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

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Africa Wide Mineral Prospecting and Exploration (Pty) Ltd v Platinum Group Metals (RSA) (Pty) Ltd and others [2022] JOL 54365 (GJ)

Company law-scheme of arrangement under section 115 of the companies act 71 of 2008

Plaintiff ("Africa Wide") and first defendant ("PTM") were the shareholders of the third defendant ("Maseve"), which owned a mine.

A scheme of arrangement under section 115 of the Companies Act 71 of 2008, which aimed at transferring the entire shareholding of Maseve to the Royal Bafokeng, entailed the expropriation of the shareholding of Africa Wide. Africa Wide sought to collapse the scheme on the basis that it attacked an agreement in terms of which Maseve sold its ore processing plant to the fourth defendant ("RB Resources"). The proper characterisation of the plant transaction was central to both the plaintiff's cause of action and a special plea raised by the defendants to the effect that the plaintiff's claim was statutorily barred by the operation of section 115 of the Act.

Fisher J describes the scheme of arrangement; finds that Africa Wide had failed to establish its case on the evidence; and considers whether Africa Wide's claim which was based on common law was barred by the statute. The nature of a scheme of arrangement is described [paras 82-87].

Any challenge by a shareholder which entails, either directly or indirectly, an attack against the resolution approving the scheme, regardless of the form of such challenge, can be brought only under section 115.

Africa Wide's claim is dismissed.

Engen Petroleum Ltd v Flotank Transport (Pty) Ltd [2022] JOL 54200 (SCA)

Secured creditors-cession - effect of out-and-out cession on ceded debts upon liquidation of cedent

The applicant ("Engen") sought leave to appeal against the High Court's dismissal of its application to enforce a cession against the respondent ("Flotank"). A debtor ("Windsharp") of Engen had ceded to it, Windsharp's rights to a debt owed by Flotank. After Windsharp was liquidated, Engen notified Flotank of the existence of the cession, and its intention to claim the debt ceded to it. Flotank requested a copy of the cession agreement and when Engen failed to provide it, Flotank ignored Engen's notice and continued making payments to Windsharp.

Savage AJA discusses character of a cession *in securitatem debiti* [para 12]; and opposing theories in our law regarding cessions *in securitatem debiti*, namely the pledge theory [para 13] and the outright cession theory [para 14].

The cession in this case was an out-and-out cession, meaning that the debt ceded by Windsharp was an asset in the estate of Engen. Flotank was thus obliged, on receipt of notice of the cession, to make payments to Engen and not to Windsharp. Appeal upheld.

Cloete Murray N.O and Others v Ntombela and Others In re Ntombela and Another v Cloete Murray N.O and Others (3807/2020) [2022] ZAFSHC 160 (24 June 2022)
www.saflii.org/za/cases/ZAFSHC/2022/160.

Application for leave to appeal – Reviewability of a decision by liquidators not to perform in terms of an unexecuted contract for the sale of residential immovable property entered into by the insolvent prior to its liquidation – Stay of Rule 6(5)(d)(iii) – Notice to ensure completion of Rule 53 – Process.

The applicants are granted leave to appeal to the Supreme Court of Appeal.

Case info:

1] The deep core of the application for leave to appeal is the submission that (the) liquidators do not have to justify or validate a decision not to perform in terms of an unexecuted contract for the sale of an immovable residential property to the Ntombela family; entered into by the insolvent, Phehla Umsebenzi Trading 48 CC, prior to its liquidation.

[2] It is the applicants' case that the decision is not reviewable and the court had to adjudicate this point in the interlocutory application; the finding of which is also a subject of the application for leave to appeal. I will depict a summary of the comprehensive grounds for leave to appeal by the applicants later. This was the order *a quo*:

ORDER

1. The filing of the Notice in terms of Rule 6(5)(d)(iii) by the first to third and fifth respondents is provisionally set aside pending the finalisation of the process prescribed in Rule 53 dealing with reviews in the Uniform Rules of Court;

2. First to third and fifth respondents are ordered to make available to the applicants the record of the proceedings sought to be corrected and set aside and in terms of Rule 53(1)(b) and within fifteen (15) days of the date of this order;

3. The applicants may within ten (10) days after the record was made available to them deliver a notice and accompanying affidavit, amend, add to or vary the terms of their notice of motion and supplement the supporting affidavit in terms of Rule 53(4);

4. The first to third and fifth respondents may reply in terms of Rule 53(5);

5. The first to third and fifth respondents are afforded 10 (ten) days from the date of the filing of the papers and the conclusion of the Rule 53 process above in which to amend and file their Notice in terms of Rule 6(5)(d)(iii), if necessary;

6. The parties must each carry their own costs.

[3] The common law authority of the liquidators to take the decision is not in dispute. There are two major issues in contention; the reviewability of the decision of the liquidators in the circumstances of this case and the ruling on the Rule 6(5)(d)(iii) Notice.

[4] The respondents, *via* Advocate Rautenbach SC, reacted with a succinct reply in their heads of argument that reflects the second issue of the Rule 6(5)(d)(iii) Notice:

2. The respondents rely on various grounds of appeal totalling sixteen grounds.[4]

3. For purposes of this application for leave to appeal, it is submitted that it is not necessary to deal separately with each ground of appeal. This is so as the Respondents' approach towards any relief can be summarised by stating that the Applicants' reliance on the Notice issued by them in terms of Rule 6(5)(d)(iii) was premature and could only be done once certain steps were taken by the applicants in terms of Rule 53 of the Uniform Rules of Court.

[5] After an effective and brief depiction of the law he stated further that:

12. Accordingly, this Honourable Court was one hundred present correct in in (sic) "staying" the Rule 6(5)(d)(iii) Notice as the notice was premature in the circumstances. There is nothing to prevent this Court from "staying" or declaring a provisional bar against the Rule 6(5)(d)(iii) Notice. The Court is entitled to use inherent jurisdiction to make such order.

> 13. In terms of the Order, what the Court did was to order that the provisions of Rule 53 should be followed before taking cognisance of a Notice in Terms (sic) of Rule 6(5)(d)(iii).
>
> 14. In this specific matter, it seems that the only defence that the Respondents had in the interlocutory application is that they submitted that there was no documentation in respect of a record. This never constituted compliance with Rule 53 in terms of which the applicants are entitled to an answer as far as the record and the deliberations are concerned. It is in this regard quite clear from the review application that there was correspondence between the respective parties, obviously required the Respondent to apply their minds in taking a decision on the matter (sic).
>
> 15. The decision-making process was not elaborated on in the interlocutory application and nor was anything provided as part of a record of such decision-making process.
>
> 16. As pointed out above, the Respondent have not complied with the Rule and have not reached the stage where they could validly file a Rule 6(5)(d)(iii) notice in terms of which a point of law could be adjudicated.

[6] I will return to the detailed evolvement of the events in the case. But, as introduction; the Ntombela family purchased the property in 2014 and their son and his family have been residing there ever since. The legal sentiments in section 26 of the Constitution[5] and Rule 46A of the Uniform Rules of Court[6] should be regarded in the background.

[7] The property was valued for the auction by the liquidators at R2 030 000.00 and the market value to be R2 300 000.00.[7] The Ntombelas purchased the property for R2 500 000.00. They had already paid the R2 500 000.00.[8] The property was not transferred to the Ntombelas before liquidation.

[8] The liquidators bring the application for leave to appeal and drives the litigation. There was up until this moment, no input by the Master of the High Court; the twelfth respondent. This matter has, unacceptably so, dragged on since 2020.

[9] The liquidators maintain that they do not have a record of how the decision was taken and they also do not offer any reasons for their decision.[9] They took the decision and cannot; in terms of “trite law”,[10] be questioned. The law might not be so trite if one studies the ten cases they base their submissions on; hence the referral of this matter to the Supreme Court of Appeal later.

[10] The vulnerability of buyers that have paid the full price for immovable property and, in the instance, more than the price the property was valued for to be sold at the auction by the liquidators, is clear. The property is a primary residence. For an entity as the liquidator to claim absolute unaccountability and responsiveness is curious in the constitutional democratic epoch this country has embraced since 1994.

[11] The conundrum of the case is that the processes of the litigation have not taken its course and all the facts have apparently not been ventilated.

[12] The claim of the liquidators is based on the common law of insolvency and their interpretation of administrative law. Calitz[11] said it best in 2012 already on the phenomenon that the Law of Insolvency is slow to catch up with the Constitution, 1996:

> The South African Constitution is different: it … represents a decisive break from, and a ringing rejection of, that part of the past which is disgracefully racist, authoritarian, insular, and repressive and a vigorous identification of and a commitment to a democratic, universalistic, caring and aspirationally egalitarian ethos, expressly articulated in the Constitution.
>
> In the case of Pharmaceutical Manufacturers Association of South Africa: In re Ex Parte President of the Republic of South Africa Chaskalson J confirmed that there is only one system of law in South Africa and that all law, including the common law, derives its force from the Constitution of the Republic of South Africa. As the supreme law of the land the Constitution has changed the face of our law dramatically in that legislation may now be tested by the courts in order to establish its constitutionality.
>
> The Constitution featuring a Bill of Rights was not in place when the Insolvency Act came into force. <u>Consequently, the values and principles entrenched in the Constitution in many instances differ radically from the values, principles and policies that formed the foundation of the Insolvency Act.</u> (Accentuation added)

[13] It is acknowledged that:

> Courts are often not best-placed, both prescriptively and descriptively, to make decisions that require a choice among many legitimate policy options or the use of specialised knowledge and skills. At the same time, administrators cannot have free reign in decision-making. <u>That would be the rule of bureaucracy, not the rule of law. For the rule of law to mean anything, we must be governed by laws and not by people.</u> (Accentuation added)

Constitutionalised judicial review — especially of questions of law and fact — necessarily requires substantive consideration of the merits of the decision, to determine whether it is lawful, reasonable and procedurally fair. Yet, as eminent administrative lawyers have cautioned, in doing so judges should take care not simply to replace the administrator's decision, with their own view of what is right.**[12]** (Accentuation added)

[14] Kroon**[13]** pronounced that:

Section 33 (of the Constitution) spawned the Promotion of Administrative Justice Act 2 of 2000 (PAJA). This is not the occasion to discuss various shortcomings in the Act to which a number of commentators have drawn attention. Suffice it to say that, albeit imperfectly, the legislation gives the courts the sinews of war, *via* judicial review, against unconstitutional administrative excesses, and enables them, by appropriate intervention, more positively to develop an ethos conducive to the advancement of our founding constitutional values.

