INSOLVENCY LAW UPDATES OCTOBER 2022[1]

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

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Southern Sky Hotel and Leisure (Pty) Ltd and Others v Southern Sky Food Enterprises (Pty) Ltd (617/2021) [2022] ZASCA 134 (13 October 2022)

Business rescue-Company – Winding up – Sale of property of company in liquidation – Pending business rescue application – Whether agreement concluded by liquidators invalid by virtue of section 131(6) of the Companies Act 71 of 2008.

Whether agreement concluded by liquidators for the sale of the property of a company in liquidation is invalid by virtue of the provisions of **s 131(6)** of the **Companies Act 71 of 2008**.

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

1 The appeal is upheld with costs, including the costs of two counsel.

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

'The application is dismissed with costs, including those of two counsel.'

The issue in this appeal is whether an agreement (the agreement) concluded by the liquidators of a company (in liquidation) for the sale of the company's immovable property in circumstances where business rescue proceedings have been commenced, is invalid by virtue of the provisions of **s 131(6)** of the **Companies Act 61** of 2008 (the **Companies Act).**

The first appellant was Southern Sky Hotel and Leisure (Pty) Ltd t/a Hans Merensky Hotel and Spa (in liquidation) (the company). The second, third, fourth and fifth appellants were the appointed provisional liquidators of the company (the liquidators). The sixth appellant was Van's Auctioneers Gauteng (Pty) Ltd (the auctioneer), who made common cause with the liquidators both before the SCA and the high court. The respondent was Southern Sky Food Enterprises (Pty) Ltd (the respondent). Ms Shamira Rinderknecht (Rinderknecht) was the sole shareholder and director of the respondent.

The issue in the appeal was whether an agreement (the agreement) concluded by the liquidators of a company (in liquidation) for the sale of the company's immovable property in circumstances where business rescue proceedings had been commenced, was invalid by virtue of the provisions of s 131(6) of the Companies Act 61 of 2008 (the Companies Act).

The facts of the matter were as follows. The Hans Merensky golf course was established in 1967 by the Phalaborwa Mining Company. The golf course and the surrounding land were later purchased by the Hans Merensky Country Club (Pty) Ltd (the club) and developed into a golf estate. The company later bought the estate from the club and developed it into the Hans Merensky Hotel and Spa. During 2003 to 2007, various individuals, referred to in the papers as the 'Irish Investors', bought immovable property from the club and developed it into furnished bush lodges. An agreement was concluded between the Irish Investors and the club in terms whereof the club had the right to lease out the bush lodges to the public, subject to the Irish Investors receiving certain agreed returns (the rental pool agreements). At some point, the company took over the management of the rental pool agreements and assumed liability under these agreements. The company became financially distressed and unable to honour its obligations in terms of the rental pool agreements.

This resulted in the Irish Investors launching a winding-up application. On 21 January 2020, the court placed the company under final liquidation. On 3 February 2020, the liquidators were appointed and on 22 September 2020 their powers were extended to allow them to, inter alia, dispose of the movable and immovable property of the company by public auction. Pursuant thereto the liquidators resolved in November 2020 to put the immovable property of the company up for sale on auction. The auction was advertised to take place on 23 and 24 February 2021. On 1 December 2020, Vision Tactical (Pty) Ltd (Vision), a creditor of the company, launched an application for an order placing the company under supervision and commencing business rescue proceedings in terms of s 131(1) of the Companies Act. This application was only enrolled for hearing on 11 March 2021, shortly after the auction was to have taken place. On 19 February 2021, the respondent was granted leave to intervene in the business rescue application.

The liquidators decided to proceed with the auction as, according to them, there was no valid business rescue application as recognised in law. The liquidators proceeded with the online auction on 23 and 24 February 2021, which was conducted by the auctioneer, for the sale of the company's immovable property and its business as a going concern (the property). Despite the pending business rescue application, Rinderknecht, on behalf of the respondent, attended the online auction on 24 February 2021 and, being the highest bidder, presented a signed and written offer prepared by the liquidators to the auctioneer. On 11 March 2021, the liquidators accepted the respondent's offer, and the agreement was concluded.

On 25 March 2021, the respondent launched an urgent application out of the high court, in which it sought an order that the high court declare the agreement invalid and set it aside, as both the auction and the agreement had occurred after the business rescue application was made and whilst the liquidation proceedings were 'suspended'.

The SCA found that the issue was thus whether s 131(6) of the Companies Act rendered the agreement invalid. To answer that question, the SCA found that the meaning and effect of clause 24 of the agreement had to firstly be determined. The SCA found that clause 24.1 and 24.2 were aimed at expediting the finalisation of any

business rescue application pending at the date of the signing of the agreement or subsequently launched prior to the transfer of the property. Clause 24.3 provided that the agreement would lapse in the event of such business rescue application succeeding. The SCA held that the combined effect of those provisions was that the property would not be realised unless the business rescue application was dismissed. Put differently, irrespective of whether clause 24 had suspensive or resolutive operation, the realisation of the property was subject to the termination of the suspension of the liquidation process under s 131(6).

The SCA found further that the next question was whether, as a matter of statutory interpretation, s 131(6) evinced an intention to visit such an agreement with nullity. The SCA held that no such indication was found in its text, context or purpose. The SCA held further that there was no direct prohibition of such an agreement as contemplated in *Schierhout v Minister of Justice* 1926 AD 99 (A). Section 131(6) did not suspend the appointment, office and powers of a liquidator; it suspended only the process of liquidation. The SCA thus held that there was no reason why a liquidator could not exercise those powers subject to the lifting of the suspension under s 131(6). Consequently, the agreement was valid and the high court should have dismissed the application to declare it invalid.

