]

INDEX

CASE NAMES

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

Richard Keay Pollock N.O and Others v Victor and Others (7352021) [2022] ZAFSHC 155 (17 June 2022)

Sand Grove Opportunities Master Fund Ltd and others v Distell Group Holdings Ltd and others [2022] 2 All SA 855 (WCC)

Schnell NO and Others v FMI Trading (Pty) Ltd (60068/19) [2022] ZAGPPHC 387 (2 June 2022)

SHIVA URANIUM (PTY) LTD (IN BUSINESS RESCUE) AND ANOTHER v TAYOB AND OTHERS 2022 (3) SA 432 (CC)

South Africa Enterprise Development (PTY) Ltd vs Kerani BTW CC (2021/7285) [2022] ZAGPJHC 371 (1 June 2022)

Strydom N.O. and Another v Snowball Wealth (Pty) Ltd and Others (356/2021) [2022] ZASCA 91 (15 June 2022)

Van Niekerk v The MV "Madiba 1" (AC13/2018) [2022] ZAWCHC 125 (17 June 2022)

VOLTEX (PTY) LTD v FIRST STRUT (RF) LTD (IN LIQUIDATION) AND OTHERS 2022 (3) SA 550 (GP)

SUBJECT INDEX

Assets-vessel- Admiralty Jurisdiction Regulation Act 105 of 1983-effect of- Section 359(1)(b) of the Companies Act reads “Any attachment or execution put in force against the estate or assets of the company after the commencement of the winding up shall be void.”- the deeming provisions of s 1(3) of the AJRA were introduced to place a third party (the actual owner of the chartered vessel) at risk for the charterer’s maritime claim debts in relation to the chartered vessel; they were not put in place for the benefit of the *concursus creditorum* in the charterer’s insolvent estate should it be wound-up through an inability to pay its debts. Van Niekerk v The MV "Madiba 1" (AC13/2018) [2022] ZAWCHC 125 (17 June 2022)

Business rescue — Business rescue practitioner — Powers — Ambit of — Right of business practitioner of company A to vote in s 151(1) meeting of another company in business rescue in respect of which company A creditor — Companies Act 71 of 2008, ss 137(2), 140(1) and 151(1). RAGAVAN AND OTHERS v OPTIMUM COAL TERMINAL (PTY) LTD AND OTHERS 2022 (3) SA 512 (GJ)

Business rescue — Business rescue practitioner — Voluntary business rescue — Company appointing practitioner — Affected person obtaining practitioner's removal — Court appointing practitioner's successor — Court-appointed practitioner resigning — Question as to repository of power to appoint new practitioner — Companies Act 71 of 2008, ss 130(6)*(a)* and 139(3)-in this situation the company was the repository of the power to appoint the practitioner's successor SHIVA URANIUM (PTY) LTD (IN BUSINESS RESCUE) AND ANOTHER v TAYOB AND OTHERS 2022 (3) SA 432 (CC)

Business rescue — Business rescue proceedings — Difference in powers of, on one hand, directors, and, on other, business rescue practitioners — Significant limitation of powers of directors — Distinction between external and internal functions of company — Companies Act 71 of 2008, ss 137(2), 140(1). RAGAVAN AND OTHERS v OPTIMUM COAL TERMINAL (PTY) LTD AND OTHERS 2022 (3) SA 512 (GJ)

Business rescue — Business rescue proceedings — Directors — Powers — Ambit of — Right of director of company A to vote in s 151(1) meeting of another company in business rescue, in respect of which company A creditor — Companies Act 71 of 2008, ss 137(2), 140(1) and 151(1). RAGAVAN AND OTHERS v OPTIMUM COAL TERMINAL (PTY) LTD AND OTHERS 2022 (3) SA 512 (GJ)

Business rescue application-financially distressed –court could not establish this-case referred to oral evidence Naturally Australian Meat and Game (Pty) Ltd v JH Meat CC (57166/20) [2022] ZAGPPHC 426 (17 June 2022)

Business rescue-joint venture prior to rescue ended – whether obligations created under a joint venture contract survived termination of the contract – principles governing interpretation of legal documents reaffirmed – reconstruction of the terms of the contract by the court on termination impermissible – all obligations ceased on termination of the contract. Naka Diamond Mining (Pty) Limited v Johannes Frederick Klopper NO & Others (277/2021) [2022] ZASCA 94 (17 June 2022)

Business rescue-liquidation application brought by joint business rescue practitioners-winding-up in terms of s 141(2)(a)(ii) of the Companies Act 71 of 2008 - opposed by Mr. PM Pillay who is the sole member of R&R. He has also brought a counter-application, effectively seeking to continue with the BR and stay a winding-up until the outcome of a dispute with MTN based on alleged prohibited conduct, which he asks the court to refer to the Competition Tribunal for determination- liquidation order granted Harold

N.O. and Another vs R and R Wholesalers and Distributors CC and Others (21033/2021) [2022] ZAGPJHC 398 (8 June 2022)

Business rescue-set aside-no proper plans- No business plan has been proposed, neither by Henria, its members or at a creditors meeting. The business rescue practitioner stated that he had put any possible "plans" on ice, pending finalization of the winding-up application. This is hardly proceedings which are "under way". These facts also indicate that the members of Henria taylor their conduct and, even more so, their affidavits as the exigencies of the situation at the time require. Henria Belgeggings CC v Changing Tides 17 (Pty) Ltd N.O.; Changing Tides 17 (Pty) Ltd v Companies & Intellectual Property Commission of South Africa and Others (5412/2008;43912/2016) [2022] ZAGPPHC 378 (1 June 2022)

Cession- Interpretation of cession – whether a pledge or out-and-out cession incorporating a *pactum fiduciae* – effect of out-and-out cession on ceded debts upon liquidation of cedent – appeal upheld with costs. Engen Petroleum Ltd v Flotank Transport (Pty) Ltd (876/2020) [2022] ZASCA 98 (21 June 2022)

Company law – Approval of scheme of arrangement by shareholders – Application for leave in terms of section 115(3)(b) of the Companies Act 71 of 2008, to apply for review of shareholders' resolution – Only registered shareholders have voting rights for the purpose of any resolution required in terms of section 115 and only registered shareholders who voted against the proposed transaction are entitled to bring proceedings for the review of a shareholders' decision to approve transaction – Holders of beneficial rights in shares registered in another party's name lacking standing to seek review. Sand Grove Opportunities Master Fund Ltd and others v Distell Group Holdings Ltd and others [2022] 2 All SA 855 (WCC)

Concursus creditorum-Insolvency- Rectification of agreement by creditor party after debtor party placed into liquidation and concursus creditorum established — Whether permissible — Principles applicable. VOLTEX (PTY) LTD v FIRST STRUT (RF) LTD (IN LIQUIDATION) AND OTHERS 2022 (3) SA 550 (GP)

Impeachable transactions- Disposition -Insolvency – s 26(1) of Insolvency Act 24 of 1936 – disposition not made for value – means for no value at all-the

phrase ‘not made for value’ in s 26(1) of the Insolvency Act 24 of 1936 means for no value at all-look at all the circumstances Strydom N.O. and Another v Snowball Wealth (Pty) Ltd and Others (356/2021) [2022] ZASCA 91 (15 June 2022)

Liquidators-suing for enrichment – *condictio indebiti* and *condictio sine causa* – company in liquidation – sale of assets – claim for repayment of amount received by secured creditor – on the basis that receipt *ultra vires* – enrichment of creditor and impoverishment of company not proved – appeal dismissed.The bank perfected its notarial bond. The liquidators expressly accepted these conditions. The inevitable conclusion to be drawn from the facts is that the recovery of the liquidators’ fees was the sole reason for the claim. As stated in Mars, a trustee (here a liquidator) who pays a creditor before confirmation of a liquidation and distribution account, does so at his own risk. Alert Steel (Pty) Ltd v Mercantile Bank Ltd (165/21) [2022] ZASCA 96 (21 June 2022)

Rescission of default sequestration order obtained by body corporate of sectional title scheme against unit owner Mokoteli and another v Body Corporate of Viking Villas Sectional Title Scheme and others [2022] JOL 53975 (WCC)

Section 69 warrant- fair hearing-ex parte was not fair Richard Keay Pollock N.O and Others v Victor and Others (7352021) [2022] ZAFSHC 155 (17 June 2022)
Trustees-recognition of insolvency of the First Respondent in the United Kingdom-insolvent claims automatic rehabilitation-section 127A of the Insolvency Act 24 of 1936 -due to an efflux of time – court refuses –court relies on court order recognizing foreign bankruptcy order and not on section 127A! Breytenbach N.O. and Another v Ellison and Another (84994/2019) [2022] ZAGPPHC 409 (17 June 2022)

Winding up application-bona fide defence- pending action-t cannot be said in respect of the appropriation of payment that the respondent is indebted to the plaintiff. Accordingly, in my view, the respondent raised defences which are reasonable. The issues would be best resolved at trial. Albaraka Bank Limited v Cecita CC (8771/2020) [2022] ZAKZDHC 25 (15 June 2022)

Winding up application-cause of action sale of shares- peremptory provisions of section 67(3) and (4) of the Financial Markets Act- Without the prescribed approval, payment to the applicant is not due-application dismissedSouth Africa Enterprise Development (PTY) Ltd vs Kerani BTW CC (2021/7285) [2022] ZAGPJHC 371 (1 June 2022)

Winding up application-factually insolvent alternatively that it is just and equitable-factual insolvency establishedSchnell NO and Others v FMI Trading (Pty) Ltd (60068/19) [2022] ZAGPPHC 387 (2 June 2022)

CASES

SHIVA URANIUM (PTY) LTD (IN BUSINESS RESCUE) AND ANOTHER v TAYOB AND OTHERS 2022 (3) SA 432 (CC)

Company — Business rescue — Business rescue practitioner — Voluntary business rescue — Company appointing practitioner — Affected person obtaining practitioner's removal — Court appointing practitioner's successor — Court-appointed practitioner resigning — Question as to repository of power to appoint new practitioner — Companies Act 71 of 2008, ss 130(6)*(a)* and 139(3).

A company voluntarily entered business rescue and appointed a business rescue practitioner (see [3] and the Companies Act 71 of 2008, ss 129(1) and 129(3)*(b)*), an affected person challenged the appointment and obtained a court order setting it aside (see [4] and [6] and s 130(1)*(b)* read with ss 130(6)*(a)* and 139(2) of the Act), the court appointed a new practitioner (see [6] and s 130(6)*(a)* of the Act) and the new practitioner then resigned (see [11]).
Held, that in this situation the company was the repository of the power to appoint the practitioner's successor (see [37], [39], [40], [59] and s 139(3) of the Act).

RAGAVAN AND OTHERS v OPTIMUM COAL TERMINAL (PTY) LTD AND OTHERS 2022 (3) SA 512 (GJ)

Company — Business rescue — Business rescue practitioner — Powers — Ambit of — Right of business practitioner of company A to vote in s 151(1) meeting of another company in business rescue in respect of which company A creditor — Companies Act 71 of 2008, ss 137(2), 140(1) and 151(1).

Company — Business rescue — Business rescue proceedings — Directors — Powers — Ambit of — Right of director of company A to vote in s 151(1) meeting of another company in business rescue, in respect of which company A creditor — Companies Act 71 of 2008, ss 137(2), 140(1) and 151(1).

Company — Business rescue — Business rescue proceedings — Difference in powers of, on one hand, directors, and, on other, business rescue practitioners — Significant limitation of powers of directors — Distinction between external and internal functions of company — Companies Act 71 of 2008, ss 137(2), 140(1).

The applicants were directors of the company in business rescue, Tegeta Exploration and Resources (Pty) Ltd (Tegeta). Tegeta was a major creditor of another company, also in business rescue, Optimum Coal Terminal (Pty) Ltd (OCT), in which it held a 100% shareholding. In the present application in the Johannesburg High Court, the applicants sought an order for a declarator to the effect that, inter alia, they, in their capacity as directors of Tegeta, should vote at any meeting of creditors in terms of s 151(1) of the Companies Act 71 of 2008 in respect of OCT, to consider the latter's proposed rescue plan. The respondents, which included amongst their number the business rescue practitioners of both Tegeta (sixth and seventh respondents) and OCT (second and third respondents), opposed the relief sought. They argued that it was rightfully Tegeta's business rescue practitioners who should vote at such meeting. The issue, the High Court held, called for an interpretation of the relevant sections of ch 6 of the Companies Act to determine the ambit of the powers of directors and those of business rescue practitioners while a company was in business rescue.

In considering the relevant legal framework, the court noted that, generally, the directors of a company had, in terms of s 66 of the Companies Act, the powers to manage the 'business' and 'affairs of a company' and were authorised to exercise all of the powers and perform any of the functions of the company. Importantly, the

court stressed, these powers, however, were subject to the proviso, '*except to the extent that this Act . . . provides otherwise*'. (See [22] – [23].) This, the court held, was particularly relevant in considering the ch 6 rights, powers and duties of directors and business rescue practitioners in the context of business rescue (see [23]). In terms of s 140 of the Companies Act, during a company's business rescue proceedings the *business rescue practitioner* had full management control of the company in substitution for its board and pre-existing management. (See [31] – [32].) In terms of s 137(2), during a company's business rescue proceedings, each director of the company had to perform the functions of director, subject to the authority of the practitioner, and had a duty to the company to perform any management function within the company in accordance with the express instructions or direction of the practitioner. (See [35] – [39].)

The court held that, based on a proper construction of ch 6, during business rescue proceedings, the directors' powers were significantly limited (see [30], [40] and [47]). Full management control of the company was transferred to the business rescue practitioners (see [32], [41], [47]). To the extent that directors continued to fulfil certain functions (see [41] and [47]), the court asserted, these were restricted to governance-related tasks, such as the presentation of annual financial statements, issuing of shares, scheduling of shareholders' meetings, proposing resolutions and holding of board meetings; neutral functions, the court described them, far removed from full management control (see [43] and [47]). The task at hand — voting in the s 151(1) meeting of another company in business rescue — the court held, fell within the management powers of the business rescue practitioners (see [41], [43] and [47]). (In reaching this conclusion, the court held that, in order to facilitate the interpretation of the functions of directors and business rescue practitioners during rescue proceedings, a distinction could be drawn between the internal functions of a company — these, the court held, the directors continued to carry out — and the external functions of a company — these fell under the management control of business rescue practitioners. The internal functions of a company would be those related to governance; the external functions would be those calling for interaction with the outside world, and would include debt-collecting and voting at meetings convened in terms of s 151(1). (See [27] – [28], [41], [43] and [47].)

The court accordingly dismissed the application (See [51].)

VOLTEX (PTY) LTD v FIRST STRUT (RF) LTD (IN LIQUIDATION) AND OTHERS 2022 (3) SA 550 (GP)

Contract — Consensus — Rectification — Rectification of agreement by creditor party after debtor party placed into liquidation and concursus creditorum established — Whether permissible — Principles applicable.

Insolvency- Rectification of agreement by creditor party after debtor party placed into liquidation and concursus creditorum established — Whether permissible — Principles applicable.

The present matter concerned the question whether an agreement between A and B, in which A stood as creditor, and B as debtor, could be still rectified where the application for rectification was sought by A *subsequent t*o B's having been wound up consequent to liquidation proceedings instituted against it, and concursus creditorum accordingly reached.

What was claimed, before the Pretoria High Court, was the rectification of 'an application for credit incorporating a cession of book debts'. The applicant, Voltex (Pty) Ltd, claimed that, on 26 January 1999, an agreement was entered into between itself and the first respondent whereby the latter applied for credit facilities from the former, and ceded to the applicant its book debts and other debts as continuing covering security. The applicant claimed, however, that the written agreement, as a result of an error, did not reflect its company registration number, but that of a pre-existing company associated with the applicant that had previously shared the same name. The applicant now sought to rectify the security cession concluded between itself and the first respondent by deleting the incorrect registration number and replacing it with the correct one. Importantly for present purposes, some time after the abovementioned agreement was entered into the first respondent was placed into liquidation. The applicant was launching this rectification application four years after those proceedings had commenced; it intended to advance a secure claim against the insolvent estate of the first respondent, relying on the cession.