[15] Due to the interlocutory nature of the proceedings that served before me I decided that:

[17] It is imperative to stress that this Court is not presently called upon to adjudicate any of the Rule 6(5)(d)(iii) objections; that is the issues of law raised against the review application. It is the view of the respondents at page 35 of their heads of argument that the Court is forced to; with regard to prayer 2 (that the applicants be supplied with the record of the proceedings sought to be corrected and set aside) to take cognisance of the competency of the review application. I cannot do this and must work from the premise that the applicants have a right to access the Court with a review application and it is for that Court to decide the viability of the review. In the meanwhile, the process must take its course as will be shown hereunder.

THE INTERLOCUTORY ISSUES

[16] Courts must fathom the issue to be adjudicated and not be let astray by the litigants. In *De Wet and another v Khammissa and others* (358/2020) **[2021] ZASCA 70** (4 June 2021) the Supreme Court of Appeal remarked that:

[14] This case demonstrates the importance of a court's central role in the identification of issues. It is only after careful thought has been given to a matter that the true issue for determination can be properly identified. That task should never be left solely to the parties or their legal representatives. Unfortunately, this is what happened in this case. The court *a quo* was

apparently led astray by the arguments contained in the appellants' notice in terms of rule 6(5)(d)(ii), which it accepted uncritically.

[17] This is the relief wanted *a quo*:

> [1] This is an interlocutory application under the auspices of Rules 30/30A of the Uniform Rules of the Court seeking:
>
> > 1. An order to set aside the notice in terms of Uniform Rule 6(5)(d)(iii)**[14]** filed by the first to third respondents in the main review application;
> >
> > 2. The applicants, secondly, seek an order against the first to fourth respondents to comply with the provisions of Rule 53(1)(b) and that is to supply to the applicants the record of the proceedings sought to be corrected and set aside; and
> >
> > 3. The applicants want an order for costs if the application is opposed.
>
> [2] The case for the applicants now, in the main application and in the urgent application, is based on an unexecuted contract entered into by the insolvent before insolvency. The applicants seek an order in the main application whereby the liquidators' election not to ratify an executory contract by a liquidated Close Corporation before its liquidation in relation to immovable property, is reviewed and set aside.

[18] The opposition to the application turned on four issues:

> 1. Whether this interlocutory application can be validly brought in terms of Uniform Rule 30A in circumstances where the applicants' notice is based on the provisions of Rule 30?
>
> 2. Whether any of the relief claimed by the applicants in this interlocutory application can be granted in circumstances where the applicants failed to file their notice or the interlocutory application within the applicable time periods stipulated by Rule 30?
>
> 3. Whether it is competent to claim relief to set aside the first to third respondents' Rule 6(5)(d)(iii) Notice in circumstances where there is, among

others, a discrepancy between the applicants' grounds of complaints compared with the relief claimed in the interlocutory application?

4. Whether the interlocutory application is at all competent to address the failure, or rather inability, given the fact that no record exists as set out in paragraph 15 of the liquidators answering affidavit at page 31? The failure to file an application for the record in terms of Rule 53 but under Rule 30 that governs the setting aside of irregular proceedings, is fatal.

[19] The conclusion *a quo* on the above came to:

> [53] This matter is unique in that the applicants were not given the opportunity to complete the litigatory process launched in terms of Rule 53. Whether the Rule 53 process is the correct one, is to be decided in the main application.
>
> [54] The law in regard to Rule 53 must thus be adhered to and as read with Rule 6. The litigation to invoke Rule 6(5)(d)(iii) was not completed because the record has not been supplied. The applicants are correct in their submission that they cannot continue with the Rule 53-process if the record is not supplied. The founding papers, unlike in a pure Rule 6 application, only comes to finalization after the record has been provided and the applicants had the opportunity to file a supplementary affidavit to vary, amend or add to their initial founding affidavit. The Rule 6(5)(d)(iii) Notice was indeed premature; it follows with logic that the Rule 6(5)(d)(iii)-proceedings may only follow after the founding papers have been concluded.
>
> [55] The respondents maintain there does not exist a record; the applicants maintains that it does exist albeit in the unusual form of correspondence and other communications. A record will have to be supplied by the respondents and they must have due regard to the fact that it may not be a conventional one. I reiterate: "It may be a formal record and dossier of what happened before the tribunal, but it may also be a disjointed indication of the material that was at the tribunal's disposal. In the latter case it would, I venture to think, include every scrap of paper throwing light, however indirectly, on what the proceedings were, both procedurally and evidentially. It does include all the documents before the Executive Committee as well as all documents which are by reference incorporated in the file before it."
>
> [56] The respondents have a right to raise any question of law. They may institute Rule 6(5)(d)(iii) proceedings but not now. To dismiss the notice abruptly and wipe it of the table will not be conducive to their right to access to Court. I will therefore grant them permission to access the Court on the same papers duly supplemented after the Rule 53 process has been finalised.

[57] All the parties contributed to the consternation and confusion in the case and they will have to carry their own costs.

Barak Fund v Insure Group Managers [2022] 2021-43053 (GJ) SAFLii

Company – Unconscionable abuse – Sufficiency of evidence to support a finding – Court's powers to order the liquidation of companies retrospectively upon a finding – Obligation to join creditors and serve court processes on creditors – Companies Act 71 of 2008, s 20(9).

EBM was a mining enterprise and Barak is its creditor, having lent it US$ 8,340,000. Barak entered into a web of security agreements with EBM, Lebonix (the wholly owned subsidiary of Ericode), Ericode (the wholly owned subsidiary of Insure) and Insure which security agreements included a written guarantee by Insure in favour of Barak in terms of which Insure guaranteed EBM's obligations to Barak in terms of the loan agreements. Barak ended up claiming against EBM which was placed under business rescue; Hollard instituted an application seeking to place Insure under business rescue; Insure, Ericode, Lebonix and EBM instituted an arbitration against Barak; and Insure was placed in a voluntary creditors' winding up. Six applications came before the court.
Opperman J discusses non-joinder and Barak's right to intervene; that the targets of the liquidators' applications were the Barak securities and that they sought to wrest control of these securities from Barak whose rights as creditor of the Insure Group were materially affected by such a ploy; that liquidators must act in the interests of creditors as a whole, not a select group thereof; the sufficiency of evidence to support a finding of "unconscionable abuse" as provided for in section 20(9) of the Companies Act; the interpretation of s 20(9) and the case of Ex parte Gore NO; the court's powers to order the liquidation of companies retrospectively upon a finding in terms of section 20(9) of the Companies Act; the obligation to join creditors and serve court processes on creditors; and costs de bonis propriis and as between attorney and client applied to both liquidators and attorney of record - see para [172]. The intervention application, at the behest of Barak to intervene in the section 20(9) application and the interdict application is granted. The section 20(9) application is dismissed. See further the order at [175].

[1] There are six applications before this Court. First, an application at the behest of Barak Fund SPC Limited ('*Barak*') to convert the creditors' voluntary winding-up of Insure Group Managers Limited ('*Insure*') into a compulsory winding-up by the Court ('*the Conversion Application*') which is unopposed and a draft order has been agreed to. Second, an application at the behest of the first and second applicants ('*the Liquidators*') claiming an order in terms of section 20(9) of the Companies Act, 2008 *('the New Companies Act'*) that the first and second respondents ('*Ericode'* and '*Lebonix*') be "…*deemed not to be separate juristic entities in respect of any right, obligation or liability of the company or of a shareholder of the company*…" and "*be integrated into the third applicant ('Insure') and that the two entities shall exist as a single entity … and wound-up as such by [the Liquidators]*…" with effect from 21 June 2021 ('*the Section 20(9) Application*'). Third, an application at the behest of the Liquidators (of Insure) claiming an interim interdict against the holding of the first

statutory meeting of creditors in EBM (Proprietary) Limited (in liquidation) (‘*EBM*’) pending the outcome of the Section 20(9) Application (‘*the Interdict Application*’). Fourth, an application at the behest of Barak to intervene in the Section 20(9) Application and the Interdict Application (‘*Intervention Application*’). Fifth, the conditional counter-application at the behest of Barak claiming a mandatory interdict against the Master to convene the first statutory meeting of creditors in EBM should the Section 20(9) Application and Interdict Application fail (‘*the Conditional Counter Application*’). Sixth, an application at the behest of Barak to have the arbitration award between Barak and Lebonix made an order of Court. The Liquidators sought leave to intervene in this application and opposed the relief claimed by Barak (‘*the Barak Arbitration Award Application*’) but during the hearing consented to an order being taken in the Barak Arbitration Award Application.

The central features of these applications

[2] As pointed out by Mr Daniels SC, representing the Liquidators, the central application is the Section 20(9) Application, which seeks to collapse the corporate structure of Ericode and Lebonix and for them to be dealt with as if liquidated and part of Insure. The adjudication of such application requires adjudication of the Intervention Application. Mr Daniels submitted that the Interdict Application would follow the result of the Section 20(9) Application.

