# INSOLVENCY LAW UPDATES AUGUST2022[1]

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

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### Dippenaar N.O. and Others v Noordman N.O. and Others (2949/2022) [2022] ZAFSHC 181 (26 July 2022)

Trustees –sale of assets-must get authorisation

Urgent application – 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.

www.saflii.org/za/cases/ZAFSHC/2022/181.html

**Sibanda and Another v Transhunt (PTY) Ltd and Others (2022/13229) [2022] ZAGPJHC 488 (29 July 2022)**

Business rescue- when already wound up-not better prospects

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.

[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.

[11] Whatever the relationship between Sviridov and Sibanda was in the past, one that had her at the helm of looking after his business interests, that has since broken down and it is now that antagonism that fuels the current litigation. Sviridov was central to the decision to place Transhunt in voluntary liquidation. She prepared the financial statements and the statutory required Statement of Affairs which the meeting of shareholders is required to have before it to consider.[1] She despite being at the same time being a director of the Transhunt, also signed the resolutions on behalf the three of the four shareholders which voted to place the company in voluntary winding up.

[12] There is some dispute about whether the statement of affairs which is dated 18 February was actually presented at the meeting whose resolutions are dated the day before i.e. 17 February. The intervenors state the date of the statement of affairs is an error and the cart was not put before the horse and the resolution was adopted in a regular manner. The reason given for the resolution was that the company was unable to meet its financial commitments in the immediate to medium term and that its liabilities exceed its assets. The reasons given in the resolution for this state of affairs are the economic consequences of the Covid pandemic and events pertaining to one of its largest customers, Biltrans Services, a Harare based company.

www.saflii.org/za/cases/ZAGPJHC/2022/488.html

**De Magalhaes v Christensen NO [2022] 2020-13195 (GJ) at [32]-[59]**

Section 21– Effect on 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.

**Venter NO and another v Alba Skrynwerkersgeboue (Pty) Ltd [2022] JOL 54725 (NCK)**

Section 69-access to premises-also applicable to company

As liquidators of a close corporation (CC) which had leased premises from the respondent, the applicants sought to be authorised in terms of section 69 of the Insolvency Act 24 of 1936 to enter the leased property and search and take into possession movable assets, books and documents belonging to the CC. The respondent had denied the applicants access to the property and refused to release the assets of the CC.

Mamosebo J considers respondent's contentions regarding Magistrates Court having exclusive jurisdiction to adjudicate the matter in terms of section 69(3) of the Act; whether applicants failed to comply with section 19(1); whether liquidators could rely on the provisions of section 69 of the Insolvency Act instead of section 386 of the Companies Act; and whether applicants lacked standing to seek a declaratory order. None of those points were decided in respondent's favour.

Relief sought by applicants is granted.

**SA Securities Solutions and Technologies (Pty) Ltd v Modular Communications SA (Pty) Ltd (2796/2021) [2022] ZAECQBHC 18 (26 July 2022)**

Winding-up application - Badenhorst rule followed

The applicant seeks the provisional winding-up of the respondent on the grounds that it is unable to pay its debts as contemplated in section 344 and 345 of the Companies Act, 61 of 1973, alternatively, that it would be just and equitable for the respondent to be placed under provisional winding-up – Application of legal principles – Whether or not the suspensive condition in clause 3 of the first agreement was fulfilled or whether fulfilment thereof could be and was waived by the applicant – Whether, in fact, the applicant ever became a shareholder in the respondent – The locus standi of the applicant – The application is dismissed.

[17] There is a wealth of authority to the effect that winding-up proceedings ought not to be resorted to and by means thereof to try to enforce payment of a debt the existence of which is in good faith disputed by the company on reasonable grounds.

[18] The procedure for winding-up is not designed for the resolution of disputes as to the existence or non-existence of a debt - the so-called "Badenhorst rule",

following the decision in Badenhorst v Northern Construction Enterprises (Pty) Ltd 1956 (2) SA 346 (T) at 347-348.

[19] The legal position which will inform my decision in this matter, with reference to a long line of authority, is appositely stated in the following terms in Kalil v Decotex (Pty) Ltd and Another 1988 (1) SA 943 (AD) at 980 B-C:

"As in the present case, the disputes which arise on the affidavits may relate to the locus standi of the applicant, either as a member or creditor, or as to whether proper grounds for winding-up have been established. In regard to locus standi as a creditor, it has been held, following certain English authority, that an application for liquidation should not be resorted to in order to enforce a claim which is bona fide disputed by the company. Consequently, where the respondent shows on a balance of probability that its indebtedness to the applicant is disputed on bona fide and reasonable grounds, the Court will refuse a winding-up order. The onus on the respondent is not a show that it is not indebted to the applicant: it is merely to show that the indebtedness is disputed on bona fide and reasonable grounds."