The third respondent, Prevance Bonds (Pty) Ltd, a rival creditor of the insolvent estate of the first respondent, opposed the rectification. It relied on the principle of law that, once a company was liquidated, a concursus creditorum was established,

crystallising the insolvent's estate, and after which no transaction could be entered into with regard to estate matters by a single creditor to the prejudice of the general body. The claim of each creditor could only be dealt with as it existed at the issue of the order. To grant the rectification sought here would have the effect of allowing a creditor which was only a concurrent creditor at the date of winding-up to alter its position post-liquidation to become a preferent creditor, in disturbance of concursus creditorum. That could not be permitted. (See [6] and [12].)

The court identified the question lying at the heart of the dispute between the parties as whether, in circumstances where one party to an agreement was in liquidation, a written agreement concluded inter se could be rectified after the concursus creditorum was established (see [8]). After a thorough review of case law on the topic (see [8] – [33]), the court, referring with approval to academic authority, held that the legal position was that rectification post-concursus was only precluded where such rectification would result in a creditor acquiring a right or a claim *not already held* at the institution of concursus (see [34]). Thus, rectification was permissible where it was sought merely to reflect the correct position according to the true intention of the parties as at such a date. (See [34] and [35].)

The court went on to hold that, in circumstances where the facts proved that (i) a valid cession agreement was concluded between the parties prior to a liquidation order being granted; but (ii) the agreement did not reflect the parties' common intention in the sense that the creditor was not correctly described, and the evidence indicated that the insolvent and the creditor were in actual fact the parties to the agreement, rectification would neither create nor detract from any rights as they existed when the concursus creditorum came into existence. It was a misconception to view ex post facto rectification of the description of a party to an agreement as an interference with the position obtained at the concursus creditorum. If, in the present case, it was found on the facts that a valid cession of book debts was transacted between the parties, the applicant was a secured creditor and had been such from the moment of liquidation. Where a misdescription of a party was the only issue taken with the contentious agreement, there could be no prejudice to third parties if the document wherein the agreement was captured was rectified to reflect the correct description of the parties. The status quo was not affected by such rectification. (See [36].) The court went on to hold, based on the facts, that the applicant had indeed established that the parties had intended for the credit

agreement and security cession to be concluded between the applicant and the first respondent (see [50]), and that it had otherwise met the requirements for rectification (see [51]). The court accordingly granted an order rectifying the agreement in the manner contended for by the applicant (see [51]).

Sand Grove Opportunities Master Fund Ltd and others v Distell Group Holdings Ltd and others [2022] 2 All SA 855 (WCC)

Corporate and Commercial – Company law – Approval of scheme of arrangement by shareholders – Application for leave in terms of section 115(3)(b) of the Companies Act 71 of 2008, to apply for review of shareholders' resolution – Only registered shareholders have voting rights for the purpose of any resolution required in terms of section 115 and only registered shareholders who voted against the proposed transaction are entitled to bring proceedings for the review of a shareholders' decision to approve transaction – Holders of beneficial rights in shares registered in another party's name lacking standing to seek review.

The first respondent ("Distell") proposed a scheme of arrangement to its shareholders, entailing restructuring of its business. The eventual outcome of the scheme of arrangement was that Distell would delist and the second respondent ("Heineken") would hold a minimum of 65% of its issued share capital. The scheme required approval by the Takeover Regulation Panel established in terms of section 196 of the Companies Act 71 of 2008.

At a meeting convened to vote on the scheme, the scheme was approved by a majority of Distell shareholders. Section 115(3)(b) of the Act provides that a company may not proceed to implement a resolution without the approval of a court where any person who voted against the resolution obtains leave to apply to court for review of the transaction.

The applicants, who claimed to be the beneficial owners of 3,72% of the issued ordinary shares in Distell that were votable, sought leave in terms of section 115(3)(b) to apply for review of the shareholders' resolution accepting the scheme of arrangement. The applicants (referred to collectively as "Sand Grove") were

investment funds. The respondents disputed Sand Grove's standing to bring the application, stating that only registered shareholders have voting rights for the purpose of any resolution required in terms of section 115 and only registered shareholders who voted against the proposed transaction are entitled to bring proceedings for the review of a shareholders' decision to approve the transaction.

Held – As the applicants had beneficial ownership of the shares, but none of the funds was the registered holder of such shares, the first issue to be determined related to their standing to bring the proceedings in terms of section 115 of the Act. The Court referred to the principle of company law that a company concerns itself only with the registered holders of its shares, and agreed with the respondents that the Sand Grove funds, as holders of beneficial rights in shares registered in another party's name, were not persons entitled to exercise voting rights at the meeting. They therefore lacked standing to bring the application.

The problem regarding standing gave rise to an application by the nominee companies who were the registered holders of the shares, for leave to intervene in the proceedings as co-applicants. However, section 115(3)(b) prescribes a 10-business day time limit for the nominee companies to challenge the resolution. That period had elapsed before they lodged their applications for leave to intervene. The court held that it had no power to condone the non-compliance with the time limit, and the application for leave to intervene was dismissed.

Sand Grove also applied for leave to amend their notice of motion by the insertion of a claim for orders declaring that the meeting at which the resolution was adopted was not properly constituted and therefore invalid and void, and that the resolution purportedly adopted at it was accordingly also void. The court rejected the submission that that where different classes of securities were affected by a proposed scheme, separate meetings had to be convened of the holders of each class of security.

Even if the applicants did have standing, the court would not have found that they had made out a case for review based on their submissions.

The application for leave in terms of section 115(6) to apply for a review of the scheme of arrangement was refused.

Richard Keay Pollock N.O and Others v Victor and Others (7352021) [2022] ZAFSHC 155 (17 June 2022)

Section 69 warrant- fair hearing-ex parte was not fair

[1] In this application the Applicants seek an order reviewing and setting aside an order made by the Seventh Respondent on 12 February 2021 under case number 19/2020 in the Magistrate's Court for the district of Wepener. The Applicants are the joint liquidators of a company by the name of Rohallion Farms (Pty) Limited, which company was finally placed in liquidation by the Johannesburg High Court on 31 July 2018.

[2] The First Respondent is an unrehabilitated insolvent and an erstwhile director of Rohallion and the Third Respondent, Wonderhoek Farms (Pty) Limited. Wonderhoek owns a number of farms, *inter alia* the farm Aanvang 1 in the district of the Wepener, where the First Respondent and his wife, the Second Respondent reside. Rohallion was the operating company through which the farming operations on the farms owned by Wonderhoek were conducted, but it never owned any fixed property.

[3] More recently, and until 2014, the First Respondent became a senior manager of Rohallion and he was then responsible for all the day-to-day activities of Wonderhoek and Rohallion. He was also entrusted with the assets of the two companies. As will be seen later hereinafter, the First Respondent played a pivotal role in the events that caused the present application to be launched.

[4] On the basis of allegations that the First Respondent had removed assets of Rohallion worth millions of Rands from the farm Aanvang 1 to an adjacent farm owned by the Fourth Respondent, and on the basis of allegations that the First and Second Respondents were renting that adjacent farm from the Fourth Respondent, the Applicants decided to approach the Wepener Magistrate's Court on 11 December 2021 for a warrant in terms of Section 69(2) and 69(3) of the Insolvency Act. They did so because Section 69 obliges the liquidators, as soon as possible after their appointment, to take into possession or under their control all movable property, books and documents belonging to the insolvent estate. In terms of section 69(2) of the Act, if a trustee or liquidator has reason to believe that any property, book or document is concealed or otherwise unlawfully withheld, he may apply to the Magistrate having

jurisdiction for a search warrant mentioned in Section 69(3). Once such a warrant is issued, it confers authority on the person executing it to search for and take possession of the property concerned and to deliver any article seized thereunder to the trustee. The Applicants approached the Magistrate on 11 December 2021 *ex parte*, and the warrant was issued by order returnable or 19 February 2021.

[5] On 18 December 2021 the First Respondent, opposing the order, anticipated the return date of the order, and eventually the matter came before the Seventh Respondent on 29 January 2021. After hearing arguments by both counsel for the Applicants and the First Respondent, the Seventh Respondent postponed the matter to 12 February 2021. On that day, he dismissed the application for a warrant on an attorney and client scale.

[6] The Notice of Motion in the present application consists of a Part A and a Part B. In Part A it is prayed that the Fifth and Sixth Respondent be interdicted from releasing the goods to the First, Second, Third or Fourth Respondents attached pursuant to the warrant issued on 11 December 2020 pending the final determination of the relief sought in Part B. In the alternative, it is prayed in Part A that the goods so attached, be held and retained under the attachment. In Part B the review and the setting of the proceedings before the Seventh Respondent is sought. Before us, counsel appearing for the Applicants requested the Court to only grant the relief sought in Part B, saying that the relief sought in Part A is no longer sought by the Applicants.

[7] It is the proceedings of 29 January 2021 and the subsequent order dismissing the application on 12 February 2021 that exclusively form the basis for this review application. Apart from the main relief sought, certain ancillary relief is also sought by the Applicants, namely that the matter be referred back to the Magistrate's Court of Wepener to be heard de novo by a Magistrate other than the Seventh Respondent.

Now the grounds for a review of proceedings in a Magistrate's Court are clearly regulated by Section 22(1) of the Superior Courts Act**[3]** in the following words:

"(1) The grounds upon which the proceedings of any Magistrate's Court may be brought under review before a Court of a Division are –

(a) absence of jurisdiction on the part of the court;

(b) interest in the cause, bias, malice or corruption on the part of the presiding judicial officer;

(c) gross irregularity in the proceedings; and

(d) the admission of inadmissible or incompetent evidence or the rejection of admissible or competent evidence.

(2) This section does not affect the provisions of any other law relating to the review or proceedings in Magistrate's Courts."

[9] It speaks for itself that if any of these grounds are found to be present in the instant case, this Court will be competent to interfere and to review the decision in question and to set it aside.

[10] Before the proceedings of 29 January 2021 and 12 February 2021 are dealt with in more detail, the following needs mentioning: The Seventh Respondent has filed a Notice to Abide by the decision of this Court, and he therefore does not oppose the application for a review. Furthermore, the First Respondent and the Second Respondent have filed a counter application in response to the main application, calling for an order that the Applicants and the Fifth and the Sixth Respondent be ordered to immediately comply with the Court order of the Seventh Respondent dated 12 February 2021, namely to return the movable assets that were removed by the Fifth Respondent on 11 and 12 December 2020 at the farm Aanvang 1 and its adjacent farm to the First and Second Respondents. In addition, an order is sought in the counter-application to the effect that the Applicants should be found to be in contempt of court for their failure to return the assets so seized after the dismissal of the application for a warrant on 12 February 2021. A further order is sought that the Applicants be committed to imprisonment for a certain period for their contempt of court. Whereas a review application is normally heard by two Judges, and whereas a contempt application is normally heard by a single judge, the Acting Judge President of this Division granted leave that the contempt application be heard together with the review application by the two Judges of review.

[11] I now turn to the events of 29 January 2021 when the Seventh Respondent heard submissions by the respective counsel pertaining to the order authorizing a search warrant dated 11 December 2020. This Court has been provided with a full transcribed record of the proceedings of 29 January 2021 and 12 February 2021, and consequently the record can be accepted as a true reflection of what transpired in the Court on those two days.

[12] The record makes it clear that the First Respondent raised three points *in limine* and also dealt with the merits of the Section 69 application in his answering affidavit anticipating the return date. In Heads of Argument subsequently filed by the Applicants, the three points in limine raised in the answering affidavit and the merits of the application where duly addressed. Pursuant to the filing of these Heads, the Heads on behalf of the First and Second Respondents were then filed in reply. In these Heads, the Respondents also dealt with the three *points in limine* and the merits of the applications as raised in the answering affidavit. The Heads went further, however, to raise a further and fourth point *in limine* which was not raised in the answering affidavit at all. This point contended that the Magistrate's Court lacked the necessary jurisdiction to issue a warrant in terms of Section 69, since the Applicants should have used the remedies provided for in the Companies Act 61 of 1973.

[13] Upon receipt of the Heads of Argument raising this fourth point *in limine,* the Applicants were quick to file further Heads of Argument wherein it was submitted that the Court could not determine the fourth point *in limine* as it had not been raised in the answering affidavit. In these Heads, the Applicants referred to a number of authorities in support of their argument.

[14] On the day of the hearing, namely on 29 January 2021, counsel appearing for the Applicants only made submissions relating to the admissibility of the fourth point *in limine,* and he requested the following. "We want Your Worship to make a finding to the effect that the issue raised by my colleague … cannot be raised in this Court." He did not deal with the remaining three points *in limine* or the merits of the application. In his subsequent address to the Court, counsel appearing for the First and Second Respondents, also focused on the question whether the fourth point *in limine* should be allowed or not. He submitted that the fourth point entailed a point of law, and that a point of law can be raised at any time during proceedings.

[15] The Seventh Respondent then indicated that he would require at least a week to finalize “the point in limine raised”, whereupon council for the Applicants had the following to say: “May I make a suggestion that we postpone until the 12th because whatever happens we can carry on if Your Worship is against me. Maybe that will give you a bit more time and then, you know, we have got the whole day to continue whatever and I see my colleagues says it is fine.” Counsel for the First and Second Respondents confirmed that he had no objection.

[16] The Seventh Respondent then adjourned the matter to the 12th of February 2021 “for the Court to make a ruling on the fourth point *in limine* raised”. Now having regard to what was said by everybody concerned in the Court on the day in question, it is patently clear to this Court that it was understood and agreed by all, including the Seventh Respondent, that the Court would only make a ruling on 12th February 2021 as to whether the First and Second Respondents would be allowed to raise the fourth point *in limine* or not.

[17] On 12th February 2021 the Seventh Respondent, however, not only dismissed the submission that the fourth point *in limine* should not be allowed, but he went further to uphold the fourth point of no jurisdiction, seemingly on different grounds than those raised in the fourth point, with costs on the attorney and client scale. In coming to this conclusion, he also dealt with the merits of the application in general. He did so without hearing the Applicants on the merits of the fourth point *in limine* or on the question of jurisdiction, and without hearing the Applicants on the merits of the application as a whole.

[18] Before us, Mr. Ferreira appearing for the First and Second Respondents, submitted that the application for a review should be dismissed because the Applicants should have made use of the appeal procedure. This is so, the argument went, since the Seventh Respondent had *mero motu* decided the jurisdiction issue on different grounds than those raised in the fourth point, as he was entitled to do in law. This approach by the Seventh Respondent called for an appeal in the circumstances, and not a review. I do not agree. While there may be merit in the submission generally, the fact remains that in this case, there was a clear understanding between the Seventh Respondent and the respective counsel on 29 January 2021 that the Seventh Respondent would only make a ruling on the admissibility of the fourth Point on 12 February 2021, and nothing more. By proceeding beyond that issue on 12 February 2021, counsel for the Applicants was

denied the opportunity to address the Court on the aspect of jurisdiction before the Court made its final decision.

[19] Section 34 of the Constitution guarantees a right to a fair hearing. The Constitutional Court formulated this right unanimously in **De Beer N.O. v North Central Local Council etc[4]** as follows: “A fair hearing before a Court as a prerequisite to an order being made against anyone is fundamental to a just and credible legal order. Courts in our country are obliged to ensure that the proceedings before them are always fair. Since procedures that would render the hearing unfair or inconsistent with the Constitution, Courts must interpret legislation and Rules of Court, where it is reasonably possibly to do so, in a way that would render the proceedings fair. It is a crucial aspect of our law that Court Orders should not be made without affording the other side a reasonable opportunity to state their case.”

[20] It follows that the proceedings under scrutiny were irregular in so far as the Seventh Respondent went beyond the understanding that he would only make a ruling as to whether the fourth point *in limine* could be argued or not. He in fact upheld the fourth point, or the one on jurisdiction, without hearing the Applicants thereon and on the merits of the application as a whole. This irregularity qualifies as a gross irregularity as envisaged by Section 22(1)(c) of the Superior Court Act**[5]** because it caused prejudice to the Applicants and because it denied the Applicants a fair hearing. This court is therefore obliged to interfere in favour of the Applicants.