[3] Mr Fine SC, representing Barak in these proceedings, submitted that a core issue in each of the applications is the right to enforce the Lebonix shareholders’ loan claim in EBM and the entitlement (right) to vote on the shares Lebonix pledged to Barak which rights arose by no later than October 2020, but in any event prior to the liquidation of EBM or the voluntary winding-up of Insure. He submitted (and by the end of the hearing it was common cause as the Liquidators consented to the relief sought in the Barak Arbitration Award Application), that at the first statutory meeting of creditors, Barak would be entitled to prove a claim both as a creditor of EBM in respect of its claim from the Loan Agreements of approximately USD 34 million and as cessionary of a Lebonix Loan Claim and would also be entitled to vote in respect of Lebonix’s pledged shares.

The facts

[4] EBM, a mining enterprise, had different names over the years and was owned by different holding companies. It formed part of the Exxaro Group when Lebonix bought the shares in EBM from Exxaro Resources Limited on 11 October 2012. The Sale of Shares and Claims Agreement was signed by one Mr Venter on behalf of EBM and Mr Ngale, Mr van den Berg and Mr Grobler as chairman and directors of Lebonix.

[5] Barak is a creditor of EBM having lent and advanced US$ 8 340 000 to EBM in terms of an agreement concluded on 2 October 2014 to develop EBM’s zinc beneficiation structure. Barak entered into a web of security agreements with EBM, Lebonix (the wholly owned subsidiary of Ericode), Ericode (the wholly owned subsidiary of Insure) and Insure (collectively referred to as ‘*the Insure Group*’), which security agreements included a written guarantee by Insure in favour of Barak in terms of which Insure guaranteed EBM’s obligations to Barak in terms of the loan agreements. Six separate security agreements were concluded between Barak and Ericode, and Barak and Lebonix, on 15 December 2017. On 29 January 2018, Barak

provided EBM with a further facility of some US$ 17 Million to develop the zinc beneficiation structure.

[6] Insure's business was to collect insurance premiums from insured persons and to transmit these, after certain deductions, to insurers. It was the largest insurance premium collector in South Africa and collected premiums for short-term and long-term insurance companies on the strength of hundreds of thousands of debit orders per month. Insure's revenue model was such that it could retain the collected premiums for 45 days in the case of short-term insurers and 30 days in respect of long-term insurers before having to pay those amounts across to the insurance companies. This did not happen in all instances and is referred to as 'the fraud', which was perpetrated on the insurance companies by Insure. I too will refer to it as such.

[7] It would appear that Insure had invested some of the premiums that it had collected in different subsidiaries whose businesses had nothing to do with Insure's core business of conducting the business of a financial services provider. One of the divisions into which some of the premiums might have been invested was the mining division. This division beneficiates mine dumps by extracting various metals. At the apex of this division within Insure is Ericode which holds the shares in Lebonix which in turn holds the shares in EBM, the operating company. EBM is the holder of a mining interest, the most valuable asset in the Insure Group. Barak has claims against EBM via its own loan to EBM and via its having taken cession of the claims of Ericode and Lebonix against EBM. Insure itself does not have a claim against EBM. That is an inconvenient truth for Insure. The efforts to circumvent that truth make up much of the litigation in this matter.

[8] Another division of Insure's which may have received premiums, the property division, consists of a company PCI Rentals (Pty) Ltd which holds various percentages of shares in a web of property-owning companies.

[9] Mr Lategan, The Hollard Insurance Company Limited's representative ('*Hollard*'), stated that Insure had invested some R880 million in the mining division and some R550 million in the property division.

[10] The principal creditors of Insure are the insurance companies for which Insure collected premiums. The largest Insure creditors swopped part of their claims against Insure for shares in Insure in debt-for-equity transactions. Insure is now, for all practical purposes, owned by insurance companies, of which Hollard is one. (It is in liquidation presently and under the control of the Liquidators.)

[11] On 14 September 2018, the Financial Services Conduct Authority appointed Mr Bezuidenhout as Insure's curator.

[12] From the papers it would appear that the Liquidators assert *locus standi* to bring the Section 20(9) Application on the basis that Insure is a creditor of Ericode and Insure is a contingent creditor of Lebonix. The Annual Financial Statements ('*AFS*') of Insure, Ericode and Lebonix do not reflect Insure as a creditor contingent or otherwise of Lebonix. During argument however, Mr Daniels SC, representing the Liquidators, submitted that an interest was sufficient to rely on Section 20(9) of the New Companies Act. More about this later.

[13] Ericode's loan claim against Lebonix in the amount of R930 822 652 has been ceded *in securitatem debiti* to Barak and Lebonix's loan claim against EBM in an amount of R1 051 739.94 has been ceded *in securitatem debiti* to Barak.

[see whole judgment 57 pages]

Mattheus Hermanus Wessels Fourie N.O and Another v Elani Botha N.O and Another v Kombani Holdings (Pty) Ltd and Others (23412/2021) [2022] ZAGPPHC 528 (20 July 2022)
www.saflii.org/za/cases/ZAGPPHC/2022/528.html

Insolvency – Final sequestration of a property holding family trust where payment of creditor's claim has been provided for – Court's discretion – Provisional order discharged.

Araujo v Krige and others [2022] JOL 54615 (GP)

Interrogations- application for removal of commissioner of enquiry investigating dealings of company
The applicant sought an order declaring the first respondent not fit and proper to act as the Commissioner in an enquiry established to investigate the trade and dealings of the sixth respondent, in the alternative the first respondent's recusal and the setting aside of his appointment. The applicant was summoned to appear before the Enquiry in terms of sections 417 and 418 of the Companies Act 61 of 1973 (as amended) read together with Item 9(1) of Schedule 5 of the Companies Act 71 of 2008.

Phooko AJ states that the removal of a commissioner of enquiry will not be easily granted if it is against the benefit of all the interested parties [para 33]; confirms the test for the determination of actual or reasonable apprehension of bias [para 37]; and finds that an objective assessment of the facts did not show actual bias or a reasonable perception of apprehension of bias on the part of the first respondent. Applicant also failed to demonstrate that the first respondent was not fit and proper to continue as a Commissioner of the Enquiry.

Application dismissed.

Dippenaar N.O. and Others v Noordman N.O. and Others (2949/2022) [2022] ZAFSHC 181 (26 July 2022)
www.saflii.org/za/cases/ZAFSHC/2022/181.html

Trustees-sale of assets-authority– The issue that needs to be determined is whether the trustees had been authorised to sell the assets of the insolvent trust by the creditors at the second meeting, alternatively after the second meeting of creditors or whether the Master has granted authorisation to sell the assets of the insolvent trust

The applicants made out a proper case to stop the auction to proceed on the following day on the basis that neither the creditors agreed to the sale per auction of the assets of the insolvent trust – Nor did the trustees obtain the direction of the Master to proceed with the sale of the insolvent trust's assets.

Sibanda and Another v Transhunt (PTY) Ltd and Others (2022/13229) [2022] ZAGPJHC 488 (29 July 2022)
www.saflii.org/za/cases/ZAGPJHC/2022/488.html

Urgent application – The applicant has brought this urgent application against the first respondent to place it under business rescue in terms of the Companies Act 71 of 2008 – Case for Business Rescue – Objectives set out see Oakdene Square Properties (Pty) ltd and Others v Farm Bothasfontein (Kyalami) (Pty) Ltd and Others 2013 (4) SA 539 – Whether business rescue would produce a better outcome for creditors and shareholders than would liquidation – Court held that both the main application and the urgent application must be dismissed.

The applicant in this matter, whom I shall refer to from now as Sibanda, has brought this urgent application against the first respondent (which I will refer to from now on as Transhunt) to place it under business rescue in terms of the Companies Act 71 of 2008 (the Act).

[2] Transhunt has already been provisionally wound up. In the alternative Sibanda seeks that this order, which came as a result of a creditors voluntary winding up, be set aside.

[3] The second and third respondents have not opposed the application.

[4] The fourth, fifth and sixth intervenors, who do, are all shareholders of Transhunt, whilst the seventh respondent was formerly its sole director.

The Parties

[5] In order to bring an application for business rescue an applicant must be an 'affected person' as defined in terms of section 128(1)(a) of the Act. In Sibanda's case he alleges he is a creditor of the company which owes him a debt of R 1,6 million. Sibanda is a Zimbabwean citizen domiciled in that country and had to give security to bring this litigation.

[6] Although he need only rely on this fact to qualify as an affected person, Sibanda has a further relationship with Transhunt, which whilst not relevant to his

status as an affected person, is relevant to understanding the context in which this application occurs. He is the founder of a family trust whose beneficiaries are his wife and children. This trust owns 100% of a company called Saxobrite (Pty) Ltd, which in turn owns 65% of Transhunt.

[7] The second applicant is a company called YTS. YTS is also a creditor of Transhunt. According to Sibanda, YTS owes Transhunt 93,4 million rand. Sibanda, through another trust known as the Ken Trust, of which he is the sole beneficiary, owns 60% of YTS. Both YTS and the Ken Trust are offshore entities registered in Guernsey. When this litigation commenced Sibanda alleged he was authorised to bring the application in the name of YTS as he was a member of its executive committee having been nominated to serve in this capacity by the Ken Trust.

[8] However, at the commencement of the urgent application a firm of attorneys representing YTS based in Guernsey, challenged Sibanda's authority to represent it. Sibanda's attorneys then withdrew their representation of YTS. Sibanda is not a director of the YTS nor is he a trustee of the Ken Trust, which despite being a trust for his family's benefit, is represented by professional trustees. Since then, YTS has played no part in these proceedings.

[9] Transhunt is the firm that Sibanda seeks to place in business rescue. Transhunt provides transport services to companies that haul heavy cargo between South Africa and neighbouring states in Southern Africa. Its business model is unusual in that its customers – allegedly only three of them on the intervenors version- were both debtors and creditors. This is because Transhunt served as an agent for these companies collecting from their customers (hence the creditor relationship as it had to repay these amounts to the three firms) whilst also charging a fee on top (hence its debtor relationship). Its assets are trailers, but it does not have the trucks to haul them.