Application of legal principles

[20] On the papers before me the following disputes are apparent:

20.1. the existence or non-existence of any indebtedness by the respondent to the applicant;

20.2. if there is indeed an indebtedness by the respondent to the applicant, the extent of such indebtedness;

20.3. whether or not the suspensive condition in clause 3 of the first agreement was fulfilled or whether fulfilment thereof could be and was waived by the applicant and/or the parties to the various agreements providing for the sale of shares in the respondent to the applicant;

20.4. whether, in fact, the applicant ever became a shareholder in the respondent, which will be dependent on a determination of the issues referred to in the preceding sub-paragraph;

20.5. the locus standi of the applicant which, in turn, is dependent on the existence of an indebtedness by the respondent to the applicant and/or the applicant being a shareholder in the respondent;

20.6. the validity of the second agreement, which will be determined by resolution of the disputes referred to in the preceding sub-paragraphs;

20.7. the possibility that the debt on which the applicant relies has been extinguished by prescription.

www.saflii.org/za/cases/ZAECQBHC/2022/18.html

**Jansen van Rensburg v Kitchenbrand and Another (25207/2021) [2022] ZAGPJHC 515 (2 August 2022)**

Sequestration application – opposed-applicant defrauded by respondent-order granted

Two applications before the court – The first application is against the First Respondent and his wife, to whom he is married in community of property – The relief sought in such application is for the confirmation of a rule nisi handed down in the urgent court by Georgiades AJ on 11 June 2021 – Principles for the granting of an application for intervention – See SA Riding for the Disabled Association v Regional Land Claims Commissioner and Others 2017 (5) SA 1 (CC) – The rule nisi Order of Georgiades AJ is hereby confirmed and sequestration order is made a final order.

12. Against the version of Mr Kitchenbrand, Mr Pretorius set out a very sad and detailed account of the respects in which he was effectively defrauded by Mr Kitchenbrand, in the millions. A summary of the allegations in such founding papers are briefly the following:

12.1. Mr Pretorius set out in detail from paragraphs 51 to 74, the manner and respects in which he was unduly coerced and persuaded to invest R8 million with Mr Kitchenbrand, who led him to believe that he was acquiring an interest in an entity known as iCore. It is quite clear from these paragraphs that Mr Kitchenbrand personally undertook to indemnify Mr Pretorius against the loss of any investments placed. It is also clear that there was no definite structured investment plan for any

one given company or entity. Mr Pretorius explained further at paragraph 77 that the R8 Million was retained by Mr Kitchenbrand personally, as iCore did not exist. He alleged that he was effectively defrauded out of R8 Million.

12.2. Mr Pretorius explained further that his ex-wife has invested with Mr Kitchenbrand's company, known as RentQuip, to which Mr Kitchenbrand was the sole director and shareholder. It was through his ex-wife that he was initially introduced to Mr Kitchenbrand.

12.3. Mr Pretorius set out that Mr Kitchenbrand had informed him about a portable payment system that he had developed, the IT to which belonged to him. This technology was known as the Vendex System. He proposed an opportunity for Mr Pretorius to invest in a new company to be formed, which would own the Vendex IT. Mr Pretorius agreed to purchase 10% of the shares in such new company, against payment of R1 Million. An agreement was attached to the founding papers, reflecting that RentQuip would be the custodian of the shares in the Vendex system, as well as its intellectual property, until such time as the new company had been formed. Mr Pretorius duly paid R1 Million over to RentQuip, against an understanding that those funds would be held by RentQuip, pending the formation of the new company, and the allocation to Mr Pretorius of his shares.

12.4. Alarmingly, Mr Pretorius says at paragraph 87 of his founding affidavit:

"It is glaringly now apparent that once the money was paid into the RentQuip cash washing machine, it simply disappeared into Mark's personal coffers. In the premises, Mark had managed to dupe me once again and had scammed me of R1 Million."

www.saflii.org/za/cases/ZAGPJHC/2022/515.html

**Compair (SA) (Pty) Limited v Van Jaarsveldt N.O. and Others (47458/21) [2022] ZAGPJHC 513 (3 August 2022)**

Assets-application by applicant to have assets returned-definition of instalment sale-Section 84(1) of the Insolvency Act, as read with section 83 thereof finds application in these proceedings

Vindicatory motion in which the applicant seeks an Order against the first to third respondents for the return of the equipment set out in a schedule to the Founding Affidavit – Common cause – The applicant entered into an oral Agreement with a company known as Normellaz, the terms and conditions of which were those set out in the unsigned written agreement – The agreement meets the requirements set out in section 1 of the National Credit Act of 2005 – See Potgieter NO v Daewoo Heavy Industries (Pty) Ltd [2003] 1 All SA 135 – Section 84(1) of the Insolvency Act, as read with section 83 thereof finds application in these proceedings, which disentitles the Applicant to the relief sought – The Application is dismissed.

This is a vindicatory motion in which the Applicant seeks an Order against the First to Third Respondents for the return of the equipment set out in a schedule in annexure “FA2” to the Founding Affidavit.

2. It is common cause that the Applicant had entered into an oral Agreement with a company known as Normellaz, the terms and conditions of which were those set out in the unsigned written agreement constituting annexure “FA2” to the Founding Affidavit.

3. The First to Third Respondents are the joint liquidators of Normellaz, which entity was placed in liquidation prior to the termination of the sixty-month term agreed upon in “FA2”.