[21] It further follows that the counter application for the return of the goods and for contempt cannot succeed. The Applicants and the Respondents concerned cannot incur any liability upon a Court Order that was based on an irregular and unfair procedure.

[22] Counsel for the First and Second Respondents also urged us to dismiss Part A of the Notice of Motion with costs on the punitive scale since the relief sought in that Part caused the Respondents to respond thereto in the application papers, and now the Applicants have simply abandoned the relief sough in Part A. Again, I do not agree. Correspondence before us indicate that Part A was included in the Notice of Motion because the attorney for the First and Second Respondents had threatened to launch an urgent application for the release of the goods attached, pursuant to the

order of the Seventh Respondent on 12 February 2021. This urgent application never materialized, afterwards or at any stage, and it is for that reason that the Applicants have decided not to continue seeking the relief set out in Part A. In my view there should therefore be no order as to costs as far as Part A is concerned.

[23] As for the remaining costs, I can find no reason why the Applicants should be out of pocket in circumstances where a clear and gross irregularity in the proceedings of the Magistrate's Court has occurred. The following orders are therefore made:

1. The order of the Seventh Respondent, dated 12 February 2021 under case number 19/2020 in the Magistrate's Court for the District of Wepener, is hereby reviewed and set aside.

2. The matter is referred back to the Magistrate's Court for the District of Wepener to be heard *de novo* by a Magistrate other than the Seventh Respondent

3. The First and Second Respondents are ordered to pay the costs of the application for review jointly and severally on an attorney and client scale.

4. The counter application is dismissed with costs on an attorney and client scale, to be paid by the First and Second Respondents jointly and severally.

5. Part A of the Notice of Motion is dismissed, with no order as to costs.

Albaraka Bank Limited v Cecita CC (8771/2020) [2022] ZAKZDHC 25 (15 June 2022):

[1] The applicant is a registered commercial bank, which instituted winding up proceedings against the respondent. The proceedings are opposed. The respondent, a registered Close Corporation, is not a trading entity but owns an undeveloped land situated at Ballitoville ('the immovable property'). This property is bonded to the

applicant as security for the loan. The applicant and respondent are jointly referred to as 'the parties'. All procedural requirements as set out in the Companies Act, 1973 ('the Companies Act') were complied with prior to the hearing of the matter.

Issue

[2] The issue to be determined is whether the applicant is entitled to bring this application having instituted an action, which the respondent defended, prior to launching this application, i.e. whether the application is bona fide or an abuse of process.

The facts

[3] The parties in this matter concluded Musharaka agreements (agreements similar to joint venture agreements) during 2015. In terms of these agreements, the applicant lent various sums of money to the respondent. The respondent undertook to repay the loan monthly as prescribed in each agreement. The respondent used part of the money loaned to acquire the immovable property.

[4] The applicant contends that the respondent breached the agreements by failing to pay the monthly instalments. As at the institution of the proceedings, reference is made to two accounts. The arrears in both accounts is R446 570.25 and R832 140.20 with the last payment being made during November 2017.

[5] During 2018, the applicant launched an action against the respondent referred to earlier in this judgment. The applicant avers that the respondent denied liability and has made no efforts to comply with pre-trial preparations.

[6] On 20 July 2020, the applicant issued a notice in terms of s 69 of the close Corporations Act 69 of 1984 calling upon the respondent to pay the arrears totalling R167 247.40. The Sherriff served the letter. There was no payment by the respondent in response to the notice. The applicant contends that the only reasonable inference

to draw is that the respondent is unable to pay its debts as defined by the **Insolvency Act, 1936** and the Companies Act. Further, that the respondent is commercially insolvent. In view of this, the applicant elected to proceed by way of winding up proceedings.

29] It is trite that winding up proceedings should not be used to enforce payment of a debt, which is reasonably, and bona fide disputed. See *Badenhorst v Northern Construction Enterprise (Pty) Ltd* **1956 (2) SA 346** (T) and *Freshvest Investments (Proprietary) Limited v Marabeng (Proprietary) Limited* **[2016] JOL 36911** (SCA).

[30] As submitted by Mr *Eades* for the applicant, the question arises whether the respondent demonstrated that the claim is disputed on reasonable and bona fide grounds. See *GAP Merchant Recycling CC v Goal Reach Trading 55 CC* **2016 (1) SA 261** (WCC) para 20. Mr *Eades* argues that this is determined by looking at the defence to the action being that the applicant granted the respondent AN extension of time in respect of its claim and accordingly a moratorium applies. He submitted that the applicant relies on the non-variation clause. Accordingly, any attempt to vary the terms of the agreement as envisaged by the respondent is of no force or effect.

[31] Mr *Pitman* for the respondent argued that the applicant fails to appreciate the respondent's defence being the applicant's failure to appropriate payments made to the correct account together with the inconsistency in the debt due. The appropriation is part of the dispute in the action. Also, that the applicant admits the payment of R100 000 without explaining how this came to be.

[32] I agree with Mr *Eades* that the issue of appropriation of payments, and the arrangement leading to the payment of the R100 000 raises new disputes. It cannot be said in respect of the appropriation of payment that the respondent is indebted to

the plaintiff. Accordingly, in my view, the respondent raised defences which are reasonable. The issues would be best resolved at trial.

[33] In respect of costs, I am of the view that the issues raised in the matter do not call for an order for costs as sought on an attorney and client scale by the respondent.

Order

[34] The application is dismissed with costs on a party and party scale.

Henria Belgeggings CC v Changing Tides 17 (Pty) Ltd N.O.; Changing Tides 17 (Pty) Ltd v Companies & Intellectual Property Commission of South Africa and Others (5412/2008;43912/2016) [2022] ZAGPPHC 378 (1 June 2022):

[1] Introduction

There were two applications before the Court. The first (in case no 5412/2008) was an application for rescission of a judgment and the second (in case no 43 912/2016) related to the setting aside of business rescue proceedings and the winding-up of a company.

[2] The parties

2.1 The corporation which forms the principal subject matter of the litigation is Henria Beleggings CC (Registration number 1992/023080/23) (Henria). It is the applicant in case no 5412/2008 and the second respondent in case no 43912/2016.

2.2 The other principal role-player is Changing Tides 17 (Pty) Ltd (Changing Tides). It is the trustee of the SA Home Loans Guarantee Trust (SAHL Trust), formerly known as the Guarantee Trust, who features as a creditor of Henria. It is the respondent in case no 5412/2008 and the applicant in case no 43912/2016.

2.3 The Companies and Intellectual Properties Commission (CIPC) is the first respondent in case no 43912/2016.

2.4 The other respondents in case no 43912/2016 are the former members of Henria being A. Du Preez, A Wynbergen and N Wynbergen as third, fourth and fifth respondents respectively, the previous business rescue practitioner of Henria, one W. C. Esterhuizen as sixth respondent (the BRP) and the Minister of Trade and Industry as seventh respondent (due to the fact that Henria at some stage faced deregistration).

[3] Relief sought

3.1 In case no 5412/2008

In this matter Henria (in business rescue) applied for the rescission of a judgment granted against Henria in favour of Changing Tides.

3.2 In case no 43912/2016

After it had become common cause that Henria was not deregistered, no relief was further necessary for the reinstatement thereof. The citation of the CIPC and the Minister therefore became superfluous. The remainder of the relief sought by Changing Tides in this application are the following:

> "*4. That the resolution in terms whereof the Second Respondent [Henria] was placed in business rescue be set aside in terms of* **section 130(5)(a)** *of the* **Companies Act 71 of 2008***;*
>
> *5. That an order be granted in terms of* **section 130(5)(c)** *placing the Second Respondent [Henria] under liquidation in the hands of the Master of the High Court;*
>
> *6. Costs of the application be costs in the winding up, except in the event of opposition …"*.

[4] The factual matrix from Changing Tides' perspective

4.1 On 2 March 2005 Henria borrowed R 1 490 194, 60 million from a company known as Blue Banner Securitisation vehicle RC1 (Pty) Ltd (Banner) in terms of a written loan agreement with an option for an additional R 550 000,00.

4.2 The advance of the funds to be lended in terms of loan agreement were conditional upon the issue of a guarantee by the SAHL Trust in favour of Banner in

terms whereof the Trust, (represented by its trustee Changing Tides) would undertake to make payment in the event that Henria failed to repay the loan. Such a guarantee was issued on 3 March 2015.

4.3 In return for the guarantee, Henria issued an indemnity in favour of the SAHL Trust. In terms hereof, should the SAHL Trust become obliged to make payment to Banner, Henria would indemnify the SAHL Trust.

4.4 As security an "indemnity bond" was registered in favour of the SAHL Trust on 18 May 2005 over a certain property in Waterkloof, Pretoria.

4.5 On 14 January 2008 Banner ceded all its rights arising from the loan agreement with Henria to Blue Granite Investments No1 (Pty) Ltd (Granite).

4.6 Henria fell behind in the loan repayment installments and the outstanding balance on 27 November 2007 in the amount of R 1 499 634,71 became due and payable.

4.7 As a consequence, the SAHL Trust was called upon to make good its guarantee.

4.8 Changing Tides thereupon instituted the action under case no 5412/2008 against Henria to make good its indemnity.

4.9 The cause of action and, in particular, the cession to Granite was scantily pleaded. Nevertheless, Changing Tides obtained judgment against Henria for an agreed settlement amount of R 1 650 000.00 plus interest on 31 July 2014. This order was granted by agreement between the parties on the eventual trial date.

4.10 Banner and Granite are both companies established for the purpose of advancing home loans under the SA Home Loans brand and operate as lenders for SA Home Loans clients. As such, its loan businesses are administered by SA Home Loans (Pty) Ltd (SAHL). The SAHL Trust in turn operates as a guarantor for SAHL and/or its lending companies. Although Changing Tides is the trustee of the trust (appointed as such by the Master of this Court) SAHL has been appointed as the accountant for the SAHL Trust and authorised by trustee resolution to act on behalf of the SAHL Trust regarding indemnity bonds. The Master's latest appointment letter is dated 12 October 2012 and reads "*Master reference IT/10713/00. This is to certify that Changing Tides 17 (Pty) Ltd represented by Kurt Wade van Staden is authorised to*

act as trustee of the SOUTH AFRICAN HOME LOANS GUARANTEE TRUST" and a trustee resolution dated 19 February 2008 reads that "*It was resolved that SA home Loans and/or SA Home Loan Investment Holdings (Pty) Ltd are authorised to attend to the administration of the indemnity bonds passed in favour of the Trust …"*.

4.11 The order agreed to on 31 July 2014 provided that, should the settlement amount not be paid before a specific date, Changing Tides would be entitled to proceed to obtain default judgment in the amount originally sued for. The parties also agreed in the order that all previous disputes have been settled in full and final and that no defences based on any such disputes will in future be capable of being relied on in any legal action on application.

4.12 When Henria defaulted on the settlement terms embodied in the aforesaid order, Changing Tides proceeded to obtain default judgment on 12 May 2015 in the amount of R 1 499 643, 71 plus interest at the rate of 15,65% per annum compounded monthly in arrear from 27 November 2007 to date of payment.

4.13 On 13 July 2015 Henria provided SAHL with a special power of attorney to sell the bonded property as its agent for a gross selling price of R 1 850 000.00. In terms of the special power of attorney Henria again acknowledged Henria's indebtedness to the SAHL Trust and undertook to make good any shortfall.

4.14 When a purchaser could not be found in satisfaction of the power of attorney to sell at the agreed price, Changing Tides proceeded with execution with a sale to be held on 8 September 2015.

4.15 The day before the sale in execution Henria provided Changing Tides with an offer to purchase the property from "the Luvhombe Group" for an amount of R 2,5 million. The sale in execution was accordingly called off.

4.16 On 20 January 2016 Henria's then attorneys informed Changing Tides that the abovementioned sale was cancelled but that a new sale was on the cards. On 11 April 2016 Changing Tides informed Henria that the new offer was not acceptable to it due to it being a proposed installment sale agreement to which Changing Tides was not a party and with no right of enforcement thereof. This resulted in Henria's termination of the mandate of its then attorneys.

4.17 On 11 May 2016 the two Wynbergen sisters attended the offices of Changing Tides' attorneys and indicated their (and Henria's) willingness to settle Changing

Tides' claim by way of a once-off payment of R 1, 5 million. As part of the motivation to settle for a lesser amount, the one Wynbergen sister provided photographs the next day showing the dilapidated state of the bonded property.

4.18 On 16 May 2016 Changing Tides declined the settlement offer and thereafter a7] <u>The business rescue/winding-up issues:</u>

7.1 Once the rescission application fails, as I find it must, it should follow that the resolution whereby Henria had been placed in business rescue, should also be set aside. In her founding affidavit in the rescission application, this was advanced by Ms Wynbergen the only reason why the members resorted to business rescue.

7.2 Which brings me to a question the Court asked repeatedly during the hearing of argument on these matters, namely why the route of business rescue was followed and why did Henria, if it had a genuine belief in the merits of its rescission application, not launched it itself. It had no business, no employees, no "going concern" which could be operated by a business rescue practitioner in order to "rescue" the business. The answer Adv Wagener SC gave eventually, was that it was the "safest way" in which Henria could "protect" itself.

7.3 Changing Tides (in my view correctly so) saw this as purely an attempt at delaying the inevitable execution of the bonded property and therefore promptly launched the application to have the business rescue proceedings converted into winding-up proceedings.

7.4 It was in opposition to the application for winding-up that Ms Wynbergen vainly alleged that the business rescue proceedings "were under way" and that the reasons why Henria believed there were reasonable prospects of a successful rescue were that "*the company will be able to settle the amount owing to its creditors if it's afforded time and opportunity to shed costs, restructure the business to maximize the potential in the property and recover money from debtors*". These were also reasons formulated in the resolution whereby Henria was placed into business rescue. It was further alleged that "*an investor has made a commitment to make funds available to improve the property to sell or rent out*".

7.5 The facts as already described above, indicate that these contentions are not only devoid of a factual basis, but are patently untrue. Henria is purely a property holding corporation, it has no business to "restructure", it has no employees nor any "costs" which it could "shed". The business rescue practitioner has confirmed that Changing Tides constitutes "99%" of Henria's creditors, the remaining being SARS and the local authority in respect of rates, taxes and amenities. At the time the resolution was taken, the property had been vacant for six weeks. The facts set out in the answering affidavit are in conflict with the dilapidated state of the property earlier portrayed by the Wynbergens. While it might be that an "investor" might buy the property or invest money to have it refurbished and rented out, none of the previous efforts in this regard have been successful and neither has this mystery investor been identified. No business plan has been proposed, neither by Henria, its members or at a creditors meeting. The business rescue practitioner stated that he had put any possible "plans" on ice, pending finalization of the winding-up application. This is

hardly proceedings which are “under way”. These facts also indicate that the members of Henria taylor their conduct and, even more so, their affidavits as the exigencies of the situation at the time require.

7.6 In *Firstrand Bank Ltd v Normandie Restaurant Investments and Another* (189/2016)[2016] ZASCA (25 November 2016), the court held, in respect of an application to place a corporation in business rescue, it “… *had to prove to the court in order to succeed in the application, that it was just and equitable, for financial reasons, to grant the order and that there was a reasonable prospect for rescuing the business … a ‘reasonable prospect’ requires more than a prima facie case, an arguable possibility or mere suggestive speculation. It must be a prospect based on reasonable grounds*”. In appropriate circumstances further, the interest of creditors, as opposed to those of the company or its shareholders, should carry more weight See: *Oakdene Square Properties (Pty) Ltd v Farm Bothasfontein (Kayalami) (Pty) Ltd* **2012 (3) SA 273** (GP) at 288G – H.

7.7 In *Griesel and another v Lizemore and others* **2016 (6) SA 236** (GP) the aims of business rescue were considered to be this: the primary aim was to “rescue” the company and to “rehabilitate” it. Should this not be possible, the permissible secondary aim could be to realise a better return for creditors. In adjudicating the validity of a resolution, the element of good faith was also a requirement.