[10] Sibanda despite the indirect 65% shareholding that his family trust holds in Transhunt via Saxobrite is not a director of Transhunt. Up until the time it was voluntarily liquidated it had only one director, Natalie Sviridov. Sviridov wears many hats in relation to the companies Sibanda has an interest in. Apart from being an erstwhile director of Transhunt she was also until recently a trustee of the trust that owns the indirect interest in Transhunt. But she is also a director of a company called Transaction Carriers (Pty) Ltd or TAC, which, as I go on to discuss plays a central role in Sibanda's concerns and hence the need for business rescue. In the voluntary winding up she recorded affirmative votes for Saxobrite (65%) and two of the minority shareholder companies, who between them each held 10% of the shares in Transhunt; respectively, Diobuzz and Tundranamix. The third shareholder Winterview, holds 15% and its shares were voted by another director T. Hunter, based, like Sibanda, in Zimbabwe. Thus, shareholders holding 100% of the equity vote in favour of the winding up.

De Magalhaes v Christensen NO [2022] 2020-13195 (GJ)

Inso;vent-solvent spouse – Funds in bank account – Wife of insolvent seeking to have funds released – Valid title – Insurance disability policy benefits – Proceeds of sale of immovable property – Insolvency Act 24 of 1936, s 21 – Long Term Insurance Act 52 of 1998, s 63(1)(a).

The applicant is the wife of Mr De Magalhaes whose estate was placed under final sequestration by order of court 2019. The respondents are the duly appointed provisional trustees of the insolvent estate. Applicant seeks an order directing the respondents to release her bank accounts pursuant to section 21 of the Insolvency Act 24 of 1936 and contends that the proceeds of a policy benefit held in her bank account is excluded from attachment pursuant to section 63(1)(a) of the Long Term Insurance Act 52 of 1998 (LTI Act).
Maier-Frawley J discusses the background matrix; whether the applicant has demonstrated that she holds valid title to the funds contained in her bank accounts; whether the funds in the applicant's bank account constitute policy benefits which are exempted from attachment in terms of s 63(1)(a) of the LTI Act; the disability benefit paid under the policy; section 21 of the Insolvency Act and the effect on the estate of the solvent spouse; section 63 of the LTI Act and the respondents' argument that payment of disability benefits are analogous to and should be treated the same way as the payment of pension benefits; that on a purposive interpretation of the protection offered in s 63 of the LTI Act, when read with the purpose the legislature sought to achieve in s 21 of the Insolvency Act, the disability benefits paid to the applicant were legally and factually protected from attachment.
As to the proceeds of the sale of immovable property, there was no reason to disbelieve the applicant's evidence that she paid for the property purchased by her some eighteen years ago with her own funds. The applicant has established that she held a valid title to those proceeds which were retained in the account at the time of its attachment.
The respondents are ordered to release the property, comprising the applicant's bank account and its contents, including any funds withdrawn therefrom by the respondents, from the insolvency proceedings instituted against the insolvent.

In the main application, the applicant seeks an order directing the respondents to release her bank accounts pursuant to section 21 of the Insolvency Act 24 of 1936 ('the Act'), alternatively, to release the attachment of her bank accounts, including but not limited to the proceeds of a policy benefit held in her bank account in terms of s 21, insofar as such policy benefit is excluded from attachment pursuant to section 63(1)(a) of the Long Term Insurance Act, 52 of 1998 ('the LTI Act'), further alternatively, insofar as it is found that she is

not the owner of the funds, an order directing that the monies constitute policy benefit[s] which are excluded from attachment in terms of section 63(1)(a) of the LTI Act.

2. The applicant is the wife of Mr AMF De Magalhaes ('the insolvent') whose estate was placed under final sequestration by order of court on 15 August 2019.

3. The first and second respondents are the duly appointed provisional trustees of the insolvent estate. The respondents launched a counter-application wherein they seek an extension of their powers in terms of s 18(3) of the Act in order to oppose the main application. The counter-application is not opposed.

4. The applicant's case is that monies contained in her bank accounts constitute her own property which she acquired during her marriage to the insolvent. In para 7 of the founding affidavit, the applicant avers that the relief sought by her is premised on obtaining:
4.1. the release of her personal bank accounts from attachment on the basis that the monies contained therein are her property which she acquired during her marriage to the insolvent, in accordance with the provisions of Section 21 of the Act;
4.2. alternatively, an order directing the respondents to release and pay over all monies withdrawn [by the respondents] from her bank accounts on the basis that the monies so withdrawn constitute the applicant's property which she acquired during her marriage to the insolvent, in accordance with the provisions of s 21 of the Act;
4.3. further alternatively, in the event that it is found that she did not acquire ownership of the monies, an order directing that the monies constitute policy benefits which are excluded from attachment pursuant to the provisions of s 63(1)(a) of the LTI Act.

5. The respondents oppose the main application on the basis that the applicant has failed to demonstrate that the funds in her bank accounts were acquired by her by a title valid as against the creditors of the insolvent, as required by s 21(2)(c) of the Act, and further, that s 63 of the LTI Act does not find application on the facts of the matter since any policy benefits paid to the applicant were wholly depleted by the time of their attachment by the respondents.

6. The main issues arising for determination are:
6.1. Whether the applicant has demonstrated that she holds valid title to the funds contained in her bank accounts; and
6.2. Whether the funds in the applicant's bank account (FNB maximiser account) constitute policy benefits which are exempted from attachment in terms of s 63(1)(a) of the LTI Act.

Jawaharlal v Celaglo (Pty) Ltd and Others In Re: Celaglo (Pty) Ltd v Kish Gas (Pty) Ltd (15531/2021) [2022] ZAGPPHC 496 (28 June 2022) www.saflii.org/za/cases/ZAGPPHC/2022/496.html

Rescission application- final liquidation order -dismissed
This is an application for order granted by my sister, Khumalo J, against the Fifth Respondent in favour of the First Respondent on 22 June 2022 in this Division – whether the applicant has met the requirements for recission in terms of Rule

42(1)(a) of the Uniform Rules of the High Court, section 345(1) of the Companies Act and/or the common law?

PPLICABLE LAW
[35] A recission application seeks to set aside a decision of the court of first instance. However, a recission application is premised on narrow requirements. Rule 42(1)(a) of the Uniform Rules of the High Court provides that the court may rescind:
"(a) an order or judgment erroneously sought or erroneously granted in the absence of any party affected thereby;
[36] Rule 42(1)(a) of the Uniform Rules of the High Court recently became a subject matter in Zuma v Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector Including Organs of State and Others[3], where Khampepe J supported by majority of the court said the following in relation to Rule 42(1)(a):
"It is trite that an applicant who invokes this rule must show that the order sought to be rescinded was granted in his or her absence and that it was erroneously granted or sought. Both grounds must be shown to exist" (own emphasis added).

Munsamy and Another v Pollock NO and Another (2019/13587) [2022] ZAGPJHC 473 (19 July 2022)
www.saflii.org/za/cases/ZAGPJHC/2022/473.html

Application for leave to appeal – This matter is related to various other matters which go back many years – The applications relate to the liquidation of Castle Quest Properties (Pty) Ltd (Castle Crest), which was placed under provisional liquidation – Whether the rescission application and this application will have any effect on the ongoing activities and conduct of this estate.

This is an application for leave to appeal against the judgment that I granted on the 23rd of June 2022 in which I refused the rescission of a judgment granted by Mia AJ. This matter is related to various other matters which go back many years. The applications relate to the liquidation of Castle Quest Properties (Pty) Ltd (Castle Crest), which was placed under provisional liquidation on the 21st of October 2015.

[2] The final order of liquidation was granted in February 2017. The provisional liquidators (Mr Pollock N.O. and Mr Ismail, since deceased) applied to court for an extension of their powers as they wished to sell certain properties belonging to Castle Crest and evict the applicants herein (Mr Munsamy and Dr Adonis). The matter was heard before Mia AJ, who granted the provisional liquidators the power to bring proceedings for, *inter alia*, the eviction of the applicants who were residing at one of the properties situated in Hyde Park (the property) and the disposition of the property by public auction, tender or private contract.

[3] The eviction application was launched on the 9th of July 2019. Attached to the eviction application, which was served on Mr Munsamy personally on the 16th of

July 2019, was the order granted by Mia AJ. In the rescission application, the applicants sought condonation for the late filing of the rescission application. I found that a proper case had not been made out, in that the various delays in seeking the order, were not adequately detailed. I also found that the prospects of success on the merits were poor and thus refused condonation.

[4] Mr Van Rensburg SC, who appears for the applicants has raised various grounds upon which leave to appeal is sought. He submitted that I erred in finding that the applicants had engaged in dilatory tactics; that I did not consider the seriousness of the complaints levelled against Mr Pollock and the Masters' Office and the investigations into the maladministration of the estate. He also contended that the master was biased in favour of Mr Pollock, and that the extension of powers order was as a result of the maladministration and corruption in the Master's office, which I had failed to deal with. He submitted further that I erred in not taking into account that the provisional liquidators' powers were restricted and they were therefore prohibited from launching the application, unless and until the decision of the Master restricting their powers was reviewed and set aside. In addition, it was contended that I erred in finding that the applicants were not proven creditors of Castle Crest and therefore did not have legal standing to launch the rescission application.

[5] I had found that the Mia AJ order did not affect them and they were therefore not entitled to have been joined to the application. The order, in my view, extended the liquidators' powers and that did not affect them. Only the eviction application would affect them and notice would be given to them on that occasion. This, too, Mr Van Rensburg submitted, was an error.

[6] Mr Van Rensburg, at the hearing for leave to appeal, raised the issue that the provisional liquidators, in applying for the extension order before Mia AJ, were obliged, in the same application, to first apply for authority to bring the application for their powers to be extended. This issue was not raised in the rescission application nor in the written application for leave to appeal.