4. It is common cause that the Agreement meets the requirements contemplated in paragraphs (a), (b) and (c)(i) of the definition of “instalment agreement” set out in section 1 of the National Credit Act of 2005. In accordance with section 1 of the National Credit Act an instalment agreement is defined:

“a sale of movable property in terms of which-

(a) all or part of the price is deferred and is to be paid by periodic payments;

b) possession and use of the property is transferred to the consumer;

(c) ownership of the property either –

(i) passes to the consumer only when the agreement is fully complied with; or

(ii) passes to the consumer immediately subject to a right of the credit provider to repossess the property if the consumer fails to satisfy all of the consumer's financial obligations under the agreement; and

(d) interest, fees or other charges are payable to the credit provider in respect of the agreement or the amount that has been deferred."

www.saflii.org/za/cases/ZAGPJHC/2022/513.html

**Van Rooyen NO v Mokwena NO [2022] ZALMPPHC 43 at [21]-[54]**

Interrogations-Evidence – Hearsay evidence – Admissibility of evidence given at insolvency enquiry – Companies Act 61 of 1973, ss 417, 418 – Law of Evidence Amendment Act 45 of 1988, s 3(1)(c).

Tumi Mokwena Incorporated (TMI) traded as an attorneys practice and Mr Mokwena was the sole director of the law firm and was the controlling mind behind it. TMI was liquidated as a result of its alleged inability to pay money deposited by a client. The applicants were appointed as liquidators of TMI. They launched an urgent application seeking an order that the Dikwenanyana Trust be provisionally sequestrated and that the veneer of the Trust be pierced. It was contended that the Trust was the alter ego of Mr Mokwena and TMI and that it was indebted to TMI in an amount in excess of R7,400,000. The liquidators allege that TMI trust funds were irregularly transferred, sine causa, to the Trust and as such the Trust's property is tainted, rendering the Trust invalid and liable to sequestration.

Makgoba JP discusses the admissibility of evidence given at the insolvency enquiry; the respondents' contention that most of the evidence upon which the applicants relied was inadmissible, being derived from the transcript of proceedings at the TMI enquiry and that such evidence constituted hearsay evidence; the case law on the admissibility of evidence given at enquiries in terms of sections 417 and 418 of the Companies Act 61 of 1973; whether the evidence adduced at the sections 417 and 418 enquiry should be admissible in terms of section 3 of the Law of Evidence Amendment Act 45 of 1988; and the probative value of the transcripts. The applicants failed to make out a case why this hearsay evidence should be admitted as evidence in the present application. The court also discusses legal professional

privilege; whether the Trust veneer ought to be pierced; and whether applicant's claim was bona fide disputed. The application is dismissed with costs.

**De Magalhaes v Christensen and another [2022] JOL 54809 (GJ)**

Section 21-Release of bank account-exempted - the provisions of section 63 of the Long-Term Insurance Act applied.

Release of bank account in terms of section 21 of the insolvency act 24 of 1936

Two amounts, each exceeding R2m, were paid into the applicant's bank account by her husband (the insolvent) before his estate was placed under sequestration. The respondents were appointed as the provisional trustees of the sequestrated estate, and froze the funds in the applicant's account. That led to the applicant applying for the release of her bank accounts pursuant to section 21 of the Insolvency Act 24 of 1936.

Maier-Frawley J highlights the issues to be decided as whether the applicant had demonstrated that she held valid title to the funds contained in her bank accounts; and whether the funds in the applicant's bank account constituted policy benefits which were exempt from attachment in terms of section 63(1)(a) of the Long-Term Insurance Act 52 of 1998.

The court describes the effects of the sequestration of an insolvent's estate [paras 20-21]; the onus upon a solvent spouse to prove her entitlement to the release of her property [paras 24-26]; and the provisions of section 63 of the Long-Term Insurance Act regarding protected benefits.

Applicant establishing title to the funds in her account and respondents are ordered to release funds.

**Gatter v Grand Tech Auto Body [2022] ZAGPJHC 523**

Secured creditors-lien -car repairs – lien and storage costs

Repairs were carried out to Ms Gatter's BMW motor vehicle. She paid for some of these, but disputed that she agreed to certain further work. The respondents refused to return the vehicle, contending for a lien over the vehicle, both in respect of the unpaid repair charges and storage costs consequent upon them retaining the vehicle pursuant to the lien. The court discusses the correspondence between the parties

about the storage costs; the release of the vehicle against the establishment of substitute security; whether the security is adequate insofar as it does not extend to cover the storage costs; and that Ms Gatter is being kept out of her possession and use of her vehicle which by all accounts is worth considerably more than the outstanding balance for the repairs. The respondents are ordered to return the car on provision being made for the security.

**Van Rooyen NO and another v Mokwena NO and another [2022] JOL 54876 (LP)**

Sequestration of trust and piercing of trust veneer

As liquidators in an insolvent estate, the applicants sought the sequestration of the Dikwenanyana Trust and piercing of the Trust veneer because the Trust was the alter ego of the insolvent company (TMI) and its sole director. At the core of the application were allegations that the Trust improperly benefited from unlawful funds originating from TMI.