7.8 In the present matter the element of good faith is under suspicion. Henria itself could have launched the rescission application, had it

genuinely believed in the merits thereof. The resolution to do so while under business rescue was not taken with any genuine belief life in a "rehabilitation" of the corporation or in the rescue of its "business". It was merely a convenient mechanism employed to halt execution.

7.9 One can appreciate that, had the rescission application been successful, it might have staved off Changing Tides' judgment, but only temporarily and only until a next trial date. All the time, the uncontroverted fact of Henria's outstanding liability and unpaid debt to Granite would remain. There was never any "plan" whereby Henria would pay off its debt. Henria's attempt to avoid the judgment (only) by way of business rescue was a sham and an abuse of the purpose for which business rescue proceedings were incorporated into the **Companies Act 71 of 2008**. See *Alderbaran (Pty) Ltd v Bouwer and others* **2018 (5) SA 215** (WCC) dealing with similar circumstances.

7.10 In terms of **section 130** (5)(a), a court considering an application for the setting aside a resolution to place a corporation in business rescue, may set aside such a resolution, with reference to **section 130(1)(a)**, on the grounds that there is no reasonable prospect for rescuing the company or, with reference to **section 130(5)(a)(ii)**, "*if, having regard to all of the evidence, the court considers it is otherwise just and equitable to do so*".

7.11 Having regard to the factors mentioned above, I find that no reasonable prospect for the rescue of Henria by way of business rescue had been proven and, having regard to the abuse of this process, I find that

it would be just and equitable to set aside the resolution. Even if the business rescue proceedings had not been resorted to as an abusive process, I find that, once the rescission application was unsuccessful, that it would still be just and equitable to set aside the resolution. Having reached this conclusion, I need not consider whether the resolution had not in any event lapsed due to non-compliance with the time periods referred to in **sections 128** and **133** of the **Companies Act.**

7.12 It is common cause that Henria is "commercially" insolvent and all indications are that it is also factually insolvent.

[8] Conclusion

In summary then, I find that:

8.1 No common law grounds for rescission of the judgment in case no 5412/2008 dated 31 July 2014 have been established.

8.2 There was no "common error" as contemplated in Rule 42(1)(c) upon which the aforesaid judgment should be rescinded.

8.3 Henria's objections against the *locus standi* of Changing Tides, representing the SAHL Trust as creditor, are unfounded.

8.4 The resolution to place Henria in business rescue should be set aside.

8.5 This is a proper case where a final winding-up order should be granted.

[9] Order

9.1 The rescission application in case no 5412/2008 is refused with costs.

9.2 The resolution in terms whereof Henria Beleggings CC was placed in business rescue, is set aside.

9.3 In terms of **section 130** (5)(c) of the **Companies Act 71 of 2008**, Henria Beleggings CC is placed in final liquidation in the hands of the Master of this Court.

9.4 The costs in case no 43912/2016 shall be costs in the winding-up.

rranged to proceed with a new sale in execution already scheduled for 24 May 2016.

4.19 Four days before the new sale in execution, Changing Tides was informed by Henria's new attorneys that Henria had filed a notice to commence business rescue proceedings. At that stage the outstanding amount had escalated to R 1 970 341, 53.

4.20 At the date of the launching of the application in case number 43912/2016 the outstanding amount was R 2 701 191, 38 and the arrears equated to more than 78 months of missed instalments.

4.21 It is clear that the sole purpose of the business rescue proceedings and the appointment of the BRP was to proceed with rescission of the judgment previously agreed to on 31 July 2014. Henria had no employees, no annual turnover and is and was always simply a property holding company. The resolution placing Henria under business rescue accordingly fell short of the requirements for such a procedure. This aspect shall be dealt with more fully hereinlater.

[5] Henria's contentions

5.1 In the founding affidavit in the rescission application (in case no 5412/2008), Ms Andrea Wynbergen stated that the basis for the application are as follows:

> "*13. I am advised that the current application stands to be adjudicated in terms of the principles of common law rescission alternatively lack of authority alternatively the principles of* **Rule 42(1)(c)***, that of common mistake.*
>
> *14. the relevant common law principles in terms of which the application stands to be adjudicated are:*
>
> *14.1 Fraud;*
>
> *14.2 A Justus error in the consent to judgment*".

5.2 As a first ground thereafter, Ms Wynbergen alleged that Changing Tides, representing the SAHL Trust never had *locus standi* to claim against Henria. This argument was premised on the following:

> "*20. I submit that the Respondent could in fact not plead to that effect because Blue Banner could never have enforced its rights in terms of the guarantee as it ceded its rights and obligations under the loan agreement in terms of a written cession dated 14 January 2008 to Blue Granite.*
>
> *21. On the basis of the written cession the vague averment pleaded by the Respondent that the lender enforced its rights in terms of the guarantee, therefore can legally not hold any water.*

22. In any event, apart from its averment in paragraph 9 of the particulars of claim, the Respondent failed to allege with any particularity, a nexus between it and Blue Granite either on the basis of a guarantee called up by Blue Granite against the respondent or otherwise".

5.3 Ms Wynbergen, in trying to explain the long delay between the judgment sought to be rescinded and the launch of the rescission application (more than 2 years), alleged that "… *the actions of the applicant are reasonable within the circumstances given the fact that it immediately acted upon the newfound knowledge/advice of the cession by taking the necessary steps*".

5.4 As a further ground of rescission, Ms Wynbergen alleged that Du Preez had no authority to agree to the order of 31 July 2014. This ground was not formally abandoned during the argument of the matter, but Adv Wagener SC who appeared for Henria (and the BRP) declined to make submissions in support thereof.

5.5 In short, Henria's contentions are that, as Banner had ceded its rights to Granite, it could not have made a demand on either Henria or on the SAHL Trust and accordingly Changing Tides could not rely on the indemnity issued by Henria to the SAHL Trust. The SAHL Trust could therefore, on this construction, not execute on the indemnity bond and everyone had been in error thinking that it could.

Schnell NO and Others v FMI Trading (Pty) Ltd (60068/19) [2022] ZAGPPHC 387 (2 June 2022):

1. This is an application for the winding up of the respondent on the grounds that it is factually insolvent alternatively that it is just and equitable for it to be wound up. A provisional winding up order is sought in the notice of motion.

2. The first, second and third applicants are the trustees of the Werner Schnell Trust ("**the Schnell Trust**"). The fourth applicant avers that he is a creditor of the respondent. He is also the father of the first applicant. The trustees of the Schnell Trust in their capacities as such hold 50% of the shares in the respondent. The other 50% of the shareholding in the respondent is held by the Melgisedek Trust.

Respondent's directors from time to time

3. Mr Ignatius Michal de Jager (also known as "Natie") ("**De Jager**"), one of two directors of the respondent, has an interest in the Melgisedek Trust.**[1]** He was employed as the respondent's operations manager during 2012 and was appointed as a director on 25 November 2014. He was the sole director from 13 August 2015 until 9 January 2017 being the date on which Ms Barton was appointed a director. The following individuals were also directors of the respondent:

3.1. Mr Jacobus Stefanus Cornelius Johannes Jacobs ("**Jacobs")** from 6 September 2010 until 12 August 2015**.** Mr Jacobs served as financial director;

3.2. Mr Richard Gerald Bahre ("**Bahre** ") from 6 September 2010 to 1 March 2012; and

3.3. Mr Jan Louis Venter (also known as "Jantjie"), the fourth applicant, from 25 November 2014 until 12 August 2015.

Shareholders from time to time

4. The fourth applicant was an existing shareholder when a shareholders' agreement was entered into on 9 January 2015. Following the conclusion of the shareholders' agreement, the shareholders of the respondent were:

4.1. The Declaune Trust;

4.2. The Bahre Family Trust;

4.3. The Brewer Venter Trust; and

4.4. The Melgisedek Trust.

These Trusts are collectively referred to as "the four Trusts".

5. There were subsequent changes in the shareholding and with effect from 12 January 2016, the shareholding in the respondent was as follows:

5.1. Werner Schnell Trust (50%); and

5.2. Melgiesedek Trust (50%).

Issues

6. There are three issues which arise in this application. The first, whether the fourth applicant is a creditor of the respondent. The second, whether the respondent

is factually insolvent. The third, in the event that the respondent is not factually insolvent, whether it is just and equitable to wind-up the respondent.

40. In the circumstances I am satisfied that the fourth applicant lent and advanced to the respondent an amount of R22 050 000.00 which amount has not been repaid and at best for the respondent an amount of R16 750 000.00 of R22 050 000.00 has not been paid. The respondent raises in the answering affidavit that any debt owed to the fourth applicant has in any event prescribed. According to the fourth applicant the loan had no specific date for repayment terms and was payable on demand. The fourth applicant demanded payment in his affidavit deposed to on 6 August 2019 which is attached to the first to third applicants' founding affidavit.**[17]** The fourth applicant's claim has accordingly not prescribed.

41. Having found that the respondent is factually insolvent, I find that a case for the winding up of the respondent has been made out. The applicants seek a provisional order which I grant. The order is returnable on the first available date on the unopposed motion court roll.

42. The applicants are requested to immediately arrange with the Registrar a return date for a provisional winding up order and then to prepare a draft order, which caters for service on interested parties, including on the respondent at its registered office and for the publication of the provisional order once in the Government Gazette and in a daily newspaper circulating throughout the Gauteng province, for signature by me.

Breytenbach N.O. and Another v Ellison and Another (84994/2019) [2022] ZAGPPHC 409 (17 June 2022):

1. This is an opposed application wherein the Applicants are seeking an order,**[1]** as well as certian consequential relief, evicting the First Respondent from the

residential premises situated at [....] Dam Road Waterkloof, Pretoria ('the premises') registered in the name of the sequestrated estate of the First Respodent.

2. The First Respondent has brought a counter-application seeking *inter alia* an order declaring that the premises from which he is to be evicted falls outside the sequestrated estate.**[2]**

3. On 22 October 2021, the Applicants obtained an ex parte order against the First Respondent in terms of the provisions of section 4(2) of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 ('the PIE Act').

4. This order was personally served on the First Respondent on 29 October 2021. Subsequently, the order together with the section 4(2) notice was also served on the First Respondent's attorneys on 25 October 2021. Thereafter the set down was served on the First Respondents attorneys of record on 11 November 2021.

5. As far as the procedural requirements for the enrolment of the application is concerned this Court is satisfied that same have been complied with by the Applicants.

ISSUES FOR DETERMINATION

6. As per the joint pactice note, the issues to be determined by the court have been set out to be the following:**[3]**

6.1 The effect of the order of Kollapen J granted on 12 April 2018;

6.2 Whether the provisions of section 127A and 129 of the Insolvency Act 24 of 1936 ('the **Insolvency Act&rsquo**;) are applicable;

6.3 Insofar as the provisions of **section 127** and **129** are applicable, the 'date of sequestration' as envisaged in terms of the provisions of **section 20(2)(a)**, **124** (2) and **section 127A** (1) of the Insolvency Act;

6.4 Whether the immovable property in question, which is occupied by the First Respondent is part of the sequestrated estate of the First Respondent i.e. vests in the Applicants as the trustees of the First Respondent;

6.5 Whether the eviction of the First Respondent will be just and equitable in terms of the provisions of section 4(6) and/or section 4(7) of the PIE Act;

6.6 A just and equitable date for the eviction of the First Respondent in terms of section 4(9) of the PIE Act.

Breytenbach N.O. and Another v Ellison and Another (84994/2019) [2022] ZAGPPHC 409 (17 June 2022)

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REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION PRETORIA)

CASE NO: 84994/2019

REPORTABLE: NO

OF INTEREST TO OTHER JUDGES: NO

REVISED

17 JUNE 2022

In the matter between:

MARTHINUS JACOBUS DEWALD BREYTENBACH N.O. **FIRST APPLICANT**

RICHARD HICKEN N.O. **SECOND APPLICANT**

(In their capacity of joint trustees of

CLIVE MALCOLM ELLISON)

and

CLIVE MALCOLM ELLISON **FIRST RESPONDENT**

ID [....]

THE CITY OF TSHWANE **SECOND RESPONDENT**

This judgment is issued by the Judge whose name is reflected herein and is submitted electronically to the parties/their legal representatives by email. The judgment is further uploaded to the electronic file of this matter on Caselines by the Judge or his/her secretary. The date of this judgment is deemed to be 17 JUNE 2022.

JUDGMENT

COLLIS J

INTRODUCTION

1. This is an opposed application wherein the Applicants are seeking an order,**[1]** as well as certian consequential relief, evicting the First Respondent from the residential premises situated at [....] Dam Road Waterkloof, Pretoria ('the premises') registered in the name of the sequestrated estate of the First Respodent.

2. The First Respondent has brought a counter-application seeking *inter alia* an order declaring that the premises from which he is to be evicted falls outside the sequestrated estate.**[2]**

3. On 22 October 2021, the Applicants obtained an ex parte order against the First Respondent in terms of the provisions of section 4(2) of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 ('the PIE Act').

4. This order was personally served on the First Respondent on 29 October 2021. Subsequently, the order together with the section 4(2) notice was also served on the First Respondent's attorneys on 25 October 2021. Thereafter the set down was served on the First Respondents attorneys of record on 11 November 2021.

5. As far as the procedural requirements for the enrolment of the application is concerned this Court is satisfied that same have been complied with by the Applicants.

ISSUES FOR DETERMINATION

6. As per the joint pactice note, the issues to be determined by the court have been set out to be the following:**[3]**

6.1 The effect of the order of Kollapen J granted on 12 April 2018;

6.2 Whether the provisions of section 127A and 129 of the Insolvency Act 24 of 1936 ('the **Insolvency Act&rsquo**;) are applicable;

6.3 Insofar as the provisions of **section 127** and **129** are applicable, the 'date of sequestration' as envisaged in terms of the provisions of **section 20(2)(a)**, **124** (2) and **section 127A** (1) of the Insolvency Act;

6.4 Whether the immovable property in question, which is occupied by the First Respondent is part of the sequestrated estate of the First Respondent i.e. vests in the Applicants as the trustees of the First Respondent;

6.5 Whether the eviction of the First Respondent will be just and equitable in terms of the provisions of section 4(6) and/or section 4(7) of the PIE Act;

6.6 A just and equitable date for the eviction of the First Respondent in terms of section 4(9) of the PIE Act.

BACKGROUND FACTS **[4]**

7. On 4 October 2000, the First Respondent was sequestrated under case number 3873/2000**[5]** and on the 14th of March 2013 under case number 359/2012**[6]** in the United Kingdom. These applications were brought by the petitioning creditor, the Commissioner of Her Majesty's Revenue and Customs, the revenue collection agency of the United Kingdom.

8. In terms of the applications it was established at the time that the First Respondent owes the sequestrating creditor, Her Majesty's Revenue and Customs, an amount of R12 103 054. 00 (twelve million one hundred and three thousand and fifty-four rand).**[7]**

9. On the 31st of January 2017, this Court granted a provisional order recognising the insolvency of the First Respondent in the United Kingdom on 4 October 2000 under case number 3873/2000 and on 14 March 2013 under case

number 359/2012.**[8]** Further in terms of the order, the Second Applicant's appointment as trustee of the insolvent estate of the First Respondent was also recognised. On the 12th of April 2018**[9]**, this Court further confirmed the provisional order which inter alia recognised the 4 October 2000 insolvency of the First Respondent, as the 14 March 2013 bankruptcy order had been discharged. This appears from the judgment of Kollapen J.The result being that the 4 October 2000 bankruptcy order remains extant as the First Respondent's applications to annul the 4 October 2000 bankruptcy order were dismissed with costs.**[10]** The First Respondent therefter applied for leave to appeal the Kollapen J order and on the 3rd of August 2018, the application for leave was dismissed by this Honourable Court.**[11]** What then ensued was the appointment by the Master of First and Second Applicants as trustees of the First Respondent,**[12]** which occured on the 18th of March 2019. It is important to note that the insolvent estate is the owner of the fixed property i.e. Erf [....] Waterkloof, Extention 2, Pretoria, situated at [....] Dam street, Waterkloof. The First Respondent is presently in occupation thereof.