[7] At a previous hearing, I had raised the issue as to whether or not the application for rescission was moot as, on 18 February 2022, Mr Pollock was appointed as the final liquidator and that appointment still stands. I was informed at the present hearing, that a review of that appointment has now been launched on the basis that the Master previously refused to appoint Mr Pollock and /or removed him as as a final liquidator. and that decision was never reviewed and set aside.

[8] In my view, the question boils down to whether the rescission application and this application will have any effect on the ongoing activities and conduct of this estate.

[9] The Master in a report dated 3 February 2022 stated that one of the officials was supposed to be supervising the administration of the estate and a different Master had taken control of the file. According to the Master's report, the assistant master who had removed Mr Pollock as liquidator was not the master who was tasked with the administration of the estate and in control of the file. Several Masters and assistant Masters have involved themselves in this estate and have issued contradictory orders.

[10] The latest decision emanating from the Masters' office is the one in which Mr Pollock was appointed the final liquidator. As stated above, that decision has now been taken on review and is pending.

[11] A meeting of creditors took place on 25 March 2022. At that meeting, the creditors ratified and confirmed the actions of the liquidator(s) to date. Other resolutions were adopted at the second meeting of creditors. The respondent argued that as a result of his appointment and the meeting of creditors which have ratified all his actions. Mr Pollock is entitled to bring proceedings on behalf of Castle Crest and no longer requires the extension of powers that Mia AJ granted in order to sell the property and apply for the applicants' eviction.

[12] The respondent submitted that to rescind and set aside the Mia AJ will have no practical effect as Mr Pollock, until the application for review is decided, remains the final liquidator and can exercise his powers as such.

[13] The respondent contended further that it is not open to a third party (even one who has some sort of interest as a shareholder, creditor or a tenant of the property) to challenge a liquidators' authority to litigate on behalf of an insolvent company.[1]

[14] In *Lynn N.O. and another v Coreejes and another*,[2] the SCA, in dealing with non-compliance with S 382(1) of the Companies Act (1973) held that although the section requires a liquidator to be duly authorised by a meeting of creditors or members, or by the Master, to bring certain proceedings, such proceedings can be brought on behalf of the company. If the liquidator litigates without such authority, the court may refuse to allow him his costs out of the company's assets and he may have to pay such costs himself. But, the litigation is not a nullity or invalid. Retrospective sanction of unauthorised litigation is available to the liquidator in appropriate instances. The present matter relates to proceedings of the liquidator and not necessarily on behalf of the company. Even without the authority of the court, such proceedings are not a nullity and have, in any event, been sanctioned by the creditors, retrospectively.

[15] Whilst some of the points raised by Mr Van Rensburg may raise some interesting legal issues, these will be dealt with in due course, during the review

proceedings. In my view, there would be no point in granting leave to appeal in this matter, as the review will encompass the issues raised. The issues raised in this matter will most likely be overtaken by subsequent events and will become moot.

[16] Accordingly, I make the following order:

1. The application for leave to appeal is refused with costs.

Mattheus Hermanus Wessels Fourie N.O and Another v Elani Botha N.O and Another v Kombani Holdings (Pty) Ltd and Others (23412/2021) [2022] ZAGPPHC 528 (20 July 2022)
www.saflii.org/za/cases/ZAGPPHC/2022/528.html

Final sequestration of a property holding family trust where payment of creditor's claim has been provided for – Court's discretion – Provisional order discharged.

Introduction

The respondents are the trustees of a family trust, the Gomo Trust. The applicants are the trustees of another trust, the Wesmy Bus Share Trust (Wesmy Trust). The sale of a valuable property, on which a luxury residence has been built, to the Wesmy Trust has fallen through. The Wesmy Trust has, however, already paid R 1 587 032,00 in respect of the purchase price of R 9, 5 million. Based on its claim for repayment, the Wesmy Trust has obtained a provisional sequestration order of the Gomo Trust. Confirmation of the order is opposed by another creditor, Kambani Holdings (Pty) Ltd (Kambani) and other family members of the trustees of the Gomo Trust, including yet another disputed trustee, all as intervening parties. The Wesmy Trust has consented to this intervention. Kambani has tendered repayment of the amount claimed by the Wesmy Trust. The facts appear from the chronology set out below.

[2] Relevant chronology

2.1 On 13 March 2013, a property known as Erf [....] S[....] H[....], the W[....], Registration Division JR, Gauteng (the property) was registered in the name of the Gomo Trust.

2.2 On 28 October 2014 the Gomo Trust concluded a Building Construction Agreement with Kambani. This agreement was cancelled on 4 February 2016, by

agreement, but in the meantime a substantial but uncompleted luxury dwelling has been constructed on the property.

2.3 On 6 February 2016 the Gomo Trust and Kambani concluded a Principle Sales and Marketing agreement to which they added an addendum on 16 June 2016. Pursuant to the agreements with Kambani, the original title deed to the property had been surrendered to it by the Gomo Trust.

2.4 On 18 June 2020, the Gomo Trust sold the property to the Wesmy Trust for an amount of R 9, 5 million. At that stage the disputed value of the property ranged between R 8, 5 million and R 15, 35 million. Pursuant to this sale the Wesmy Trust paid R 900 000,00 to the conveyancer, which included the amount of the transfer duty payable on the sale to SARS and paid R 480 632,00 for the settlement of the clearance figures due to the Tshwane Municipality in respect of outstanding taxes, water consumption and levies. A further R 6 400,00 was paid to a contractor to obtain an electricity connection. In terms of an addendum to the sale agreement dated 10 November 2020 a further R 200 000,00 was also advanced by the Wesmy Trust.

2.5 In the meantime, the agreements and negotiations between the Gomo Trust and Kambani at one stage envisaged that the Gomo Trust would unconditionally surrender and cede all its right title and interest in the property to Kambani. It came as no surprise then, that the sale by the Gomo Trust to the Wesmy Trust resulted in litigation between the Gomo Trust and Kambani. This included a claim by Kambani for payment of some R14, 8 million. These disputes currently form the subject of arbitration proceedings between the Gomo Trust and Kambani, the finalisation of which was interrupted by the provisional sequestration order.

2.6 The payments made by the Wesmy Trust had been made after the lapsing of the sale agreement due to the non-fulfilment of suspensive conditions and the subsequent attempts to revive the sale agreement are in dispute.

2.7 Pursuant to the above the Wesmy Trust's basis upon which it claims the final sequestration of the trust is that it is a creditor in the amount of R 1 587 032,00 and that the Gomo Trust is factually insolvent.

[3] <u>Kambani's tender</u>

3.1 On the Wesmy Trust's own papers, Kambani is the only other creditor of the Gomo Trust. Having regard Kambani's vested interest in the property and its ongoing arbitration with the Gomo Trust, its intervention in and opposition to the sequestration application is unsurprising. In fact, its claim against the Gomo Trust is ten times the size of that of the Wesmy Trust.

3.2 Prior to its application to intervene, Kambani's attorneys tendered in writing to the Wesmy Trust on 6 August 2021, unconditionally payment of the amount of R 726 032,00 consisting of the amount paid to the Tshwane Municipality in the amount of R 480 632,00, the amount paid to obtain electricity of R 6 400,00 and the advance payment of R 200 000,00 (despite a dispute as to whether that should be paid by one of the trustees personally). The Wesmy Trust was further advised that, as transfer in terms of the sale of the property would no longer proceed, the conveyancing attorney could and should reclaim the transfer duty of R 861 000,00 pre-paid by him to SARS. Kambani further tendered to pay the difference between the deposit of R 900 000,00 paid and the amount to be reclaimed from SARS.

3.3 This tender was subsequently repeated by Kambani's deponent on oath in the subsequent application for leave to intervene.

3.4 At the hearing of the oral argument in this matter, the tender was again, on instructions from Kambani, repeated in open court by Adv Hartman who appeared for all the intervening parties.

[4] Evaluation

4.1 Adv Terblanche SC, who appeared with Adv Storm for the Wesmy Trust, could not furnish any cogent reason why the Wesmy Trust, as a creditor, would not accept a full refund and repayment of what it had paid in respect of an agreement which is no longer viable.

4.2 Faint arguments were raised as to interest and costs, without those having been calculated or even estimated. Having regard to the amounts at play, these would in any event be rather insignificant.

4.3 The argument that acceptance of the tender would result in a preference to one creditor over another is also incorrect: the tender is not made by the proposed insolvent, but by another creditor. In fact, on the Wesmy Trust's version, the only other creditor.

4.4 Even the argument advanced by the Wesmy Trust that the Gomo Trust is factually insolvent is somewhat teneous and only based on speculative grounds relating to the actual value of the property. Similarly, the value of Kambani's alleged claim and the validity thereof (on which the Wesmy Trust relies for its calculations of factual insolvency) are subject to arbitration proceedings.

4.5 When one considers the issue of benefit for creditors, as one must when considering the granting of a final order of sequestration, on the version of the

Wesmy Trust, it would receive a dividend which would be less than the tender made by Kambani, should the provisional sequestration order be made final.

4.6 What is more weighty, is that once the payment tendered by Kambani is made and the refund is received from SARS (which is with the obvious acquiescence of the Gomo Trust), the Wesmy Trust will no longer be a creditor of the Gomo Trust and will have no *locus standi* to pursue a sequestration order. The only remaining creditor is one who, knowing its own position and that of the Gomo Trust best, opposes the confirmation of the sequestration order.