Makgoba JP addresses the issue of the admissibility of evidence given at the insolvency enquiry into the present proceedings, concluding that the testimony of the three witnesses who testified before the insolvency enquiry was only admissible against such witnesses and could not be used against the Trust [para 29]. Applicants failing to make out a case why hearsay evidence should be admitted as evidence [para 49].

Principle of legal professional privilege discussed [para 52]; as well as requirements of a party challenging an application for winding-up of a company or sequestration as an abuse of the process of court on the grounds that the applicant's claim against the respondent is disputed [para 61].

Application is dismissed.

**Sheer v Buddy Whiteman Engraving CC [2022] ZAGPJHC 521 at [19]-[50]**

Winding up – Close corporation – Whether just and equitable – Breakdown in relationship between two members – Clean hands – Deadlock principle – Winding up ordered.

Facts: The first respondent trades under the name “Swatco” and operates in the firearm and gunsmithing industry and also runs a shooting range. Swatco is a close corporation in which the first applicant (Mr Sheer) and the second respondent (Mr Glajchen) each hold a 50 % membership interest. It appeared that, due to differing approaches to the business, the relationship between Mr Sheer and Mr Glajchen deteriorated, culminating in an altercation where Mr Glajchen reached for his firearm and alleged that Mr Sheer had reached for a knife.

Application: Applicants seek the winding up of Swatco on just and equitable grounds, either on the basis that Swatco is solvent and it is just and equitable to do so under s 81(1)(d)(iii) of the Companies Act 71 of 2008 as read with s 66 of the Close Corporations Act 69 of 1984, alternatively on the basis that it is just and equitable to do so and Swatco is insolvent and unable to pay its debts in the ordinary course in terms of s 344(h) of the old Companies Act 61 of 1973.

Discussion: Whether it was just and equitable to wind up Swatco; Mr Sheer’s case that there is a deadlock in the management of Swatco and that he has been oppressed by the conduct of Mr Glajchen; the “deadlock principle”; Mr Glajchen’s reliance on the “clean hands” principle and the  Emphy case; the full court case of Barbaglia and that any wrongful conduct causing the situation which has arisen was merely a factor to be taken into consideration.

Findings: The relationship between Mr Sheer and Mr Glajchen has irretrievably broken down and a deadlock exists in relation to the Swatco business, for which Mr Sheer is not solely responsible.

Order: Swatco is placed under final winding up.

**Vincemus Investments (Pty) Ltd T/A Kempson Finance v Nel (2280/2020) [2022] ZAFSHC 188 (4 August 2022)**

Sequestration application-surety- respondent conduct calls for closer scrutiny-provisional order granted

Applicant sought an order for the sequestration of the respondent's estate, with ancillary relief in respect of costs – The indebtedness arises from certain credit agreements entered between the applicant and the Prinsloo Familie Trust – It was pertinently put to the respondent that he signed as surety in favour of the applicant

and he was asked whether he had the financial means to pay the shortfall – The manner in which the respondent has conducted himself calls for closer scrutiny, which can well be achieved by a trustee appointed to administer the insolvent estate – Mr Meintjes correctly submitted that a provisional order of sequestration should be granted – Held that the estate of Willem Andries Maritz Nel is placed under provisional sequestration in the hands of the Master of the Free State High Court, Bloemfontein.

www.saflii.org/za/cases/ZAFSHC/2022/188.html

**First Rand Bank Limited v Teckra Resources (PTY) Ltd (32078/2021) [2022] ZAGPJHC 562 (5 August 2022)**

Winding-up application – deemed inability to meet its financial obligations as and when they become due and payable-granted

Firstrand Bank Limited claims the final winding up of Teckra Resources, (Pty) Limited, together with costs of the application – The applicant's claim is based on a demand made in terms of s 345 of Companies Act 61 of 1973 read together with the provisions of item 9 of schedule 5 of the Companies Act 71 of 2008 – The applicant relies on the respondent's deemed inability to meet its financial obligations as and when they become due and payable – The question of whether the requirements are met on at prima facie basis if a provisional order is sought, is determined by assessing whether the balance of probabilities on the affidavits favour the applicant's case – See Kalil v Decotex (Pty) Limited and Another 1988 (1) SA 943 – Held that the respondent is placed under final winding-up – The costs of this application are costs in the winding-up.

www.saflii.org/za/cases/ZAGPJHC/2022/562.html

**Firstrand Bank Limited v K2016522263 (SA) (PTY) Ltd (42861/21; 42862/21) [2022] ZAGPJHC 560 (15 August 2022)**

Winding-up application – deemed inability to meet its financial obligations as and when they become due and payable-granted

The applicant in case seeks the final winding up of the respondent based on inability to pay debts owing to the applicant, as contemplated in terms of the provisions of section 345 read with Section 344(f) of the Companies Act 61 of 1973 – The applicant alleges that, the respondent is currently indebted to it in the sum of R496 919.25 pursuant to a written loan agreement – The failure to maintain the monthly agreed upon repayment instalments constituted a default event as referred to in the loan agreements – Section 344(f) of the 1973 Companies Act provides that a company may be wound up by the Court if "the company is unable to pay its debts as prescribed in section 345" – The loan agreements provide that the applicant would be entitled to prove the respondent's indebtedness by way of a certificate of balance which the applicant complied with in both instances – The respondent, by extension on the basis of the suretyship agreement is indebted to the applicant in the amount of R496 919.25 together with interest at the applicable prime rate – Held that the respondent is placed under provisional winding-up in the hands of the Master of the High Court.