APPLICANT'S CASE

10. On behalf of the applicants the following arguments were advanced:

10.1 It is the duty of the trustees to realise the assets of the estate and to make full and equitable distribution of the amounts realised on behalf of the insolvent estate amongst the general body of creditors and thus avoid the preference of any one creditor above another. The trustees must take possession and control of the affairs of the insolvent estate for the benefit of the general body of creditors.**[13]**

10.2 This has the effect that the assets of the insolvent, in this case the First Respondents immovable property being Erf [....], Waterkloof, Pretoria has to be sold by the trustees.**[14]**

10.3 On the 23 May 2019 a second meeting of creditors was held and Absa Bank submitted and proved a claim in the amount of R 1 111 749.50 in terms of the bond over the property situated at [....] Dam Street, Waterkloof, Pretoria. This is the same property that the First Respondent is occupying.**[15]**

10.4 On the 31st July 2019 a letter of demand was sent to the First Respondent demanding that he vacates the premises by no later than the 31st of August 2019.**[16]**

10.5 On the 1st August 2019 the First Respondent responded by email stating that he does not believe that the trustees have the right to evict him and that a formal response will follow from his attorney.**[17]**

10.6 Further that the First Respondent is not entitled to continue to occupy the property after sequestration,**[18]** and by refusing the trustees and valuators access to the property he is making it difficult for them to carry out their duties, more so in circumstances where no legal basis exist why the First Respondent should not be ordered to vacate the premises in question.

THE FIRST RESPONDENT'S CASE

11. The First Respondent's case is the following:

11.1 In response the First Respondent denies that the Applicants are entitled to evict him form the immovable property.**[19]**

11.2 The First Respondent further denies that he owes the sequestrating creditor Her Majesty's Revenue and Customs any amount.**[20]**

11.3 Further that the Applicants are only entitled to administer as his estate the property at the date of his sequestration on 4 October 2000 and all the property which he may have acquired or which may have accrued to him during his sequestration until 4 October 2010.**[21]**

11.4 The immovable property which is the subject of these eviction proceedings falls outside of his insolvent estate, which the Applicants can administer, in that the immovable property was only registered in his name on 20 December 2012, as such well after 4 October 2010.**[22]**

11.5 In addition the only creditor who has proven a claim is ABSA but as ABSA is not a creditor of the relevant estate, no creditors of the relevant estate have proven any claims and the mortgaged property thus falls outside of the relevant estate.

11.6 Furthermore that he has been rehabilitated in terms of section 127A of the Insolvency Act 24 of 1936 ("the **Insolvency Act&quot**;) and ostensibly so due to an efflux of time, as a result of which the First Respondent alleges that he is discharged of all debts which arose before his UK sequestration on 4 October 2000.

11.7 That the applicants are only entitled to administer as his estate at the date of his UK sequestration on 4 October 2000 and all the property which he may have acquired or which may have accrued to him until 4 October 2010.

11.8 That the immovable property which is the subject of these eviction proceedings falls outside of the First Respondent's insolvent estate which the applicants can administer, in that the immovable property was only registered in his name on 20 December 2012, i.e. thus after 4 October 2010.

11.9 As he resides on the property, which is his home, he does not own alternative accommodation into which he can relocate,**[23]** and it on this

basis that he contends that it would not be just and equitable that he should vacate his home which he only acquired on 20 December 2012.**[24]**

44.9 Considering the argument that the appointment of the trustees was irregular, in that their appointment took place during 2014, and as such beyond the 10-year period of the insolvent person being sequestrated, it is common cause that the order of Kollapen J vested the trustees with certain powers.

44.10 It is further common cause that these powers so bestowed upon the trustees took place with full participation of the First Respondent during the proceedings before Kollapen J, and that no challenge was mounted against the powers being bestowed on them by the order of Kollapen J or that their appointment would be irregular. As the order of Kollapen J, to date remains unchallenged by the First Respondent, there cannot be any merit given to this argument.

44.11 As far as the date when the immovable property was acquired by the First Respondent, it is common cause between the parties that the property was acquired by way of a divorce settlement on 4 February 2011 whereafter the registration of transfer was effected on 20 December 2012.

Vide: Deed of transfer: Annexure AA1 to 3: p 006-17 to 19.

44.12 The date on which the immovable property was registered into the name of the First Respondent is to my mind of no moment if one has regard to the date when the recognition order was granted by Kollapen J, on

12 April 2018. As at this date, and in terms of the recognition order the First Respondent was still an undischarged bankrupt.

45. It is for this reason that I therefore conclude that as of 12th April 2018, the immovable property formed part of the sequestrated estate of the First Respondent and that it would be subject to be realised by the trustees.

ORDER

58. In the result the following order is made:

58.1 The First Respondent is evicted from the premises situated at [....] Dam Road, Waterkloof, Pretoria ('the premises').

58.2 The First Respondent is to vacate the premises within 30 days of the date of this order.

58.3 The sheriff and his/her lawful deputy is authorised and directed to take such steps as are necessary to evict the First Respondent from the premises in the event that the First Respondent does not vacate the premises within 30 days from the date of this order.

58.4 The First Respondent is to pay the costs of this application on the attorney and client scale.

58.5 The First Respondent's counter-application is dismissed with costs on an attorney and client scale.

Naturally Australian Meat and Game (Pty) Ltd v JH Meat CC (57166/20) [2022] ZAGPPHC 426 (17 June 2022):

[1] It is the applicant's case that the respondent be placed under business rescue supervision in accordance with Section 131 of the Companies Act 71 of 2008 ("the Act"), and that Mr Daniel Terblanche be appointed as business rescue practitioner in accordance with Section 131(5) of the Act.

[2] The respondent raised two main points *in limine* in its opposing affidavit, namely that the applicant does not have personal knowledge of the matter, and secondly, there are material disputes of fact which cannot be ventilated properly on the papers.

ISSUES FOR DETERMINATION

[3] Whether the respondent's points *in limine* has merit, namely:

(i) the applicant does not have personal knowledge of the matter;

(ii) whether there are material disputes of facts which cannot be dealt with properly on the papers.

[4] On a substantive basis the applicant submits that it has made out a case for business rescue proceedings to be instituted.

BACKGROUND

[5] The applicant and the respondent were in a business relationship since 2015. The nature of their business relationship was such that the applicant sold frozen boneless kangaroo meat to the respondent which was shipped from Australia to South Africa. The business relationship continued until November 2018 when the respondent failed to pay for certain shipments of kangaroo meat. It is the respondent's case that these shipments were received by the applicant. The amount claimed for the shipments was an amount of USD $327,995.89 (hereinafter referred to as "the goods").

[6] The respondent disputed the fact that the said goods were delivered and received by the applicant. The respondent pointed out that:

(i) the goods (referred to in annexures "FA3" and "FA4.1" to "FA4.18" to the applicant's founding affidavit) were erroneously and/or fraudulently delivered by third parties and/or entities**[1]**;

(ii) this caused the respondent to open a criminal case of fraud/theft against such third parties at the SAPS Table Bay Harbour on or about 19 May 2019;

(iii) thereafter, on 19 June 2019, it instituted civil proceedings for recovery of the damages (in the amount of R7,905,849.69) against the said third parties.

terms of the applications it was established at the time that the First Respondent owes the sequestrating creditor, Her Majesty's Revenue and Customs, an amount of R12 103 054. 00 (twelve million one hundred and three thousand and fifty-four rand).**[7]**

[43] In the pleadings before me, I am unable to determine if the said requirements have been met. I have only been privy to the financial position of the respondent in the 2014 year (hence the 2015 financial statements). I have not been placed in a position to determine the status of the respondent at the time the debt became due.

[44] The phrase “financially distressed” is defined in **Section 128(1)(f)** of the **Companies Act to** include two distinct concepts. It is defined as follows:

> “*Financially distressed – in reference to a particular company at any particular time, means that:*
>
> *(i) it appears to be reasonably likely that the company will be unable to pay all of its debts as they become due and payable within the immediately ensuing six months; or*
>
> *(ii) it appears to be reasonably likely that the company would become insolvent within the immediately ensuing six months.”*

[45] In light of the disputes raised, it is not possible to determine as to whether the respondent is “financially distressed”. More importantly, a mere speculative suggestion that the entity is “financially distressed” is not sufficient. One needs to establish more than a mere *prima facie* case or an arguable possibility**[20]**.

[46] This court is required to adjudicate matters in a fair and full manner. Often courts have to decide where the truth lies between two conflicting versions. In this instance, where the said disputes of fact exist, it would not be possible to make a determination on the matter without subjecting the parties to cross-examination. A court may, of course, after cross-examination still be unable to decide where the truth lies. However, that possibility does not entitle the court to decide the matter without allowing cross-examination**[21]**.

[47] In the premises I make the following order:

1. This matter is referred to trial for oral evidence.

2. Costs of the application are reserved.

South Africa Enterprise Development (PTY) Ltd vs Kerani BTW CC (2021/7285) [2022] ZAGPJHC 371 (1 June 2022):

[1] This is an application in which the applicant seeks the liquidation of the respondent in terms of sections 66(1) and 69(1)(a) of the Close Corporation Act No. 69 of 1984, read with sections 344(f) and 345 of the Companies Act No 61 of 1973. The application is opposed by the respondent. Before I discuss as set out below, I must apologise to the parties for the delay in rendering the judgment and do so without attempting to explain the delay, well aware that any explanation should excuse the delay

[2] The applicant's affidavit deposed to by David Pimstein, the Chief Executive Officer, describes the applicant as a company which invests in specialised companies with a view to taking equity and funding the companies with the company ZAR X (Pty) Ltd ("ZAR X") being one such company. The applicant and the respondent each owns 24% and 16% shares respectively ZAR X. The other shareholders are Public Investment Corporation Limited, Government Employee Pension Fund, Black and White Innovations and JGW Family Trust. Mr Geoffrey Martin Cook is the respondent's sole member.

[3] The applicant seeks the liquidation of the respondent on the ground that it is commercially insolvent, having failed to honour a contractual obligation to pay the share purchase price in accordance with a share sale agreement in terms of which the applicant agreed to sell and the respondent agreed to purchase the applicant's shares in ZAR X. The applicant seeks the liquidation of the respondent on the ground that it is unable to pay its debts and as a creditor as contemplated in section 345 of the Companies Act, 1973 and on the ground that liquidation is just and equitable in accordance with section 68(d) of the Close Corporation Act, read with section 344(h) of the Companies Act, 1973.

[4] The relevant facts as set out in the founding affidavit may be summarised as follows.

[5] On 10 September 2020, the applicant and the respondent, represented by Mr Cook, concluded a share sale agreement in terms of which the applicant sold to the respondent its entire shareholding in ZAR X for the price of three million five hundred rand (R3 500 000) (the agreement was signed by the respondent on 8 August 2020). The sale agreement is subject to the fulfilment of certain suspensive conditions to be fulfilled on or before 22 September 2020 and the agreement states that it shall become effective on "*the first Business Day after the fulfilment of the last of the Conditions*". The suspensive conditions are:

> 5.1 The remaining shareholders waive any pre-emptive, come along, tag along or similar rights which they may have in regard to the Sale Shares (clause 2.1.1).
>
> 5.2 Any required Shareholder and Board approvals necessary to give effect to the sale agreement are obtained (clause 2.1.2).
>
> 5.3 Any required regulatory approvals necessary to give effect to the sale agreement are obtained (clause 2.1.3).

[6] Clause 3.1 provides that "*on and with effect from the Effective Date …*", the applicant sells to the respondent the shares and, in terms of clause 3.2 the risk in and ownership and benefit of the shares will pass to the respondent on the Effective Date.

[7] Clause 6, under the heading "*Implementation and Delivery*" prescribes the obligations with which each party must comply on the Effective Date. This includes that the applicant shall, against compliance by the respondent with specified obligations, including payment of the purchase price, deliver to the respondent the original share certificate together with a proper instrument of transfer in accordance with section 51(6)(a) of the Companies Act (clause 6.1.2.1.1).

se 6.1.

[9] It came to pass that the conditions were not fulfilled on 30 November 2020 and that the respondent was unable and failed to pay the sale price on the Effective Date and after numerous extensions of the date for payment of the sale price and, in a letter dated 12 January 2021, the applicant's attorneys served on the respondent a letter of demand in terms of section 69(1)(a) of the Close Corporation Act 69 of 1984, in terms of

which the applicant made demand that the respondent pay the purchase price within 21 days of delivery of the letter. This application is the culmination of the respondent's failure to make payment as demanded in the letter.

[10] The applicant seeks the liquidation of the respondent on the basis that the purchase price is a debt that is due and payable to it by the respondent and that the respondent is commercially insolvent.

[11] In its answer affidavit opposing the application, the respondent disputes that it is indebted to the applicant, that the debt is due and payable. It does on the grounds, *inter alia*, that the share sale agreement never came into effect for non-fulfilment of the suspensive conditions, including absence of ZAR X shareholder and directors' approval and absence of regulatory approval, required in terms of section 67 of the Financial Markets Act, Act No. 19 of 2012. I return to this issue.

[12] The respondent further contends that the sale agreement provides a dispute resolution mechanism, namely mediation and arbitration, and as a result, the court lacks jurisdiction. This is easily disposed on the basis that the relief claimed by the applicant is not one capable of mediation and or arbitration. The applicant does not seek specific performance, namely, that the respondent be ordered to comply with the contract. Rather, the applicant seeks the respondent's liquidation, a remedy which is not competent in mediation or arbitration. Accordingly, this defence does not avail the respondent and must fail.

[13] The respondent's defence that the debt on which the applicant relies for the relief claimed is not due and payable on the other hand requires different treatment. In its replying affidavit, the applicant admits or at least does not deny that the transfer of shares as contemplated by the parties cannot be given effect to without regulatory approval. Further, it does not dispute that the transfer of share is subject to approval by the directors of ZAR X - it is common cause that both these conditions have not been complied with. The applicant however contends that the suspensive conditions, including approval of the directors of ZAR X and the regulators

(clause 6.2), are deemed fulfilled alternatively waived by virtue of the agreement of the parties that I have referred to above. I do not agree.

[14] The requirement that the share sale must be approved by the regulatory authorities is prescribed in section 67 of the Financial Markets Act under the heading "*Limitation on control of and shareholding or other interest in market infrastructure*". Section 67(1) defines who is an "associate" for the purposes of the section. Section 67(3) prescribes that "*a person may not, without prior approval of the Authority, acquire or hold shares or any other interest in a market infrastructure if the acquisition or holding results in that person, directly or indirectly, alone or with an associate, exercising control within the meaning of subsection (2) over the market infrastructure.*" A person controls a market infrastructure within the meaning of section 67(2) if the person controls a market infrastructure, *inter alia*, that is a company, if that person, alone or with associate, holds shares in the market infrastructure of which the total nominal value represents more than 15% of the nominal value of all the issued shares thereof (s67(2)(a)(i); is directly or indirectly able to exercise or control the exercise of more than 15% of the rights associated with securities of that company (67(2)(a)(ii). Section 67(4) prescribes that "*a person may not, without prior approval of the registrar, acquire shares or any other interest in a market infrastructure in excess of that approved under subsection (3).*" A "market infrastructure" includes an exchange licenced under section 9 (sec 1). It is common cause that ZAR X is a market infrastructure.

[15] The respondent holds more than 15% shares in ZAR X and the applicant concedes, or at least does not dispute, that approval in accordance with section 67 is required. Sections 67(3) and 67(4) are peremptory in their terms and the respondent has no discretion to opt out of its requirements, as the parties purported to do with the agreement that the condition to obtain regulatory approval is deemed fulfilled alternatively is waived. The parties had no such power, and their agreement has no legal effect in the light of the peremptory terms of subsections (3) and (4). It is, for the purposes of this application and the relief claimed by the applicant, irrelevant that the respondent was aware of these hurdles to the completion of the transaction, as the applicant alleges, and either led the applicant

down the garden path or has become opportunistic in the face of the application for liquidation.