4.7 The issues relating to the exercise of a judicial discretion in circumstances where an unpaid creditor approaches a court for a winding-up order, has most recently been considered in *Afgri Operations Ltd v Hamba Fleet (Pty) Ltd* **2022 (1) SA 91** (SCA) at paragraph 12. There it was reiterated that an unpaid creditor had a right *ex debito iustitiae* to a winding-up order and that a court has a very narrow discretion "*that is rarely exercised and then in special and unusual circumstances*". Examples of consideration of such circumstances can be found in *Service Trade Supplies (Pty) Ltd v Dasco & Sons* **1962 (3) SA 424** (T) at 428B, *Firstrand Bank Ltd v Evans* **2011 (4) SA 597** (KZD) paragraph 27, *Oretisolve (Pty) Ltd t/a Essa Investments v NDFT Investment Holdings (Pty) Ltd and Another* **2015 (4) SA 449** (WCC) paragraph 18 and *Victory Parade Trading 74 Proprietary t/a Agri-Best SA v Tropical Paradise 93 (Pty) Ltd t/a Vari Food*s **[2007] ZAWCHC 31** paragraph 28.

4.8 In the present matter, there are only two creditors of the proposed insolvent. The one creditor, whose claim is notionally ten times that of the sequestrating creditor, tenders to pay the sequestrating creditor, virtually in full. There is no obvious benefit to the sequestrating creditor in not accepting this tender and its insistence on sequestrating the proposed insolvent to its own detriment appears *prima facie* illogical and possibly vexatious or bordering on an abuse of process. Particularly where such procedure might prejudice the only other creditor and, since the proposed insolvent is a trust, also the trust beneficiaries. I find that these circumstances constitute "special" or "unusual" circumstances and having regard thereto, decline to exercise this courts' discretion in favour of the Wesmy Trust.

4.9 Notwithstanding the above, until such time as the tender had been made, or at least until it has been made on oath in these proceedings, which was the delivery of Kambani's application for intervention, the Wesmy Trust would have been entitled to proceed with its application and, consequently to costs. Since then, particularly in the absence of any real of substantial justification for persisting with its application, costs should follow the event, being that the provisional sequestration order should be discharged. These considerations will be reflected in the costs order.

[5] Order

1. The provisional sequestration order is discharged.

2. The first and second respondents, in their capacities as the trustees of the Gomo Trust, are ordered to pay the applicants' costs up to 14 August 2021, including the costs of two counsel.

3. The applicants, in their capacities as the trustees of the Wesmy Bus Share Trust, are ordered to pay the costs of the application incurred subsequent to the delivery of the application for intervention on 14 August 2021.

JP MARKETS SA (PTY) LTD v FINANCIAL SECTOR CONDUCT AUTHORITY 2022 (4) SA 94 (SCA)

Company — Winding-up — Of solvent company by court order — Application for winding-up by Financial Sector Conduct Authority — Not requirement that preceding investigation had to be concluded — Whether winding-up just and equitable — Requiring consideration of whether objects of FMA would be achieved and of availability of alternative remedies — Companies Act 71 of 2008, ss 81(1)*(c)*(ii); Financial Markets Act 19 of 2012, ss 96*(a)*(i).
Financial institution — Financial Sector Conduct Authority — Application for winding-up of after supervisory on-site inspection or investigation — Not requirement that preceding investigation had to be concluded — Whether winding-up just and equitable — Requiring consideration of whether objects of FMA would be achieved and of availability of alternative remedies — Companies Act 71 of 2008, ss 81(1)*(c)*(ii); Financial Markets Act 19 of 2012, ss 96*(a)*(i).

In terms of ss 96*(a)*(i) of the Financial Markets Act 19 of 2012 (the FMA), the Financial Sector Conduct Authority (the Authority) may, after a supervisory on-site inspection or an investigation has been conducted, and in order to achieve the objects of the FMA, apply for the winding-up of a respondent under s 81 of the Companies Act, as if it were a creditor of the respondent.
Section 81(1)*(c)*(ii) of the Companies Act 71 of 2008 provides that '(a) court may order a solvent company to be wound up if one or more of the company's creditors have applied to the court for an order to wind up the company on the grounds that . . . it is otherwise just and equitable for the company to be wound up'.
This case concerned an appeal to the Supreme Court of Appeal against a High Court order placing the appellant, JP Markets SA (Pty) Ltd (JP Markets), under final liquidation at the instance of the Authority. JP Markets had been transacting in over-the-counter (OTC) derivatives when regulations introduced the requirement of an OTC derivative provider (ODP) licence during February 2018. After a number of interactions between JP Markets and the Authority regarding JP Markets' ODP licence application, it was finally submitted to the Authority on 21 August 2020. This was after the Authority provisionally suspended JP Markets' financial service provider licence in June 2020,

after investigation of complaints related to OTC derivative transactions. The application for its liquidation was launched on an urgent basis on 7 July 2020, while the ODP licence application was pending.
At issue were whether the Authority met the statutory jurisdictional requirements for the exercise of the power to institute an application for liquidation; and if so, whether it made out a proper case for the winding-up of JP Markets. JP Markets contended that the jurisdictional requirement that 'an investigation has been conducted' had not been met because the investigation had not yet been finalised (see [24]); the Authority that information gathered from an ongoing investigation informed the liquidation, including that it operated as an ODP without a licence. (See [10] – [18].)

Held

Textually and contextually a formal or final result in respect of an investigation was not a requirement. The court a quo correctly held that the Authority was authorised by s 96 of the FMA to apply for the liquidation. (See [25] – [29].)
In the circumstances of this case s 81(1)*(c)*(ii) of the Companies Act was applicable. Thus, the Authority had to show that it was just and equitable for JP Markets to be wound up. Importantly, a winding-up under s 96 must be aimed at achieving the objects of the FMA. The determination of whether it would be just and equitable to order a winding-up under s 96 was therefore inextricably linked to the achievement of the objects of the FMA — to serve the public interest. Consequently, a consideration of alternative remedies must also take a central place in the enquiry. (See [30], [32].)
The evidence did not establish that the business of JP Markets constituted a systemic risk to its clients or to financial markets generally. It followed that the only remaining relevant factor was that JP Markets had been doing business as an ODP without a licence. The decisive consideration was that JP Markets had applied for an ODP licence. At the time of the hearing of the appeal, that application was still pending before the Authority. The liquidation of JP Markets prior to the determination of its ODP licence application would not achieve the objects of the FMA. Should an ODP licence ultimately be refused, the Authority would have no difficulty in obtaining an order prohibiting JP Markets from continuing to do business as an ODP. In the result, the winding-up of JP Markets was neither just nor equitable. The court a quo erred in finding that it was just and equitable to liquidate JP Markets, and the appeal would therefore succeed.

FIRM-O-SEAL CC v WYNAND PRINSLOO & VAN EEDEN INC AND ANOTHER 2022 (4) SA 205 (ML)

Company — Business rescue — Effect on directors — Must continue to exercise functions, but subject to authority and instructions of business rescue practitioner — Unauthorised conduct void ab initio and unratifiable — Summons issued by director without practitioner's approval void and cannot subsequently be ratified by practitioner — Companies Act 71 of 2008, s 137(2).

Section 137(2) of the Companies Act 71 of 2008 stipulates that, during business rescue proceedings, company directors continue to exercise their functions but subject to the authority and instructions of the business rescue practitioner. Conduct performed without the knowledge of the practitioner is void ab initio and cannot subsequently be ratified by the practitioner. (See [7], [14] – [15].)
In the present case the directors of the plaintiff, a company under business rescue, issued summons commencing the present action on the instructions of its directors

without the approval, or even knowledge, of the business rescue practitioner. The practitioner, having first indicated that he intended to withdraw the action, subsequently signed a power of attorney purportedly authorising the plaintiff to proceed and ratifying any steps already taken in furtherance of the action. The court, applying the abovementioned principles, found that the action by the directors in instructing the plaintiff's attorney to issue summons was void for not having been approved by the practitioner, and that their decision was incapable of being ratified ex post facto. The court accordingly upheld the defendants' special plea challenging the plaintiff's locus standi. (See [16] – [17].)

GORE NO AND ANOTHER v WARD AND ANOTHER 2022 (4) SA 213 (WCC)
Banker — Fraudulent misrepresentation inducing deposit — P, acting as agent of company, fraudulently inducing L to make deposit into company's bank account — Company obtaining effective right against banker to funds — Becoming company's 'property' in wide sense of word, even though stolen — If company, acting through P, makes contractual payment to third party, such payment effective and bank not entitled to reverse credit — Bank not liable to L but payment constituting voidable disposition as intended in Insolvency Act 24 of 1936, s 26.
Company — Contracts — Authority — Actual authority — Actual authority, such as that possessed by sole director, existing independently of perceptions of third party — To be distinguished from apparent or ostensible authority, when representation by company crucial.
Company — Directors and officers — Directing mind doctrine — Ambit — Not shielding company in contractual setting where normal rules of agency applicable — Sole director of company, having fraudulently procured payment into company's bank account, causing money to be paid out to third party, who received it in context of contract between it and company — Payment constituting disposition by company — Can be clawed back by liquidators if not for value — Insolvency Act 24 of 1936, s 26.
Company — Winding-up — Unlawful alienations and preferences — Voidable disposition — Disposition without value — Payment out of stolen funds in company's bank account — Exercise, whether lawful or not, of company's power of disposal over funds in its account constituting 'disposition' for purposes of Insolvency Act — Conferring no benefits on company but adversely affecting its ability to reimburse victim or pay other creditors — Constituting voidable disposition — Insolvency Act 24 of 1936, s 2 sv 'disposition', s 26; Companies Act 61 of 1973, s 340.