www.saflii.org/za/cases/ZAGPJHC/2022/560.html

**ABSA Bank Limited v Longchamp Turf Investments (PT) Ltd and Others (7753/2015) [2022] ZAGPJHC 545 (12 August 2022)**

Winding-up application – deemed inability to meet its financial obligations as and when they become due and payable-granted

Absa Bank Limited brings this application for the final winding up of the first respondent – ABSA has two claims against Longchamp – The first is in respect of a term loan agreement, the second is based on an overdraft facility – Longchamp failed to make payment of the amounts due in terms of both the loan agreement and the overdraft facility despite demands for it to do so – Legal Tests – Winding up procedures cannot be used to enforce a debt that is disputed on bona fide and reasonable grounds – In Freshvest Investments (Proprietary) Limited v Marabeng (Proprietary) Limited [2016] JOL 36911 the court described the application of the rule – Held the first respondent is liquidated in the hands of the Master of the High Court, Johannesburg.

www.saflii.org/za/cases/ZAGPJHC/2022/545.html

**Van Onselen N.O. and Another v De Jager N.O. and Another (CA 196/2021) [2022] ZAECMKHC 50 (2 August 2022)**

Impeachable transactions-trust paid creditors- **contract stipulated that** purchaser shall pay directly to the seller's creditors all outstanding amounts owed by the seller to his creditors as per annexure A.

Appeal against a judgment of the High Court in terms of which the appellants were ordered to pay the amount of R2 136 405.53 to the insolvent estate – Whether a relationship of principal and agent was created vis-à-vis Rose and the Trust by virtue of clause 2.2 of the agreement is debatable –Whether a fiduciary relationship was created between them – Should the trial court have taken into account an agreement testified to by Van Onselen but not pleaded? – The trial court was correct in accepting the evidence of the parties in so far as it established indeed that certain of the creditors were paid, and the total amount so paid by the trust – Held, the appeal is dismissed with costs.

1] The appellants are the trustees of Ozzies Besigheid Eindoms Trust ("the trust") and the respondents are the trustees of the insolvent estate of Mr. Andrew Michael Rose ("Rose"). The appellants have appealed against a judgment of the High Court in terms of which the appellants were ordered to pay the amount of R2 136 405.53 to the insolvent estate.

[2] The matter had its genesis in a sale by Rose of his farms**[1]** to the trust in terms of a written deed of sale dated 23 June 2006. In terms of the agreement the aggregate purchase price was the sum of R3 million. As to the manner of payment of the purchase price the agreement contained an imprecise term which was apparently drafted in this fashion as Rose was financially strained. Because of its importance to this matter, this clause is set out below:

[3] Roughly translated, this clause reads as follows:

2. PURCHASE PRICE:

> The purchase price of the property is in the sum of R2 515 000.00 (two million five hundred and fifteen thousand rand) and the purchase price of the

equipment and crop on the land is in the sum of R485 000 (four hundred and eighty-five thousand rand).

Payable by the purchaser to the seller as follows:

"2.1 The purchaser and the seller agree that the purchaser shall pay directly to the seller's creditors all outstanding amounts owed by the seller to his creditors as per annexure A after the date of signature of this agreement. The amounts owing to the two bondholders, Landbank and ABSA, will be paid on registration of the transaction.

2.2 The seller will afford the purchaser a loan for the balance of the purchase price payable on terms and conditions as will be agreed by them.

[4] Thus, from a practical point of view, the purchase price of R3 million was to be paid/settled in the following manner:

1. The trust was to settle the amounts due to Rose's creditors and the sum thereof would be deducted from R3 million;

2. The balance remaining after this exercise would be loaned by the trust to Rose on terms and conditions to be agreed between them.

[5] The farms were registered in the name of the trust on 5 July 2007. On 15 December 2011, Rose's estate was sequestrated, and the respondents were appointed as the trustees in his insolvent estate. On 20 February 2013, the trustees instituted action against the trust**[2]** in which they sought an order that the appellants render a full accounting, supported by vouchers, of all payments made by them in respect of the purchase price together with a debatement thereof and an order for the payment of the difference between the amounts paid by the appellants and the purchase price, together with ancillary relief.

[6] The trust pleaded specially that the claims had become prescribed. The special plea was adjudicated as a separate issue and was upheld. On appeal to the full bench of this court, that order was reversed and the special plea of prescription was dismissed.

[7] The remaining allegations in the particulars of claim germane to the issues raised on appeal read as follows:

"6C. Defendants have failed, despite having been requested to do so, to provide proof of the alleged indebtedness of Mr. Rose or the alleged payments reflected in the list, annexure "B"**[3]**.