[16] Without the approval required by section 67, the applicant was never in a position to give transfer of the shares and the respondent's obligation to pay the purchase price has not arisen.

[17] Section 69(1)(a), Close Corporation Act, provides that a corporation shall be deemed unable to pay its debts if a creditor to whom it is indebted in a sum not less than two hundred rand (R200.00) then due has served on the corporation at its registered office a demand to pay the sum so due and the amount remains, after expiry of twenty one (21) days, unpaid, unsecured or uncompounded for to the satisfaction of the creditor. Accordingly, to succeed in the relief claimed, an applicant must show that the amount owed is due.

[18] In the light of the peremptory provisions of section 67(3) and (4) of the Financial Markets Act, Without the prescribed approval, payment to the applicant is not due, or as the Appellate Division (as it then was) put it in *The Master v IL Back & Co. Ltd and others* **1983 (1) SA 983** *(A)*, the amount is not immediately claimable by the applicant in the absence of the obligatory approvals or put differently, to be due "*the debt must be one in respect of which the debtor is under an obligation to pay immediately*" (at 1004F-G). The absence of approvals of the shareholders and directors of ZAR X has the same consequence.

[19] If the absence of the obligatory approvals is an impediment to the completion of the transaction, it cannot be that the respondent was under an obligation to pay the purchase price with the commensurate obligation of the applicant to give transfer of the shares. The obligation would only arise when the obligatory approvals are procured or granted. It is only then that the respondent would become liable to immediately pay the purchase prices. This occasion had not yet arisen at the time of the institution of this application.

[20] On the facts, the applicant has not shown that the respondent is indebted to it and that the debt is due and payable within the meaning of section 69(1)(a) of the Close Corporation Act. The applicant therefore cannot succeed in the relief claimed.

[21] I accordingly make the following Order:

1. The application is dismissed with costs.

Harold N.O. and Another vs R and R Wholesalers and Distributors CC and Others (21033/2021) [2022] ZAGPJHC 398 (8 June 2022):

1. This is an application brought by the joint business rescue practitioners ("*the BR practitioners*") to bring an end to the business rescue ("the BR") proceedings in respect of R & R Wholesalers CC ("*R&R" or "the Corporation"*) and place it under final winding-up in terms of s 141(2)(a)(ii) of the Companies Act 71 of 2008 ("*the Act")*

2. The application is opposed by Mr. PM Pillay who is the sole member of R&R. He has also brought a counter-application, effectively seeking to continue with the BR and stay a winding-up until the outcome of a dispute with MTN based on alleged prohibited conduct, which he asks the court to refer to the Competition Tribunal for determination.

3. MTN which is the single largest creditor has also intervened. It does so in support of the winding-up.

4. R&R's business was the purchase of prepaid airtime vouchers at a discount from cellular service providers for on-sale through stores and informal vendors.

5. On 28 January 2021 Pillay passed a resolution placing the Corporation under BR. The resolution was filed with the Companies and Intellectual Property

Commission on 4 February 2021. The BR practitioners were appointed shortly after that.

6. Sometime between the passing of the resolution to place R&R under business rescue and the appointment of the BR practitioners the corporation ceased trading and since then has not done so.

7. According to the BR practitioners, the Corporation is indebted to its creditors in excess of R500 million. MTN's claim is for R330 million. The next largest creditor is Telkom for R90 million. ABSA Bank is owed some R86 million and holds a cession of R&R's debtor book with the result that it is entitled to appropriate all revenue that might be received up to that amount should the Corporation recommence trading.

13. Earlier I mentioned that the corporation has no prospect of becoming a viable business within the foreseeable future even at the reduced liability as contended for by Mr. Pillay. This is because Mr. Zimerman was compelled to concede that the business plan would require a moratorium on the repayment of existing liability and that the existing debt would, on the most optimistic (and unrealistic) outcome, require repayment over 5 years- a period which itself excludes the two or so years it would ordinarily take for the Competition Tribunal to deal with the matter.

14. In a material way Pillay was compelled to change tack. Instead of only making out a case that there was a viable business plan, he was obliged to also submit that the BR proceedings should be stayed pending the outcome of a decision by the Competition Tribunal.

15. This brings into focus the default position of BR proceedings. By their nature they are meant to have a limited life span. BR either achieves the objective of placing the corporation back on its feet with a viable business plan which is then voted on by creditors or else the corporation must be would up. The time allowed for achieving the former is six months unless good cause is shown. If it is evident that this will not occur, then the BR practitioner is obliged to apply to court expeditiously for the corporation's winding-up.

In *Koen and Another v Wedgewood Village Golf & Country Estate (Pty) Ltd and others*

2012 (2) SA 378 (WCC) Binns-Ward J said at para 10:

> "*It is axiomatic that business rescue proceedings, by their very nature, must be conducted with the maximum possible expedition. In most cases a failure to expeditiously implement rescue measures when a company is in financial distress will lessen or entirely negate the prospect of effective rescue.*
>
> *Legislative recognition of this axiom is reflected in the tight time lines given in terms of the Act for the implementation of business rescue procedures if an order placing a company under supervision for that purpose is granted. There is also the consideration that the mere institution of business rescue proceedings — however dubious might be their prospects of success in a given case — materially affects the rights of third parties to enforce their rights against the subject company."*

16. In the present case the BR commenced on 4 February 2021. The only business plan proposed is one whereby the company can obtain MTN airtime for on-sale at a better discount rate than it previously enjoyed. This would not only require MTN to provide a better rate but there would also have to be a moratorium placed on the repayment of the existing debt owed to it by R&R and for that matter the other creditors. Needless to say there would also have to be the prospect that MTN or another service provider would supply airtime vouchers going forward.

MTN is not prepared to do either. Absent agreement the question is whether there is any other basis on which the company can continue in business rescue, bearing in mind that that the corporation's controlling mind was responsible for placing it under business rescue thereby admitting that it was financially distressed but could come up with a reasonable plan to either obtain capital or trade its way out of debt**[7]**. Pillay has produced neither.

No case is made out by Pillay that a court, or Competition Tribunal for that matter, can compel MTN or any other service provider to supply it going forward.

17. Accordingly, and having regard to the fact that R&R is factually and commercially insolvent, there is no basis on which the court should exercise its discretion to continue with BR proceedings.

18. Insofar as the application for a stay pending the outcome of proceedings before the Competition Tribunal is concerned, there is similarly no basis on which the court should exercise its judicial discretion in favour of doing so.

Aside from the basic principles that BR proceedings must achieve the expeditious return of the company to solvency failing which it is to be wound up, the reason for R&R finding itself in the position it did has more to do with the way in which Pillay conducted its affair by utilising R&R funds in affiliated loss making entities. The stay is sought to enable the Competition Tribunal to investigate complaints against MTN. The outcome cannot realistically affect the parlous state of R&R which has already closed shop. It therefore is unnecessary to consider the further argument advanced by the BR practitioners that the requirements of **s 65** of the **Competition Act have** not be satisfied.

19. Finally, it is not disputed that all the statutory requirements for a final winding-up have been met.

COSTS

20. The BR practitioners request that the costs be costs in the winding-up save that Pillay be held jointly and severally liable to pay them.

21. I am of the view that Pillay abused the BR process. He had no business plan and had expected a docile BR practitioner. When it was evident that there was no viable way to pursue a BR, Pillay looked for a way out. Irrespective of whether MTN may or may not have discriminated unfairly against R&R (and the Competition Tribunal threw out a similar complaint by another dealer) the best outcome is a Pyrrhic one, since R&R will remain factually and commercially insolvent in amounts

well over R100 million with no prospect of recovery through capital injection or otherwise.

22. In my view the *dicta* of Wallis JA in Van *Staden N.O. and others v Pro-Wiz Group (Pty) Ltd* **2019 (4) SA 532** (SCA) are apposite. At para 22 the court said:

> "*It has repeatedly been stressed that business rescue exists for the sake of rehabilitating companies that have fallen on hard times but are capable of being restored to profitability or, if that is impossible, to be employed where it will lead to creditors receiving an enhanced dividend. Its use to delay a winding-up, 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 costs order is appropriate. "*

23. BR proceedings should not have been brought while a winding up in the ordinary course would have been inevitable. While maintaining fairness and in order to avoid the difficulty of determining whether any particular opposed cost should properly be allocated to the BR proceedings or the winding up or the counter-application (which was really based on the same arguments raised by Pillay in the main application) the order sought by the BR practitioners appears most appropriate in the circumstances.

ORDER

24. I accordingly order that:

> *1. The business rescue proceedings in respect of the First Respondent are hereby discontinued*

2. The First Respondent is hereby placed under final winding-up in the hands of the Master

3. The counter-application is dismissed

4. The costs of the applicants and the Second Intervening party, i.e. MTN, in the business rescue, the winding-up proceedings and the counter-application are costs in the winding up, for which costs the First Intervening party, Mr. Pillay, will be jointly and severally liable on the party and party scale, the one paying the other to be absolved. The costs include the costs of counsel but are limited to the engagement of a single senior counsel for each party.

Strydom N.O. and Another v Snowball Wealth (Pty) Ltd and Others (356/2021) [2022] ZASCA 91 (15 June 2022):

Insolvency – s 26(1) of **Insolvency Act 24 of 1936** – disposition not made for value – means for no value at all-the phrase 'not made for value' in **s 26(1)** of the **Insolvency Act 24 of 1936** means for no value at all-look at all the circumstances

[1] The appellants are the joint liquidators of DexGroup (Pty) Ltd (in liquidation) (DexGroup). The first respondent is Snowball Wealth (Pty) Ltd (Snowball). The second, third and fourth respondents are Mr LCH Chou, Ms W Zhang and Mr JD Rabinowitz respectively. I refer to the three of them collectively as the other respondents. Prior to its liquidation, DexGroup sold shares in Trustco Group Holdings Limited (the Trustco shares) to each of the respondents. The appellants sued the respondents in the Western Cape Division of the High Court, Cape Town (the high court) for the return of the Trustco shares, alternatively payment of the value of the shares, on the ground that each sale constituted a disposition without value in terms of **s 26(1)** of the Insolvency Act 24 of 1936. Snowball and the other respondents separately excepted to the appellants' particulars of claim. The high court (Erasmus J) upheld both exceptions. The appeal is with the leave of this court.

[2] By virtue of Item 9 of Schedule 5 to the **Companies Act 71 of 2008**, Chapter 14 of the repealed Companies Act 61 of 1973 continues to apply to insolvent companies, until a date to be determined. Sections 339 and 340 form part of Chapter 14. Section 339 makes the provisions of the law relating to insolvency *mutatis mutandis* applicable to the winding-up of a company unable to pay its debts. Section 340(1) provides:

'(1) Every disposition by a company of its property which, if made by an individual, could, for any reason, be set aside in the event of his insolvency, may, if made by a company, be set aside in the event of the company being wound up and unable to pay all its debts, and the provisions of the law relating to insolvency shall *mutatis mutandis* be applied to any such disposition.'

[3] **Section 26(1)** of the **Insolvency Act (s** 26(1)), in turn, reads:

'(1) Every disposition of property not made for value may be set aside by the court if such disposition was made by an insolvent –

(a) more than two years before the sequestration of his estate, and it is proved that, immediately after the disposition was made, the liabilities of the insolvent exceeded his assets;

(b) within two years of the sequestration of his estate, and the person claiming under or benefited by the disposition is unable to prove that, immediately after the disposition was made, the assets of the insolvent exceeded his liabilities:

Provided that if it is proved that the liabilities of the insolvent at any time after the making of the disposition exceeded his assets by less than the value of the property disposed of, it may be set aside only to the extent of such excess.'

The issue in the appeal is the meaning of the phrase 'not made for value' in **s 26(1)** (the phrase).

Background

[4] The background to the claims against the respondents, as sketched in the particulars of claim, was the following. DexGroup was placed in final liquidation on 26 October 2016, whereafter the appellants were appointed as joint liquidators. Since at least 2007 and at all times thereafter, however, DexGroup was unable to pay its debts and its liabilities exceeded its assets. The particulars of the dispositions of the Trustco shares by DexGroup to the respondents were as follows. On 23 September 2010, it sold 21 million shares to Snowball at 27 cent per share and on 22 November 2010, it sold a further 6 million shares to Snowball at 48 cent per share. On 22 November 2010, it also sold 4 136 755 shares to Mr Chou, at the same price. On the same date, it sold 300 000 shares to Ms Zhang and 1 million shares to Mr Rabinowitz, all at the same price.

[5] The particulars of claim proceeded to state that the 'reasonable market value' of the shares at the time of each sale was 67 cent per share. Because the respondents paid 27 cent (40 per cent of the market value) and 48 cent (72 per cent of the market value), the value given for the shares was 'illusory or merely nominal'. The dispositions took place more than two years prior to 25 February 2014, being the deemed date of sequestration in terms of **s 340(2)***(a)* of Act 61 of 1973.**[1]** On the strength of these allegations, the appellants sought orders setting aside each sale under s 26(1)*(a)*.

[6] Snowball's exception departed from the premise that 'illusory or merely nominal' value means no value. It emphasised that the according to the particulars of claim, DexGroup had received payment of R5 670 000 for the 21 million shares and R2 880 000 for the 6 million shares. Therefore, so Snowball said, the value given by it was not illusory or merely nominal. On this basis it contended that the appellants' allegations were not capable of sustaining claims based on dispositions not made for value as contemplated in s 26(1).

[33] Importantly, in terms of s 26(2),**[11]** the recipient has no claim in competition with the creditors of the insolvent estate. Section 32(3)**[12]** provides that should the property have been alienated or consumed in the period between the disposition and the setting aside, the recipient would be liable for the value of the property at the

date of the disposition or at the date on which it is set aside, whichever is the higher. On the appellants' construction therefore, should a purchaser, with no knowledge of the seller's financial situation, in the ordinary course of business purchase property at a discounted price (something less than 'reasonable market value' or a 'fair return or equivalent') from a person that is sequestrated years later, the purchaser would have to return the property without the right to reclaim the purchase price. Moreover, should the purchaser *bona fide* have alienated or consumed the property, he or she would be liable for payment of the higher of the value of the property at the time of the sale or at the time of the setting aside of the disposition and forfeit the purchase price. Many examples could be given of the absurd results that the appellants' interpretation would lead to. It suffices to say that they could not have been intended.

[34] As I have said, the appellants' case is that dispositions for less than the 'reasonable market value' or a 'fair return or equivalent' are not made for value. In *Goode, Durrant and Murray Ltd v Hewitt and Cornell, NNO* **1961 (4) SA 286** (N) at 291E-F Fannin J said:

'The word "value" is not, however, confined to a monetary or tangible material consideration, nor must it necessarily proceed from the person to whom the disposition is made. Whether an insolvent has received "value" for a disposition must be decided by reference to all the circumstances under which the transaction was made.'

In *Langeberg Koöperasie* at 604B-C this court quoted this passage with approval. Thus, it is an established principle that 'value' under s 26(1) includes benefits that do not have a reasonable market value and in respect of which a fair return or equivalent could not be evaluated or expressed in monetary terms. This consideration, too, points away from the construction favoured by the appellants.

[35] Finally, there is s 25(4)*(c)* of the Insolvency Act. In relevant part it provides:

'(4) If a person who is or was insolvent unlawfully disposes of immovable property or a right to immovable property which forms part of his insolvent estate, the trustee may, notwithstanding the provisions of subsection (3), recover the value of the property or right so disposed of-

(a) . . .

(b) . . .

(c) from any person who acquired such property or right from the insolvent or former insolvent without giving sufficient value in return, in which case the amount so recovered shall be the difference between the value of the property or right and any value given in return.'

Subsection 4*(c)* was introduced by an amendment that took effect on 1 September 1993.**[13]** The legislature is presumed to be acquainted with the existing law**[14]** and a deliberate change of expression indicates a change of intention.**[15]** In the result, the phrase could not bear the meaning of not for 'sufficient value'.