This case involved a claw-back under s 26 of the Insolvency Act 24 of 1936. The applicants, the joint liquidators of a company called Brandstock Exchange (Pty) Ltd (Brandstock), applied for the setting-aside, under s 26 (read with s 340 of the Companies Act 61 of 1973), of payments of R250 000 made to each of the respondents, alternatively for a declaration that the payments were made sine causa. The payments were made by means of transfers from funds held to the credit of Brandstock's bank account into the respondents' bank accounts. The applicants also sought orders directing the respondents to repay the amounts to the applicants, either pursuant to the relief granted in terms of s 26 or, alternatively, on the grounds of their alleged unjust enrichment at Brandstock's expense.
The respondents opposed the application on the ground that the payments were made not by Brandstock but by Mr Philp, its sole shareholder and director, using funds he stole by false pretences from one Mr Louw, a business acquaintance. The

respondents argue that the funds used to make the payments did not become 'the property' of Brandstock but that Philp had merely used Brandstock's banking account as a conduit for the purpose of fraudulently receiving and disposing of the money that he, not Brandstock, had stolen from Louw. In other words, the respondents denied that Brandstock made 'dispositions' to them within the meaning of the word in s 26. They also denied that they were enriched by the payments.
For their part, the applicants argued that Louw had dealt with Brandstock, a separate juristic entity, and not Philp in his personal capacity. Since Philp's conduct was attributable to Brandstock, a binding contract arose between it and Louw.
To counter this argument, the respondents relied on the 'directing mind' doctrine for their contention that Philp had been on a frolic of his own. Under the directing mind doctrine, the conduct of the directing mind of a company can only be attributed to the company if the conduct was within the field of operation the company had assigned to him or her, was not totally a fraud on the company and was partly for the benefit of the company (see [31]). The respondents argued that since Philp's conduct was as much a fraud on Brandstock as it was on Louw and was not for the benefit of Brandstock, his actions in obtaining and disposing of the money could not be attributed to Brandstock. They also argued that the funds stolen from Louw could not have become Brandstock's property by virtue of their nature as stolen property.
In deciding whether to sanction the claw-back, the court dealt with the following matter: (i) whether Philp's conduct had bound Brandstock to a contract with Louw so that Brandstock was accountable to Louw for the money stolen by Philp; (ii) the applicability, in the circumstances, of the directing mind doctrine; (iii) whether funds became Brandstock's property in the light of their nature as stolen property; and (iv) whether the payments made by Brandstock were 'dispositions' by Brandstock within the meaning of the term in the Insolvency Act.
Held
As to (i): Since a company had no mind of its own, it could be bound only by a person representing it. That person's authority could be actual or ostensible, in which case a representation by the company was essential. (See [25].) If a transaction was one of a nature that the fraudster was authorised to enter into on the company's behalf, the company was bound by it, notwithstanding that the fraud may have redounded to its prejudice as much as to that of the deceived third party. Philp, as Brandstock's sole director, was its authorised agent with virtually plenipotentiary powers. This authority was actual, not apparent or ostensible. Therefore, Brandstock was accountable to Louw for the money stolen by Philp. (See [28] – [30].)
As to (ii): The applicability of the directing mind doctrine was context-specific and had to be applied flexibly and pragmatically, when appropriate, depending on the facts of the case and the nature of the issue in question. There was no reason to resort to it to displace the normal rules of the law of agency in a situation where they were applicable and available to determine a company's liability *in a contractual context*. Here, there was a contractual nexus between the victim of the fraud, Louw, and Brandstock, and the law of agency applied. (See [33].)
As to (iii): The respondents' argument that Philp's theft of the funds had prevented them from becoming Brandstock's property erroneously equated electronically transferred funds with corporeal goods. There was a contractual context to Louw's payment to Brandstock. This differed materially from the facts in the cases relied on by the respondents, where the recipients did not receive the stolen funds in a contractual context. Because Louw intended to pay Brandstock in terms of his contract with Brandstock, Brandstock had obtained an effective right, as against the bank, to

the money. The funds thus became Brandstock's 'property' in the wide sense contemplated by s 2 of the Insolvency Act. The subsequent payments to the respondents were effective, having been made not by Philp in his personal capacity but by the bank on behalf of Brandstock. In summary, the dealings between Louw and Philp resulted in a contract between Louw and Brandstock; Louw's payments were made in terms of that contract; Brandstock received the funds when Louw performed under the contract; and Brandstock (via its agent Philp) stole them from Louw when it made the payments to the third parties. (See [35], [40] – [43], [48] – [50].)
As to (iv): Brandstock had the power of disposal of the funds standing to the credit of its bank account. Once it was exercised, whether lawfully or not, a 'disposition', as (widely) defined in s 2 of the Insolvency Act, was made by Brandstock. While Brandstock did not derive any benefit from the payments, they adversely affected its ability to reimburse Louw or pay its other creditors. It was therefore a disposition without value for the purposes of s 26 of the Insolvency Act. (See [53] – [55].) Application upheld. (In view of its finding on s 26, the court found it unnecessary to deal with the enrichment claim.)
The court accordingly set aside the disputed payments under s 26 and ordered the respondents to pay the sums in question to the applicants, together with interest *a tempore morae* (see [58]).

MINTAILS SOUTH AFRICA (PTY) LTD v MINTAILS MINING SA (PTY) LTD AND OTHERS 2022 (4) SA 238 (GJ)

Company — Business rescue — Reinstitution after final liquidation order — Application by controlling shareholder and major creditor for reinstitution of business rescue on ground that liquidation at stalemate and business rescue would offer better deal for creditors and shareholders — Not for applicant to choose preferred method of winding down business of company — Not entitled to business rescue order merely because dissatisfied with conduct of liquidators — No objective evidence submitted of how better return for all creditors would be achieved — Application refused and counter-application to allow for extension of liquidators' powers to sell company assets granted — Companies Act 71 of 2008, s 128(1)*(b)* and s 128(1)*(h)*.
Company — Winding-up — Liquidator — Provisional liquidator — Powers — Extension by court — Power to sell company assets after final liquidation order granted — Companies Act 61 of 1973, s 386(5).

The present application, launched under s 131 of the Companies Act 71 of 2008 (the Act), was for an order returning a company in liquidation (the first respondent, 'the company') to business rescue. The applicant was an 'affected party' as envisaged in s 128(1)*(a)* of the Act, being both the company's controlling shareholder (96%) and major creditor (R1,3 billion). The company, represented by its provisional liquidators, filed a counter-application for an extension of the powers of the provisional liquidators as envisaged in s 386(5) of the Companies Act 61 of 1973 (the 1973 Act) * in order to secure the sale of the company's remaining assets (shares and claims on loan account held in one of its subsidiaries).
The company — which mined gold-bearing tailings — had been in business rescue between 2015 and 2018. But in 2018 the business rescue practitioner, unable to resolve a dispute about a large environmental rehabilitation liability the company owed the Department of Mineral Resources (DMR), found that there was no reasonable prospect of rescue. A final liquidation order was granted in September 2018.

By the time of the present application, the company had been in final liquidation for more than three years. Its movable assets consisted of shares and claims on loan account in its subsidiaries, but the liquidators' powers were severely curtailed by statutory constraints on their ability to realise them. At the same time, the subsidiaries' own properties were being menaced by criminal elements (known as the 'Zama Zamas'). The need for the liquidators to obtain an extension of their statutory powers to sell these assets became urgent when they received an offer for their purchase from Pan African Resources plc (Pan African). And Pan African's alleged willingness to assume the company's R400 million liability to the DMR intensified the urgency. But the Master's four-month delay in granting the application for extension resulted in further erosion in the value of the company's movable assets, thanks to the ongoing depredations of the Zama Zamas.

The deponent to the applicant's papers, one Moolman, was a director of both the applicant and the company (before its liquidation). He contended on behalf of the applicant that business rescue was appropriate because the liquidation was at a 'stalemate', with the provisional liquidators being unable to wind up the affairs of the company due, inter alia, to statutory limitations on their powers and their alleged maladministration, delay and ineptitude. The creditors would be in a better position in business rescue because the winding-down process would be quicker. The business rescue practitioners would have access to finance provided by the applicant and would be better equipped to deal with the Pan African deal and the complexities of the company's structure, operations and assets than the liquidators. Defending their conduct, the liquidators stated that they had worked themselves ragged in a challenging liquidation to try and preserve value and a suitable return for the general body of creditors under trying circumstances.

Under s 128*(h)* of the Act, 'rescuing' a company entails achieving either of the goals set out in the definition of business rescue in s 128*(b)* of the Act. The primary goal was to facilitate the continued existence of the company and its recovery to a state of solvency. If this was not possible, the secondary goal was to ensure a higher return for creditors or shareholders than they would otherwise receive under liquidation. By the time the application was heard, it was not in dispute that the primary goal was no longer achievable. Instead, the applicant pinned its hopes on getting a better deal for the company's creditors and shareholders by means of the successful completion of the Pan African deal. † According to precedent, an applicant was required to make out its case for business rescue on either ground on a cogent evidential foundation, which the opposing parties ‡ contended was lacking in the present case.

The court refused the application for conversion to business rescue on, inter alia, the following grounds (see [38] – [39], [41] – [47], [50] – [53]).

- It was not for the applicant to choose its preferred method of winding down the affairs of the company. Moolman's opinions or reservations about the liquidators' ability was not a proper reason for taking the company out of liquidation, particularly since any savings on the costs of the liquidation process would be subsumed by new costs incurred in the business rescue scenario.
- The applicant's promise to assist only in a business rescue scenario and only on its own terms and in pursuit of its own financial interests was a half-baked one that offered only cold comfort.
- The liquidators had done their best to preserve value and negotiate the disposal of assets in a way that would optimise proceeds, as evidenced by the Pan African transaction. The delays were due to the tardiness of the Master and statutory restraints on their powers.