7. By the terms of the Agreement of Sale Defendants impliedly, alternatively tacitly, undertook to render an accounting to Seller of such payments made by them to the Seller's creditors supported by proof thereof.

8. Defendants and A M Rose did not, after the conclusion of the Agreement of Sale, Annexure "A", agree to terms as to the loan by A M Rose to Defendants in respect of the unpaid balance of the purchase price of the farm properties, farming equipment and the standing crops and, accordingly, the balance of the unpaid purchase price constitutes a loan by A M Rose to the Defendants (and) is repayable on demand together with interest thereon calculated in accordance with the prescribed rate of interest of 15.5% per annum from date of registration of transfer to date of payment."

[8] To these allegations, the trust pleaded as follows:

"5. Ad Paragraph 6C

The Defendants deny that they needed to prove any alleged indebtedness of Rose, as Plaintiff in the action bears the onus to prove his case.

6. Ad Paragraph 7

The Defendants deny the contents of this paragraph and deny that Rose, for a period of more than five years, ever requested Plaintiff for proof of payment of those amounts which were specifically set out in the annexure to the written Agreement.

7. Ad Paragraph 8

The Defendants deny the contents of this paragraph and in particular deny that there was any unpaid balance in respect of the purchase price or that Rose ever demanded payment of an alleged outstanding balance." (My underlining).

[9] The net effect of these pleadings appears to have been that the trust denied the existence of the tacit term contended for by the respondents as to an accounting and debatement, or that it bore an onus to establish any "*indebtedness*" on its part. However, in the same breath, it pleaded a denial that there was any "*unpaid balance*" relating to the purchase price, which, to my mind, can only have amounted in the circumstances to a plea to the effect that whatever indebtedness the trust owed to Rose had been settled by the trust. This must be so bearing in mind that the very purpose of the action was to ultimately ascertain whether there was any indebtedness owed by the trust and, if so, the amount so owed.

www.saflii.org/za/cases/ZAECMKHC/2022/50.html

**Araujo v Krige N.O and Others (10316/2021) [2022] ZAGPPHC 607 (12 August 2022)**

**Xxx**

Interrogations-Commissioner of the Enquiry in terms of section 417 of the Companies Act 61- Whether the answers to the questions sought from the applicant could incriminate him as the first respondent had not consulted with the National Director of Public Prosecutions

The applicant was subpoenaed to appear before a Commission of Enquiry that was established to investigate the trade and dealings of the sixth respondent – Whether the decisions of the first respondent to order the applicant as a person capable of giving information inter alia concerning the trade and dealings of the sixth respondent – Whether the provision of section 417(2)(b) of the Companies Act 61 of 1973 are applicable – Whether the answers to the questions sought from the applicant could incriminate him as the first respondent had not consulted with the National Director of Public Prosecutions – The first and second respondents and the third to sixth respondents have been largely successful parties in this matter – The application is dismissed.

[1] The facts of this case are to a large extent similar to the ones under Case No. 8923/2021 and have been detailed in my judgment in that matter. Therefore, I will briefly summarise the facts to give context to this review application.

[2] The Applicant was subpoenaed to appear before a Commission of Enquiry ("the Enquiry") that was established to investigate the trade and dealings of the Sixth Respondent. Further, the First Respondent ruled that certain questions were relevant and that the Applicant was required to answer those questions (such as the source of the funds to purchase the shares and whether the Applicant knew Mr. Mashaba's involvement in the company Swifambo) that were posed to him on the basis that there was no justification for the Applicant to refuse to answer those questions.

[3] During the proceedings before the Enquiry, the attorney for the Applicant advised the Applicant not to answer any questions posed by the liquidator's attorneys. In addition, the Applicant's attorney indicated that they would institute the current proceedings seeking an order to inter alia: review and set aside the First Respondent's decision to subpoena the Applicant; to order the Applicant to produce certain documents; and that the summons be declared null and void ab initio including the decision that the Applicant had no justifiable reasons not to answer certain questions. In addition, the Applicant asks for a punitive cost order against the Second Respondent.

[4] The First Respondent, Second Respondent, and Third to Sixth Respondents are the parties who oppose the relief sought by the Applicant.

[5] The Applicant is Carlos Alberto Fernandes, a major male businessman who resides and conducts business on a farm situated in the Western Cape.

[6] At the farm, the Applicant is:

3.1 the general manager of the business activities conducted on the farm, being a grape-growing farming enterprise (and the management of a luxury lodge); and

3.2 the farm's immovable property is owned by Okapi Farming (Pty) Ltd where the Applicant is the registered owner of 400 ordinary shares (out of 1000 issued ordinary shares) in the capital of Okapi.

[7] The First Respondent is Niel Krige N.O. an adult male who is cited in these proceedings by virtue of his appointment, by this Court, on 28 May 2019, as the Commissioner of the Enquiry in terms of section 417 of the Companies Act 61 of 1973 ("the Companies Act") as amended, read with Item 9(1) of Schedule 5 of the

Companies Act 71 of 2008 to investigate into the affairs of the Sixth Respondent in terms of the provisions of section 418(1)(a) of the Companies Act 61 of 2008.