[36] All the contextual and purposive indicators reinforce the ordinary meaning of the phrase. For these reasons, I conclude that the phrase 'not made for value' in **s 26(1)** of the **Insolvency Act 24 of 1936** means for no value at all.**[16]** It follows that the appeal must fail.

[37] The appeal is dismissed with costs, including the costs of two counsel where so employed.

Naka Diamond Mining (Pty) Limited v Johannes Frederick Klopper NO & Others (277/2021) [2022] ZASCA 94 (17 June 2022)

Contract Law – whether obligations created under a joint venture contract survived termination of the contract – principles governing interpretation of legal documents reaffirmed – reconstruction of the terms of the contract by the court on termination impermissible – all obligations ceased on termination of the contract.

ORDER

On appeal from: Gauteng Division of the High Court, Johannesburg (Spilg J sitting as court of first instance):

1 The appeal is dismissed with costs of two counsel, where so employed.

2 The cross appeal is upheld with costs of two counsel, where so employed.

3 The order of the high court is set aside and replaced with the following order:

'1 It is declared that any and all obligations of SouthernEra Diamonds (Pty) Ltd (in business rescue) owed by it in respect of the Klipspringer Joint Venture Agreement (being the agreement concluded on 31 July 2001 between SouthernEra Diamonds (Pty) Ltd, formerly SouthernEra Resources Ltd, Naka Diamond Mining (Pty) Ltd, formerly Steppon Investments (Pty) Ltd and De Beers Consolidated Mines Ltd), as amended on 6 October 2004, terminated, at the latest, on 24 May 2020.

2 Naka Diamond Mining (Pty) Ltd is liable for the costs of the application, including the costs of two counsel where so employed.'

[1] The issue in this appeal is whether certain obligations which the third respondent, SouthernEra (Pty) Ltd (in business rescue) (SouthernEra), had under a joint venture agreement survived the termination of that agreement. The Gauteng Division of the High Court, Johannesburg (Spilg J) (high court), before which the matter served, did not make any order in this regard. It merely granted a declarator that the joint venture agreement was terminated prior to the commencement of

SouthernEra's business rescue, an order which displeased both parties. The appeal by the appellant, Naka Diamond Mining (Pty) Ltd (Naka), and the cross-appeal by the first and second respondents, Mr Johannes Klopper and Mr Rynette Pieters, SouthernEra's business rescue practitioners (the practitioners), are with the leave of the high court.

[2] In 2001 SouthernEra, which was then known as SouthernEra Resources Limited, concluded a joint venture agreement with Naka, then known as Steppon Investments (Pty) Ltd, and De Beers Consolidated Mines Limited (De Beers). The object of the agreement, termed the Klipspringer Joint Venture Agreement (JV agreement), was to prospect for, mine and sell diamonds.

[3] Each party was to make a contribution to the joint venture (JV). Naka had to contribute development costs of up to R49,6 million which was to be used to boost the underground mining activities.**[1]** SouthernEra had to contribute its 'old order mining rights' in respect of Farm Rusland 93 KS, on which the Klipspringer fissure diamond mine was located (Klipspringer right), together with the use of its mining plant and infrastructure.**[2]** De Beers had to contribute its mining rights in respect of Farm Marsfontein 91 KS, together with the rights to mine in respect of the De Beers Rights and De Beers Exploration Properties.**[3]** Naka and SouthernEra also contributed the mining rights jointly held by them in respect of the Farm Doornrivier 86 KS (the Doornrivier old order rights).**[4]** In addition, each party had to make available to the JV all technical data relating to the respective JV mining rights.**[5]** In return, a 'participation interest' would be allocated to each party, being their share (expressed as a percentage) of the net revenue earned by the JV.

[4] The JV was to continue for an indefinite period; for as long as diamonds were produced on the relevant properties.**[6]** However, in terms of Clause 14 of the JV agreement the parties could terminate the agreement by mutual agreement at any time, or if a land claim or expropriation impacted negatively on the feasibility thereof**[7]**, or if the precious stones to which the JV mining rights related were exhausted.**[8]**

[5] It was the responsibility of each of the parties to the JV to maintain the validity of, and enforceability of the mining rights contributed by it to the JV.[9] However, the royalties payable in respect of the State rights, the costs of purchasing additional mineral rights, and royalties payable in respect of the Klipspringer rights and SouthernEra Exploration Properties would be borne by the JV.

[6] In October 2004 the parties concluded an addendum to the JV agreement which, amongst other things, regulated De Beers' exit from the JV and for its participation interest to be transferred to Naka. The De Beers' rights, as transferred to Naka, and Naka's share of the Doornrivier rights lapsed and returned to the State in May 2009. Thereafter Naka made no further contribution to the JV.

[7] During 2010 operations on Farm Rusland ceased as a result of underground flooding. Furthermore, no Management Committee meetings had taken place since 2008. SouthernEra maintained that the JV had terminated by operation of law following Naka's inability to contribute De Beers' and the Doornrivier rights and costs of care and maintenance of the mining operations. On 22 February 2013 the Klipspringer old order right was converted into a new order mining right as a result of a conversion application that had been lodged by SouthernEra in 2009. By March 2015 the mining operations at Rusland had been conducted at a loss of R563 990 176. Thereafter, the JV suffered further losses.

Alert Steel (Pty) Ltd v Mercantile Bank Ltd (165/21) [2022] ZASCA 96 (21 June 2022):

Enrichment – *condictio indebiti* and *condictio sine causa* – company in liquidation – sale of assets – claim for repayment of amount received by secured creditor – on the basis that receipt *ultra vires* – enrichment of creditor and impoverishment of company not proved – appeal dismissed.

[1] The issue in this appeal, which is before us with the leave of the court below, is whether the appellant, Alert Steel (Pty) Ltd (in liquidation) (the company), is entitled to repayment of an amount of R105 226 381.17, together with interest and costs, based on the *condictio indebiti*, alternatively the *condictio sine causa*. The respondent,

Mercantile Bank Limited (the bank), a creditor of the company, received the bulk of this amount (R100 million) pursuant to a sale of the company's assets.

[2] The facts are largely common ground. The company formerly traded as a wholesaler and retailer of steel and hardware products. In March 2014 the bank granted the company overdraft facilities in the sum of R104 million against certain securities, including a registered notarial bond over the company's stock and movable assets, cession of its present and future book debts and cession of its insurance cover with Credit Guarantee Insurance Company Ltd (CGIC).

[3] On 9 May 2014 the company was placed in voluntary business rescue in terms of a board resolution. On the same day, the bank cancelled the overdraft facilities, demanded repayment of R104 million plus interest, and informed the company that it would exercise its rights under the securities it held.

[4] On 10 July 2014 a creditor of the company launched an urgent application in the Gauteng Division of the High Court, Johannesburg (the high court), to set aside the resolution placing it in business rescue. CGIC was cited as a respondent in that application. Subsequently, CGIC applied to the high court for the provisional winding-up of the company, which was enrolled for hearing on 15 July 2014. CGIC provided the bank with an unsigned copy of the winding-up application on 14 July 2014, whereupon the bank perfected its notarial bond.

[5] On 17 July 2014 the high court granted an order that the company be provisionally wound-up as it was unable to pay its debts. A final winding-up order was made on 19 February 2015.

[6] The provisional liquidators (the liquidators) were appointed on 22 July 2014. That day, West Lake Trade and Investments (Pty) Ltd (West Lake) made a written offer to purchase all the company's assets for R100 million. The assets included stock in trade, fixtures and fittings, and receivable and recoverable debts of the company.

All of these assets were subject to the bank's security mentioned above. The next day the liquidators informed the bank of the offer and encouraged the bank to accept it.

[7] On 31 July 2014 the bank informed the liquidators that it supported West Lake's offer, subject to the condition that should the bank fund the West Lake transaction, there would be no flow of funds to the insolvent estate and the purchase price would be applied to reduce the company's indebtedness to the bank. The bank also imposed a condition that it would retain the cash and funds it had collected from debtors and in the perfection of its notarial bond, to reduce its exposure to the company. The liquidators expressly accepted these conditions.

[25] If the bank had not been enriched by the receipt of the collected amount, then the company was not impoverished, since the quantum of a plaintiff's claim is the amount by which it has been impoverished or by which the defendant has been enriched, whichever is the lesser.**[9]** In any event, no payment was made at the company's expense: it owed the bank R104 million plus interest, and its debt to the bank was reduced by the collected amount. Only the bank could lay claim to the proceeds of the sale to West Lake.

[26] It follows that the company did not satisfy the requirement of enrichment at its expense. Neither was there any unjustified enrichment. There was a legal basis for the bank's receipt of the collected amount. The founding affidavit stated that the bank 'was a secured creditor in an amount in excess of R104 000 000.00'.

[27] In any event, it would be unjust to require the bank, many years later, to prove its claim in the company's estate. The unchallenged evidence was that the bank could not be restored to its position as a secured creditor, since the assets were transferred to West Lake many years ago and used in the course of the latter's business. If the bank were ordered to repay the collected amount, all that would

happen is that it would have to go through the formality of proving its claim for the initial loan of R104 million plus interest, and then be repaid the amount paid to the estate, less the liquidators' fees. The inevitable conclusion to be drawn from the facts is that the recovery of the liquidators' fees was the sole reason for the claim. As stated in Mars,**[10]** a trustee (here a liquidator) who pays a creditor before confirmation of a liquidation and distribution account, does so at his own risk.

[28] In the result the appeal is dismissed with costs, including the costs of two counsel.

Engen Petroleum Ltd v Flotank Transport (Pty) Ltd (876/2020) [2022] ZASCA 98 (21 June 2022):

Application for leave to appeal from: Northern Cape Division of the High Court, Kimberley (Makoti AJ sitting as court of first instance):

1 Leave to appeal is granted.

2 The appeal is upheld with costs.

3 The order of the high court is set aside and replaced as follows:

'1. The respondent is to pay to the applicant the following amounts:

1.1 R342 389.38 with interest thereon at the legal rate from 12 December 2014 to date of payment, both days inclusive;

1.2 R344 239.14 with interest thereon at the legal rate from 19 December 2014 to date of payment, both days inclusive;

1.3 R152 817.80 with interest thereon at the legal rate from 22 December 2014 to date of payment, both days inclusive;

1.4 R313 137.14 with interest thereon at the legal rate from 24 December 2014 to date of payment, both days inclusive;

1.5 R339 052.39 with interest thereon at the legal rate from 2 January 2015 to date of payment, both days inclusive;

1.6 R198 613.68 with interest thereon at the legal rate from 9 January 2015 to date of payment, both days inclusive;

1.7 R230 571.36 with interest thereon at the legal rate from 16 January 2015 to date of payment, both days inclusive;

1.8 R276 046.04 with interest thereon at the legal rate from 23 January 2015 to date of payment, both days inclusive;

1.9 R34 794.85 with interest thereon at the legal rate from 30 January 2015 to date of payment, both days inclusive.

2. The respondent is to pay the applicant's costs.'

[1] The applicant, Engen Petroleum Limited (Engen), seeks leave to appeal to this Court against the judgment and order of the Northern Cape Division of the High Court, Kimberley (the high court), dated 29 March 2020. This was after the high court dismissed with costs Engen's application to enforce against the respondent, Flotank Transport (Pty) Ltd (Flotank), the terms of a cession agreement concluded between Engen and Windsharp Trading (Pty) Limited (Windsharp). Engen applied for leave to appeal. This was refused.

[2] Following the refusal by the high court of Engen's application for leave to appeal, Engen petitioned this Court for leave to appeal. The application was referred for oral argument in terms of **s 17(2)***(d)* of the **Superior Courts Act 10 of 2013**. The parties were advised to be prepared, if called upon to do so, to address this Court on the merits. Having regard to the prospects of success, apparent from the reasons which follow, leave to appeal to this Court is granted.

Relevant factual background

[3] In January 2009 Engen and Windsharp entered into an Engen Diesel Club (EDC) agreement. Under the terms of the EDC agreement, Windsharp became indebted to Engen in an amount which, by June 2014, exceeded R5.5 million. As security for the debt, Engen and Windsharp concluded two deeds of cession, in April 2012 and June 2014. Clause 1 of the first cession, entered into on 3 April 2012 (the 2012 cession), recorded that:

'1. CESSION AND PLEDGE

The Cedent hereby cedes, transfers and makes over to the Cessionary all the Cedent's right, title and interest in and to the Debts (as defined in clause 2) as a continuing general covering security for the due performance and discharge of every obligation and indebtedness from whatsoever cause and howsoever arising which the Cedent may now or at any time hereafter have toward the Cessionary; and without limiting the generality of the foregoing, whether such indebtedness be a direct, indirect or contingent liability; whether it be matured or not; whether it may be or may have been incurred by the Cedent individually or jointly with others or by any firm in which the Cedent has or holds or may hereafter have or hold any interest; and whether it arises through any acts of suretyship, guarantee, warranty, indemnity or other undertaking signed by the Cedent solely or jointly with others or otherwise.'

[4] Clause 1 of the second cession entered into on 30 June 2014 (the 2014 cession), which replaced the first cession, was similar to clause 1 of the first cession, but with the insertion in italics at the end of that clause of the following: '…*The Cession hereby granted by the Cedent to the Cessionary includes any and all reversionary rights the Cedent might otherwise have had in and to the claim hereby ceded*.'

[5] Clause 14.2 of the 2014 cession provided that:

'14.2 Execution of this memorandum has discharged –

(a) every prior agreement between the parties to the extent within the scope of the subject matter of this agreement, whether or not inconsistent with the provisions of this memorandum; . . .'

[6] On 5 November 2014, at Engen's instance, a provisional order of liquidation was obtained against Windsharp. That order was made final in January 2015. On 9 December 2014, Engen notified Flotank in writing of the existence of the June 2014 cession and of Engen's intention to claim the debt ceded to it by Windsharp. Engen

called upon Flotank, pursuant to the terms of the 2014 cession, to make payments directly to it. Flotank was cautioned that should it fail to do so it would not be absolved of liability towards Engen for any amounts paid to Windsharp.

[7] In response to Engen's notice, on 12 December 2014 Flotank sought that, by 13h00 the same day, Engen provide it with a copy of the relevant cession. Engen failed to do so. Thereafter, Flotank, in disregard of Engen's notice, made nine payments to Windsharp, from 12 December 2014 to 30 January 2015, in respect of debts due by it to Windsharp. In May 2017, on the basis that Windsharp had 'ceded its book debts in *securitatem debiti*' to it, Engen applied to the high court for an order that Flotank pay Engen the nine amounts it had paid to Windsharp.

[8] Flotank opposed the application inter alia on the basis that, on liquidation, Windsharp's ceded book debts resorted with its liquidators, with Engen becoming a secured creditor of Windsharp from the date of liquidation; and that Engen held a claim against Windsharp's liquidators. In addition, Flotank contended that since Engen had failed to provide it with the cession relied upon, no proper perfection of the cession had occurred.

Engen Petroleum Ltd v Flotank Transport (Pty) Ltd (876/2020) [2022] ZASCA 98 (21 June 2022)

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THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case no: 876/2020

In the matter between:

ENGEN PETROLEUM LIMITED **APPLICANT**

and

FLOTANK TRANSPORT (PTY) LTD **RESPONDENT**

Neutral citation: *Engen Petroleum Ltd v Flotank Transport (Pty) Ltd* (876/20) **[2022] ZASCA 98** (21 June 2022)

Coram: MAYA P, ZONDI, MAKGOKA JJA, MEYER AND SAVAGE AJJA

Heard: 23 May 2022

Delivered: 21 June 2022

Summary: Interpretation of cession – whether a pledge or out-and-out cession incorporating a *pactum fiduciae* – effect of out-and-out cession on ceded debts upon liquidation of cedent – appeal upheld with costs.

ORDER

Application for leave to appeal from: Northern Cape Division of the High Court, Kimberley (Makoti AJ sitting as court of first instance):

1 Leave to appeal is granted.

2 The appeal is upheld with costs.

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'1. The respondent is to pay to the applicant the following amounts:

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2. The respondent is to pay the applicant's costs.'