- A conversion to business rescue would mean that the liquidators and service providers who had worked for years without remuneration would become concurrent instead of preferent creditors, and, due to the size of the applicant's claim, receive a small or illusory dividend.
- No objective evidence was tendered in support of the applicant's argument that *all* creditors would receive a better dividend under business rescue.
- It was not clear how a liquidator would be less successful in realising a proper market value for the sale of company property than a business rescue practitioner, particularly where a fair market value for company property had already been determined by the Pan African transaction.
- Uncertainties over pending court cases militated against business rescue, particularly over the company's R400 million environmental rehabilitation liability to the DMR. Litigation could also follow in respect of the Black Hawk claim in respect of security services.
- The potential open-endedness of business rescue proceedings.
- Liquidators had statutory powers to enquire into irregularities that business rescue practitioners lacked.
- Business rescue practitioners would have to come to terms with a process that had been ongoing for years in order to do no more than what the liquidators were already doing.
- It was not possible to determine whether there was a reasonable prospect that the general body of creditors would receive an enhanced dividend under business rescue.
- The inference that the applicant was seeking, through the mechanism of business rescue, to improve its own position by depriving the liquidators of compensation for fees and administration costs.

The court granted the counter-application on the following grounds (see [57] – [59]):

- It was common cause that the company had to be wound down and its remaining assets sold. Without obtaining authorisation for an extension of their powers to enable a sale of the remaining company assets the liquidators would be hamstrung.
- Funds obtained from the sale of certain available assets would inure to the benefit of all creditors, including the applicant.

MUNSAMY AND ANOTHER v ASTRON ENERGY (PTY) LTD AND OTHERS 2022 (4) SA 267 (GJ)

Company — Winding-up — Liquidator — Appointment of liquidators and provisional liquidators — High Court order directing master to appoint final liquidators nominated by creditors — Master only person authorised to do so — No High Court judge so authorised, or to make any recommendations to master in respect of such appointments — High Court order erroneously sought and granted in absence of applicants affected thereby, and also invalid, as court had no power to grant such order — Whether necessary to declare order invalid and set it aside — Companies Act 61 of 1973, s 367.

Section 367 of the Companies Act 61 of 1973 provides that '(f)or the purpose of conducting the proceedings in a winding-up of a company the Master shall appoint a liquidator or liquidators as hereinafter provided'. In *Ex parte Master of the High Court of South Africa (North Gauteng)* 2011 (5) (SA) 311 (GNP)) (*Ex parte Master*) it was confirmed that the master was the only person authorised to appoint liquidators and

provisional liquidators of companies and close corporations in liquidation or provisional liquidation; and that no judge of the High Court of South Africa had authority or jurisdiction to affect any appointment of any person to any of the positions referred to, nor to make any recommendations to the master in respect of any appointment to any of these positions. (See [32].)

In this case Astron Energy (Pty) Ltd (Astron) and the Standard Bank of South Africa Ltd sought and obtained a High Court order directing the the master to appoint the persons nominated at a creditors' meeting of Castle Crest Properties 16 (Pty) Ltd (Castle Crest), a company which had been placed in final liquidation, as its final liquidators. Dr Munsamy and his wife, who were not cited in the application for this order, here sought rescission of the order under Uniform Rule 42(1)*(a)*, as having been 'erroneously sought or erroneously granted in the absence of any party affected thereby'.

At issue were the validity of the High Court's order; and if invalid whether it could simply be ignored or if it was necessary for an order declaring it a nullity and setting it aside. In a separate application the Munsamys also sought to review and have set aside the master's decision to appoint the final liquidators, made after the order directing her to do so. They were also the respondents in an application, brought by the so-appointed final liquidator, for their eviction from property owned by Castle Crest.

Held

It was clear from *Ex parte Master* that a judge may not make any recommendations to the master in respect of any appointment of provisional and final liquidators, and therefore that the order was erroneously sought and erroneously granted, and also invalid, as the court had no power to grant it. (See [36] and [44].)

A court order was presumed to be valid and correct until it was set aside. This position is distinguishable from an order granted by a court which did not have jurisdiction to grant such order, which was a nullity that a later court may refuse to enforce without the need for a formal setting-aside by a court of equal standing. While no order of invalidity was necessary, in view of the other applications which were pending — in particular the review application — to ensure certainty, the court would issue a declaration of the order's pre-existing invalidity and set it aside (See [47], [55] and [58] – [59].)

Lutchman NO and others v African Global Holdings (Pty) Ltd and others and a related matter [2022] 3 All SA 35 (SCA)

Corporate and Commercial – Business rescue – When is a business rescue application made within the meaning of the Companies Act 71 of 2008, section 131(6) – Interpretation of section 131(6), which provides for suspension of liquidation proceedings at the time a business rescue application is made – Section 131(6) contemplates that the business rescue application must be issued, served on the company and the Companies and Intellectual Property Commission, and all reasonable steps must have been taken to identify affected persons and their addresses and to deliver the application to them, in order to trigger the suspension of the liquidation proceedings.

African Global Operations (“Operations”) was a wholly-owned subsidiary of Global Holdings (previously known as Bosasa). While the Bosasa companies were in a creditor’s voluntary winding-up, Holdings applied for an order placing six of the companies under supervision and commencing business rescue proceedings in terms of section 131(1) of the Companies Act 71 of 2008. Holdings on the other hand, sought

to prevent the liquidators auctioning off any further assets of the companies. The High Court granted the relief sought in the auction application and dismissed the business rescue application. It gave the liquidators leave to appeal its order in the auction application. It also gave Bosasa and two other parties leave to appeal its order in the business rescue application.

The auction application and appeal were premised on two grounds. The first was that the liquidators were statutorily prohibited from proceeding with the auction and any subsequent sales of the assets of the Bosasa companies due to a suspension of the Bosasa liquidation proceedings in terms of section 131(6) of the Companies Act, because the application for business rescue was brought prior to the commencement of the auction. That ground raised two questions: when is a business rescue application made within the meaning of section 131(6); and whether the business rescue application *in casu* was indeed made within the meaning of that section. Those questions raised the proper interpretation of section 13(6). The second ground of appeal was that the liquidators were not clothed with the requisite power or authority to sell the assets on auction at the time when the auction was held or thereafter, because they were provisional liquidators, the directors had not consented to the public auction and a second meeting of creditors had not yet been held.

Held – Section 131(6), which provides for the suspension of liquidation proceedings at the time a business rescue application is made, read with the provisions of sections 131(1) to (4) and 132(1)(b), had to be interpreted in accordance with the well-known principles of interpretation. The court found that section 131(6) contemplates that the business rescue application must be issued, served on the company and the Companies and Intellectual Property Commission, and all reasonable steps must have been taken to identify affected persons and their addresses and to deliver the application to them, in order to trigger the suspension of the liquidation proceedings. Those requirements were not complied with in this case. The business rescue application was thus not made within the meaning of section 131(6), and the suspension of the liquidation proceedings, including the public auction and any subsequent sales, was not triggered in terms of the section. The application should have been struck from the roll.

The Court went on to hold that it could never have been the intention of the High Court to have ordered the liquidators never to sell the assets of the six Bosasa companies without consultation with and without obtaining the directors' consent should the liquidators be successful in their appeal.

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

Ullman Sails (Pty) Ltd and others v Jannie Reuvers Sails (Pty) Ltd and others and related matters [2022] 3 All SA 290 (WCC)

Civil Procedure – Enforcement of foreign judgment – Provisional sentence proceedings – Defences based on alleged invalidity of cession of judgment debt and on section 8(1) of the Debt Collectors' Act 114 of 1998 found to be without merit, resulting in granting of provisional sentence.

Insolvency – Sequestration – Factual insolvency – Where evidence established on a balance of probabilities that respondents were prima facie, factually insolvent, provisional sequestration order granted.

Three cases came before the court, involving the same entities. In the first application, as cessionary of a judgment debt obtained in the US district court, Ullman Sales commenced action by way of provisional sentence summons for the recovery of the judgment debt from two sail-making companies and, to the limited extent of their joint and several liability for payment thereof in the amount of US 312 439, also against Mr and Mrs Reuvers. In the remaining two cases, Ullman Sails and two related entities applied for the provisional sequestration of the estates of Mr Reuvers and Mrs Reuvers. The applicants' standing in the sequestration applications was founded on Ullman Sails' status as a creditor of the respondents by virtue of it having taken cession of the judgment creditor's rights under the American judgment against the respondents.

The defendants' opposition to all three applications was predicated on the alleged non-enforceability of the ceded claim in the hands of the cessionary by reason of the cession having been *contra bonos mores* or offensive to public policy, and the alleged bar to Ullman Sails' ability to recover the judgment debt by virtue of it not being registered as a debt collector in terms of the Debt Collectors' Act 114 of 1998.

Regarding the provisional sentence application, the Reuvers averred that in the course of restructuring their affairs, their attorney of record (England), who later became chief executive officer of Ullman Sails, became privy to confidential information relating to their personal and business affairs, which he then used to benefit his own estate and that of the companies over which he was the guiding mind.

Held – The Court found no basis upon which to uphold the contention that England's role as the cessionary's representative in the conclusion of the cession, when he had previously acted as the judgment debtors' attorney in the relevant litigation, was a consideration that should justify a refusal by the court to recognise or give effect to the agreement. The Court was also not persuaded that the enforcement of the cession in the peculiar circumstances of the case would be *contra bonos mores* or contrary to public policy.

Section 8(1) of the Debt Collectors' Act prohibits anyone from acting as a debt collector unless they have been registered as such under the statute. Any agreement between a debt collector and his client that is inconsistent with the prohibition in section 8(1) is invalid to the extent of such inconsistency. Ullman Sails instituted the proceedings currently under consideration in its own cause, and not on behalf of some other titleholder. It was found not to be acting as debt collector.

Provisional sentence was granted in the first application.

In the sequestration applications, the applicants alleged that the respondents had committed an act of insolvency of the sort provided for in section 8(c) of the Insolvency Act 24 of 1936 by attempting to make a disposition of their property which would have the effect of prejudicing their creditors or preferring one creditor above another. It was also submitted that the evidence established on a balance of probabilities that the respondents were factually insolvent. It was found that the applicants had established *prima facie* that the Reuvers were both factually insolvent. Their estates were each placed under provisional sequestration.

END-FOR NOW