[8] The Second Respondent is also Niel Krige an adult male who is cited in these proceedings in a personal capacity because the Applicant seeks a costs order against him for having instituted these proceedings.

[12] The Sixth Respondent is Swifambo Rail Leasing (Pty) Ltd a company duly registered and incorporated in accordance with the company laws of the Republic of South Africa whose address is 284 Milner Street, Waterkloof, Pretoria. The Sixth Respondent was liquidated on 28 May 2019. The Sixth Respondent is cited in this application because of an interest that it may have in the outcome of these proceedings, and there is no relief sought against it.

The issues for determination are:

(1) whether the decisions of the First Respondent to order the Applicant as a person capable of giving information inter alia concerning the trade and dealings of the Sixth Respondent, and that questions posed to the Applicant and the documents sought from the Applicant regarding Okapi Farming pertain to the trade, and dealings of the Sixth Respondent are reviewable and ought to be set aside in terms of the Promotion of Administrative Justice Act 3 of 2000 ("PAJA") or section 151 of the Insolvency Act 24 of 1936 ("Insolvency Act").

(2) whether the provision of section 417(2)(b) of the Companies Act 61 of 1973 ("the Companies Act) are applicable; and

(3) whether the answers to the questions sought from the Applicant could incriminate him as the Fi With regards to the Applicant's relief sought in terms of section 151 of the Insolvency Act and/or the principle of legality, this was not pleaded in the founding affidavit but somehow found its way into the Applicant's heads of argument. The Applicant conceded this aspect. In essence, this was an attempt by the Applicant to introduce a completely new case. In Man Financial Services (Pty) (RF) Ltd v Elsologix (Pty) Ltd and Others[24] Van Nieuwenhuizen AJ, as she was hen, said:

"…It is of course trite that not must an applicant in motion proceedings make out a proper case in the founding papers and that an applicant is bound to the case made

out therein and may not make out a new case in the replying affidavit [or heads of argument] (emphasis added).”rst Respondent had not consulted with the National Director of Public Prosecutions.

95] I agree with the above legal position. The Applicant must stand or fall by averments made in his founding affidavit. Accordingly, the Applicant’s sudden reliance on the aforesaid grounds must fail. The same applies to the issue of the Applicant concerning the ruling to produce certain documents. The explanation only found its way into the Applicant’s heads of argument.

[96] Concerning the Applicant’s contention that the questions that he was required to answer and the documents sought in respect of Okapi Farming were not relevant to the trade and affairs of the Sixth Respondent, I agree with all the Respondent’s submissions that the answers provided for by the Applicant in his founding affidavit that Okapi Farming inter alia acquired the farm for a purchase price of R6,000,000.00, and that he sold ordinary shares in the capital of Okapi to the Mamoroko Makolele Trust for the sum of R600.00 show that the questions are relevant to the dealings and affairs of the Sixth Respondent. The information provided by the Applicant shows that the answers and documents sought from him are sufficient proof to show that “were reasonable grounds for believing that the documents were relevant”[25] in the investigation of the affairs of the Sixth Respondent.

[97] I need not take this further as the provision of answers by the Applicant has clearly shown that the questions are relevant. In any event, it has already been established that it is not up to the Applicant to determine which questions are relevant and/or not relevant but that the First Respondent may do so as per the provisions of section 417(1) of the Companies Act. The Respondents were correct in that the matter has become moot. Consequently, this ground also has to fail.

[98] With regards to the First Respondent’s decision to issue the summons, the Applicant argued that the First Respondent did not inter alia independently exercise his discretion when he decided to issue the Summons. However, the Applicant did not justify the basis for his assertion. To this end, the First and Second Respondents argued that the Applicant did not advance any factual basis to the effect that the

information presented before the First Respondent to issue summons for the Applicant was not such that the Commissioner could not do so lawfully. On the contrary, a former director of the Sixth Respondent has confirmed that Okapi Farming is indebted to the Sixth Respondent for the amount of more than R24,000,000.00. Further, the rationale for the issuing of summons is comprehensively dealt with in the First Respondent's Report.[26]

[99] This court asserted that:

"I fail to understand why the Applicant contends that the summons was issued with bold statements that are not backed up by any documentation. I say so because a careful reading of the transcript of the Enquiry shows that there are documents that reveal that certain amounts may have come from the Sixth Respondent..."[27]

[100] In my view, the issuing of summons triggers the crux of this case. Without the summons, there would have been no questions posed to the Applicant. Accordingly, the overwhelming evidence before this Court which shows that the summons was not issued outside the perimeters of the law, largely weakens the Applicant's case as a whole.

With regards to the Applicant being the relevant person to provide information at the Enquiry, the Applicant sought to convince the Court that even though he was inter alia a former director of Okapi Farming and a current shareholder, he was not a person capable of giving information about the trade and affairs of the Sixth Respondent. The Applicant says so even though a former director of the Sixth Respondent had confirmed that Okapi Farming is indebted to the Sixth Respondent for the amount of more than R24,000.000.00 before the issuing of a summons. Further, the Respondents pointed out various documents that show that the Applicant is involved in the affairs of Okapi Farming in so far as they relate to the Sixth Respondent.[28] This evidence is indisputable.