JUDGMENT

Savage AJA (Maya P, Zondi, Makgoka JJA and Meyer AJA concurring)

Introduction

[1] The applicant, Engen Petroleum Limited (Engen), seeks leave to appeal to this Court against the judgment and order of the Northern Cape Division of the High Court, Kimberley (the high court), dated 29 March 2020. This was after the high court dismissed with costs Engen's application to enforce against the respondent, Flotank Transport (Pty) Ltd (Flotank), the terms of a cession agreement concluded between Engen and Windsharp Trading (Pty) Limited (Windsharp). Engen applied for leave to appeal. This was refused.

[2] Following the refusal by the high court of Engen's application for leave to appeal, Engen petitioned this Court for leave to appeal. The application was referred for oral argument in terms of **s 17(2)***(d)* of the **Superior Courts Act 10 of 2013**. The parties were advised to be prepared, if called upon to do so, to address this Court on the merits. Having regard to the prospects of success, apparent from the reasons which follow, leave to appeal to this Court is granted.

Relevant factual background

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'1. CESSION AND PLEDGE

The Cedent hereby cedes, transfers and makes over to the Cessionary all the Cedent's right, title and interest in and to the Debts (as defined in clause 2) as a continuing general covering security for the due performance and discharge of every obligation and indebtedness from whatsoever cause and howsoever arising which the Cedent may now or at any time hereafter have toward the Cessionary; and without limiting the generality of the foregoing, whether such indebtedness be a direct, indirect or contingent liability; whether it be matured or not; whether it may be or may have been incurred by the Cedent individually or jointly with others or by any firm in which the Cedent has or holds or may hereafter have or hold any interest; and whether it arises through any acts of suretyship, guarantee, warranty, indemnity or other undertaking signed by the Cedent solely or jointly with others or otherwise.'

[4] Clause 1 of the second cession entered into on 30 June 2014 (the 2014 cession), which replaced the first cession, was similar to clause 1 of the first cession, but with the insertion in italics at the end of that clause of the following: '…*The Cession hereby granted by the Cedent to the Cessionary includes any and all reversionary rights the Cedent might otherwise have had in and to the claim hereby ceded*.'

[5] Clause 14.2 of the 2014 cession provided that:

'14.2 Execution of this memorandum has discharged –

(a) every prior agreement between the parties to the extent within the scope of the subject matter of this agreement, whether or not inconsistent with the provisions of this memorandum; . . .'

[6] On 5 November 2014, at Engen's instance, a provisional order of liquidation was obtained against Windsharp. That order was made final in January 2015. On 9 December 2014, Engen notified Flotank in writing of the existence of the June 2014 cession and of Engen's intention to claim the debt ceded to it by Windsharp. Engen called upon Flotank, pursuant to the terms of the 2014 cession, to make payments directly to it. Flotank was cautioned that should it fail to do so it would not be absolved of liability towards Engen for any amounts paid to Windsharp.

[7] In response to Engen's notice, on 12 December 2014 Flotank sought that, by 13h00 the same day, Engen provide it with a copy of the relevant cession. Engen failed to do so. Thereafter, Flotank, in disregard of Engen's notice, made nine payments to Windsharp, from 12 December 2014 to 30 January 2015, in respect of debts due by it to Windsharp. In May 2017, on the basis that Windsharp had 'ceded its book debts in *securitatem debiti*' to it, Engen applied to the high court for an order that Flotank pay Engen the nine amounts it had paid to Windsharp.

[8] Flotank opposed the application inter alia on the basis that, on liquidation, Windsharp's ceded book debts resorted with its liquidators, with Engen becoming a secured creditor of Windsharp from the date of liquidation; and that Engen held a claim against Windsharp's liquidators. In addition, Flotank contended that since Engen had failed to provide it with the cession relied upon, no proper perfection of the cession had occurred.

[9] The high court found that the *concursus creditorum* was created by operation of law on 5 November 2014 when Windsharp was placed into provisional liquidation. The court rejected Flotank's contention that Engen had failed to 'perfect' the cession by not having provided a copy of the cession to Flotank and that notice to Flotank by Engen of the cession had been sufficient. The court found, however,

that it was Windsharp's liquidators and not Engen that were entitled to claim that which had been ceded *in securitatem debiti* to Engen. This, reasoned the court, was so in that the cession entered into had amounted to a pledge, which was the basis on which the case had been conducted before the court.

[10] For the first time in its application for leave to appeal to this Court, Engen argued that, properly construed and as a matter of law, the 2014 cession was not a pledge and that the high court had erred in treating it as such. Since the reversionary rights of the cedent were vested in Engen as the cessionary, it was contended that an out-and-out cession to Engen existed and that it was entitled to the relief sought against Flotank.

[11] The matter was opposed by Flotank on the basis that the cession relied upon by Engen was not an outright cession and should be construed as a pledge. This, it was submitted, was so even where there is a clear expression of the intention of the parties otherwise.

Discussion

[12] The issue turns on the interpretation of the terms of the second cession agreement. The true character of a cession *in securitatem debiti* depends on the intention of the parties,**[1]** with the wording of the cession being the appropriate point of departure to determine such intention.**[2]** In *Grobler v Oosthuizen* (*Grobler*)**[3]** this Court, recognised the existence of opposing theories in our law regarding cessions *in securitatem debiti*, namely the 'pledge theory' and the 'outright cession theory'. However, it found it unnecessary to resolve the debate between these theories one way or another.**[4]**

[13] On ‘the pledge theory’ the principal debt is ‘pledged’ to the cessionary on the basis that the cedent retains ‘bare dominium’ or a ‘reversionary interest’ in the claim against the principal debtor.**[5]** On such construction, only the right to enforce the right upon non-payment is ceded.**[6]** Since a cession ordinarily entails a transfer of a right, it is the retention by the cedent of the very substance of the right around which the doctrinal debate regarding the pledge theory has centred. This Court, in *Grobler*, recognised however that such debate had been resolved, primarily for pragmatic reasons, with the pledge theory accepted as the default position.**[7]** On this basis a cession *in securitatem debiti* is now taken to resemble a pledge, unless the intention of the parties is different.**[8]**

[14] On the alternative theory –

‘. . . a cession *in securitatem debiti* is in effect an outright or out-and-out cession on which an undertaking or *pactum fiduciae* is superimposed that the cessionary will re-cede the principal debt to the cedent on satisfaction of the secured debt. In consequence, the ceded right in all its aspects is vested in the cessionary. After the cession *in securitatem debiti* the cedent has no direct interest in the principal debt and is left only with a personal right against the cessionary, by virtue of the *pactum fiduciae,* to claim re-cession after the secured debt has been discharged.’**[9]**

[15] Although the pledge construction has been recognised as the default form of security cession, there is no support for a conclusion that it has subsumed the field of security cessions.**[10]** This is so since our law favours a recognition of both constructions of security cession.**[11]** It therefore remains open to the parties to structure a cession either as a pledge or as an out-and-out cession, upon which a *pactum fiduciae* is superimposed. This is to be determined by reference to the clear intention of the parties.**[12]**

[16] The 2014 cession expressly ceded to Engen the debt as defined, with any reversionary rights Windsharp may have to the debt ceded. From the wording used, it is clear that the parties' express intent was to achieve an out-and-out cession on which the *pactum fiduciae* could, as a matter of law, be superimposed. Although Engen, as indicated earlier, did not assert an out-and-out cession with a *pactum fiduciae* in the high court, it is open for it to do so for the first time on appeal, since the correct interpretation of a cession is a question of law.**[13]**

[17] The result is that given that the 2014 cession was an out-and-out cession, the debt ceded by Windsharp was an asset in the estate of Engen.**[14]** Windsharp held no right to receive payment from Flotank of the principal debt ceded to Engen but retained a claim by virtue of the *pactum fiduciae* to re-cede once that debt was discharged. It follows that Flotank was obliged, on receipt of notice of the cession, to make payments to Engen and not to Windsharp. In finding differently the high court erred.

[18] It follows for these reasons that the appeal must succeed with costs.

qqq

Van Niekerk v The MV "Madiba 1" (AC13/2018) [2022] ZAWCHC 125 (17 June 2022):

[1] The registered owner of the MV *Madiba 1*, which was arrested pursuant to the institution of an action *in rem* by the plaintiff in respect of a maritime claim that it has against the charterer by demise**[1]** of the vessel, Meltt (Pty) Ltd (in liquidation) (hereinafter referred to as 'Meltt'), has applied for leave to amend its plea in the action. The plaintiff opposed the application.

[2] The vessel was arrested in the circumstances provided for in terms of s 3(4)(b) read with s 1(3) of the Admiralty Jurisdiction Regulation Act 105 of 1983 ('the AJRA'). Section 3(4) provides as follows in relevant part:

> 'Without prejudice to any other remedy that may be available to a claimant or to the rules relating to the joinder of causes of action a maritime claim may be enforced by an action *in rem* –
>
> (a) ...
>
> (b) if the owner of the property to be arrested would be liable to the claimant in an action *in personam* in respect of the cause of action concerned.'

Section 1(3) provides:

> 'For the purposes of an action *in rem*, a charterer by demise shall be deemed to be, or to have been, the owner of the ship for the period of the charter by demise.'

The plaintiff therefore relied on Meltt's deemed ownership of the vessel, in terms of s 1(3) of AJRA, to arrest it for the purposes of the action *in rem*.

[3] The owner has already pleaded a denial that the vessel was on demise charter to Meltt at the time it was arrested. Without prejudice to its position in respect of the already pleaded defence, it seeks by way of the proposed amendment to introduce, contingently, two special defences based, respectively, on s 1(3) of the AJRA and s 359(1)(b) of the Companies Act 61 of 1973, that (if good in law) could become relevant were its first mentioned ground of defence rejected.

[4] The intended special pleas read as follows:

> '**First special plea: Section 1(3) of the Admiralty Act** [ie the AJRA]
>
> 4. On a proper and sensible construction of the language of section 1(3) of the Admiralty Act, and having regard to its context, the reference to a charterer by demise in the subsection does not include a charterer by demise (in liquidation) in respect of which a winding up has commenced.
>
> 5. An application for the liquidation of Meltt was issued, and thereby presented to the Court, on 14th March 2018.

6. The plaintiff instituted its action *in rem* in terms of section 3(5) of the Admiralty Act by the arrest of the defendant on 22nd March 2018.

7. A provisional winding-up order in respect of Meltt was made on 17 April 2019.

8. A final winding-up order in respect of Meltt was made on 29 May 2019.

9. The liquidator of Meltt was finally appointed on 2 September 2019.

10. Section 348 of the Companies Act, 61 of 1973 ("the Companies Act"), provides that:

> "A winding-up of a company shall be deemed to commence at the time of the presentation to the court of the application for the winding-up."

11. In the premises, at the time of the institution of the plaintiff's action *in rem*, the liquidation of Meltt had commenced. The plaintiff accordingly had no entitlement to rely on the deeming provision in section 1(3) of the Admiralty Act for the purpose of enforcing its claim and the arrest of the defendant, therefore, is null and void.

WHEREFORE the owner prays that the plaintiff's action *in rem* be dismissed with costs, including the costs of two counsel.

Second special plea: Section 359(1)(b) of the Companies Act

12. Further, and in any event, the owner refers to what is pleaded in paragraphs 5 to 10, and the first sentence of paragraph 11, above.

13. Section 359(1)(b) of the Companies Act provides that:

"(1) When the court has made an order for the winding-up of a company or a special resolution for the voluntary winding-up of a company has been registered in terms of section 200 –

(a) ....

(b) Any attachment or execution put in force against the estate or assets of the company after the commencement of the winding up shall be void."

14. An arrest pursuant to an action *in rem* constitutes an attachment or execution, as described in section 359(1)(b).

15. Furthermore, properly and sensibly construed, the *in rem* arrest of a vessel based on section 1(3) of the Admiralty Act, constitutes an attachment or execution put in force to enforce or execute a claim against the demise charterer as the deemed owner of the vessel, and is an "attachment or execution" as described in section 359(1)(b).

16. The arrest of the defendant is accordingly void.

WHEREFORE the owner prays that the plaintiff's action *in rem* be dismissed with costs, including the costs of two counsel.'

[5] The factual allegations in the intended amendment must, of course, be accepted at their face value for the purpose of deciding the application for leave to amend. Those alleged in paragraphs 5 – 9 of the intended first special plea are in any event common ground. Meltt was thus deemed, by virtue of s 348 of the 1973 Companies Act, to have been in liquidation when the action *in rem* was instituted by the arrest of the defendant vessel. It is admitted on the pleadings that after noting its intention to defend the action on 26 March 2018 the owner provided security to the plaintiff to secure the release of the vessel.

[6] In *Rennie N.O. v South African Sea Products (Pty) Ltd* **1986 (2) SA 138** (C), Berman AJ held that the arrest of a ship for the purpose of an action *in rem* was an 'attachment' within the meaning of s 359(1)(b) of the 1973 Companies Act, and accordingly void if it was effected at any time after winding-up proceedings *against the owner* had commenced as provided in s 348 of that Act, provided, of course, that a winding-up order was in fact made in such proceedings. Consistently with that finding, the learned judge also held that the provisions of s 10 of the AJRA, which currently reads:

'**Vesting of property in trustee, liquidator or judicial manager excluded in certain cases**

Any property arrested in respect of a maritime claim or any security given in respect of any property, or the proceeds of any property sold in execution or under an order of a court in the exercise of its admiralty jurisdiction, shall not, except as provided in section 11 (13), vest in a trustee in insolvency and shall not form part of the assets to be administered by a liquidator or judicial manager of the owner of the property or of any other person who might

otherwise be entitled to such property, security or proceeds, and no proceedings in respect of such property, security or proceeds, or the claim in respect of which that property was arrested, shall be stayed by or by reason of any sequestration, winding-up or judicial management with respect to that owner or person.'**[2]**

were of no application if the arrest of vessel occurred after the commencement of the winding-up of its owner. The judgment in *South African Sea Products* was followed in *The Nantai Princess* **1997 (2) SA 580** (D) and, in a case where the vessel owner had been placed under business rescue, also in *The Polaris* **2018 (5) SA 263** (WCC).

[7] The factual context in *South African Sea Products* and *The Nantai Princess* was, however, materially different from that in the current matter. In both those cases the maritime claim debtors that were in the course of being wound-up when the vessels were arrested *in rem* were the owners of the attached vessels. Meltt, by contrast, as the demise charterer, is not the owner; it is only deemed to be the owner in the sense provided for in s 1(3) of the AJRA. The determinative consideration in *South African Sea Products* and *The Nantai Princess* was that at the time they were arrested pursuant to the writs in the actions *in rem* the vessels concerned were part of the assets already sequestered by law for the benefit of the *concursus creditorum* in the vessel owners' estates. It was for that reason that, by virtue of the voiding provisions of s 359(1)(b) of the 1973 Companies Act, they were no longer amenable to being validly attached. In opposing the owner's application for leave to amend, the plaintiff contends that that is a factor that materially distinguishes this matter from the earlier cases on which the owner relies in support of its proposed amendments.

Mokoteli and another v Body Corporate of Viking Villas Sectional Title Scheme and others [2022] JOL 53975 (WCC)

Rescission of default sequestration order obtained by body corporate of sectional title scheme against unit owner

A dispute arose between Mr Mokoteli and the body corporate of the sectional title scheme into which he bought. The body corporate objected to a security gate he had installed in his unit and when he refused to remove it began fining him each month. In protest he eventually stopped paying levies and did not pay fines and interest.

In terms of section 149(2) of the Insolvency Act 24 of 1936 and the common law, Mr and Mrs Mokoteli sought an order rescinding a default order of sequestration subsequently obtained by the body corporate. An application for condonation was also brought in respect of the late filing of the replying affidavit.

Mantame J confirms the approach to condonation applications [para 6], and is satisfied that the applicant made out a case for condonation.

Requirements for rescission of default judgment at common law explained [para 25]. Court questions whether it was competent for a sequestration order to have been granted, even though the available facts from the body corporate supported the fact that Mr Mokoteli's estate was in fact solvent.

Mr Mokoteli is found to have shown good cause for the order to be rescinded.

END-FOR NOW