I, therefore, conclude that the Applicant's application falls to be dismissed in its entirety.

www.saflii.org/za/cases/ZAGPPHC/2022/607.html

**LUTCHMAN NO AND OTHERS v AFRICAN GLOBAL HOLDINGS AND OTHERS 2022 (4) SA 529 (SCA)**

**Company** — Business rescue — Liquidation proceedings already initiated — Requirements for business rescue application to be regarded as 'made' for purposes of suspending liquidation — Companies Act 71 of 2008, s 131(6).

In this matter a company (African Global Operations (Pty) Ltd) came to voluntarily enter winding-up and liquidators were appointed to this end (see [1] – [2]). However, when the liquidators began to exercise their powers first-respondent company (African Global Holdings (Pty) Ltd), the shareholder in Operations, sought an order from the High Court that the special resolution to place Operations in liquidation was void. In this it was successful, but the High Court did grant the liquidators leave to appeal to the Supreme Court of Appeal, so suspending the order's operation pending the appeal's outcome (see [3]). Then, during this period of pendency, an accord was reached between the liquidators and Holdings, which was made an order of court and which authorised the liquidators to sell by public auction the movable and immovable properties of Operations on condition that such sale was in consultation with and consented to by Holdings (see [7] – [8] and [16]). Such auction was duly planned but there developed a dispute about whether consent thereto had indeed been granted (see [17]). The liquidators nonetheless pressed ahead with the auction's arrangement, and with the auction days imminent, the Supreme Court of Appeal delivered its judgment, which overturned the High Court's order that the resolution placing Operations in winding-up was void (see [19]). Then, the day before the scheduled start of the auction, Holdings obtained the issue of a business rescue application and had it served on the first-appellant liquidator, had it delivered by a candidate attorney to second-appellant liquidator, did not serve or deliver it to third- or fourth-appellant liquidators, and notified some, but not all of Operations' employees of it — that by electronic means (see [3] and [40] – [41]). Notwithstanding this, the auction commenced and continued through its scheduled course resulting in the sale of the bulk of Operations' assets. Holdings' response was to seek an interdict of the sale of the remainder of Operations' assets pending adjudication of the business rescue application, with both applications coming before the High Court in a consolidated hearing (see [4] – [5] and [20]). It found that the business rescue application had been

validly made on the day before the auction, that this had suspended the liquidation proceedings in terms of s 131(6) of the Companies Act 71 of 2008, and that accordingly the auction had been statutorily barred from proceeding. It found further, that properly interpreted, the consent order did not bestow on the liquidators the power to sell the assets on auction at the time it was held. Accordingly, it granted the interdict. As for the business rescue application, this it dismissed on its merits (see [21] – [22]). It thereafter granted leave to the liquidators to appeal the grant of the interdict and leave to Holdings to appeal the dismissal of the business rescue application (see [5]).

In the Supreme Court of Appeal, the first issue was when a business rescue application was 'made' within the meaning of s 131(6) (see [23]). (Section 131(6) provides that 'If liquidation proceedings have already been commenced by or against the company at the time an application is made [by an affected person for an order placing the company under supervision and commencing business recue proceedings], the application will suspend those liquidation proceedings until *(a)* the court has adjudicated upon the application; or *(b)* the business rescue proceedings end, if the court makes the order applied for'.) *Held*, that on proper interpretation, such an application would only be made when it was issued and served on the company and the Companies and Intellectual Property Commission, and all reasonable steps had been taken to identify affected persons, to obtain their addresses, and to notify them of it (see [24], [28] and [31]).

Had the business rescue application been made (see [35])? *Held*, that it had not been: only one of Operations' four liquidators had been served with the application and only a part of its employees notified thereof, with no indication having been given as to whether reasonable steps had been taken to identify and notify the remainder. Accordingly, given as the application had not been made and the liquidation proceeding and its component auction had not been suspended, the s 131(6) basis for the interdict fell away (see [40] – [42]).

The third issue was the period that the consent order was intended to be operative for. (It made the liquidators' sale of Operations' assets contingent on Holdings' approval of the sale (see [16]).) *Held*, that properly interpreted, the order was intended to lapse on the Supreme Court of Appeal's determination of the appeal against the High Court's finding that the special resolution placing Operations in liquidation was void (see [21] and [46]). Given this and given that the Supreme Court of Appeal's determination was

made prior to the auction, the liquidators had indeed been possessed of the power to cause the assets' sale at the auction, a finding that disposed of the sales-interdict's second basis, an alleged lack of such power to sell the assets (see [43]).

As for Holdings' appeal against the High Court's dismissal of the business rescue application, *held*, that given as the application had not been 'made' it ought not to have been dismissed but should rather have been struck from the roll (see [42]).

Ordered that the liquidators' appeal in respect of the interdict was upheld, the related paragraphs of the High Court's order set aside and replaced with an order dismissing Holdings' application. Ordered further, in regard to Holdings' business rescue application appeal, that it be dismissed, the High Court's order set aside, and that order replaced with one striking the business rescue application from the roll (see [49]).

END-FOR NOW