Notably, the SCA deemed a final comment necessary regarding the manner in which Rinderknecht had over the years frustrated the various efforts to wind-up a company that was clearly financially distressed since at least 2013. The SCA found that this was such a case in the latest attempt by the respondent to frustrate the liquidation process by stultifying the business rescue process.

Mazars Recovery & Restructuring (Pty) Ltd and Others v Montic Dairy (Pty) Ltd (in liquidation) and Others (526/2021) [2022] ZASCA 135 (13 October 2022)

Business rescue – whether payments made to the business rescue practitioners after the conversion of business rescue proceedings to liquidation proceedings are void in terms of s 341(2) read with s 348 of the Companies Act 61 of 1973. Section 131(6)

ORDER

The appeal is dismissed with costs, including the costs of two counsel.

JUDGMENT

Hughes JA:

[1] This appeal addresses the remuneration and fees of business rescue practitioners, specifically when payments are made to the business rescue practitioners in respect of their fees and remuneration, after an application to convert rescue proceedings to liquidation proceedings, but before the final winding-up order are void in terms of s 341(2) read with s 348 of the Companies Act 61 of 1973 (the Companies Act 1973).

[2] The Western Cape Division of the High Court, Cape Town (the high court) answered that question in the affirmative. It accordingly declared void the payments to the business rescue practitioners (BRPs), and ordered them to pay those amounts to the liquidators of the first respondent, Montic Dairy (Pty) Ltd. The high court subsequently granted the BRPs leave to appeal to this Court.

[3] Montic Dairy (Pty) Ltd (in Liquidation) (the company) carried on business as a dairy. On 2 November 2015 the company was placed under business rescue proceedings and the second to fourth appellants were appointed as BRPs. The BRPs were employees and directors of the first appellant, Mazars Recovery & Restructuring (Pty) Ltd (Mazars). It was through Mazars that they conducted their business as BRPs and received remuneration for their services.

[4] On 14 April 2016 and in the Gauteng Division of the High Court, Pretoria, Creighton Dairies (Pty) Ltd, a creditor of the company, together with eleven other creditors, commenced liquidation proceedings against the company (the Creighton liquidation application). Even though the BRPs had resolved on 28 April 2016 that there were no longer any reasonable prospects for the company to be rescued, they nonetheless, filed a notice of intention to oppose the Creighton liquidation application on 29 April 2016. Such opposition was later withdrawn on 12 May 2016 and the BRPs launched their application on an urgent basis on 16 May 2016. They sought an order to discontinue the business rescue proceedings and convert them to liquidation

proceedings in terms of s 141(2)*(a)* of the Companies Act 71 of 2008 (the **Companies Act 2008**). The basis of their application was that there were no reasonable prospects for the company to be rescued. Their application for the winding-up of the company was granted by Tuchten J on 14 June 2016 and the second to fourth respondents were subsequently appointed as its liquidators (the liquidators). Meanwhile, on 23 May 2016 and 2 June 2016, while the conversion application was pending, the BRPs made two payments totalling R1,5 million in respect of their fees and expenses to Mazars.

[5] After the liquidators assumed office, they sought, and obtained, an order in the high court declaring void the payments made to Mazars in terms of **s 341(2)** and s 348 of the Companies Act 1973. Despite the repeal of that Act, these two sections are amongst those which remain applicable under the **Companies Act 2008** by virtue of item 9(1) of schedule 5 of the Act.

[6] Section 341(2) provides:

'Every disposition of its property (including rights of action) by any company being wound-up and unable to pay its debts made after the commencement of the winding-up, shall be void unless the Court otherwise orders.'

And s 348 provides that a winding-up is deemed to have commenced at the time of the presentation of the application for the winding-up to the court.

[7] The payments made by the company to Mazars took place after 16 May 2016, after the application to liquidate the company was presented to court. They are, by default void in terms of s 341(2), as no court had ordered otherwise. Thus, the BRPs have to demonstrate why the payments fall outside the clutches of s 341(2). Before this Court, they relied on the following submissions. First, that although the payments were made within the prescribed period, they should not be treated as dispositions of the company because at that stage, business rescue proceedings had not terminated. Second, that the payments were not 'made' by the company and were therefore not dispositions of the company, as envisaged by the section. Third, that because the payments were made for the BRPs services to enable them to discharge their duties during business rescue proceedings, they should accordingly not be treated as dispositions for the purposes of s 341(2).

[8] In support of these submissions, they sought that s 341(2) be read with Chapter 6 of the **Companies Act 2008**, as in a reading together of the provisions of the old and new **Companies Act. A** reading together is permissible in terms of **s 5(4)***(a)* of the **Companies Act 2008** in circumstances where there are inconsistencies between the new **Companies Act 2008** and any other national legislation. They argued that such an interpretational exercise of **s 341(2)** is desirable, sensible and results in a business-like interpretation supported by judicial precedent.

[9] The BRPs argued that as they are obliged to continue with their duties, even during this period after the commencement of liquidation proceedings but before a winding-up order, they were entitled to be paid for their services. The payments are thus 'statutorily mandate[d]',**[1]** and as such fall outside the ambit of dispositions under **s 341(2).** In addition, to the aforesaid, the BRPs argued that these payments should not be considered as dispositions by the company because they had made the payments and not the company.

[10] Plasket JA in *Eravin Construction CC v Bekker N O* pointed out that **s 341(2)** '. . . states *expressly* that a disposition in the terms contemplated by it "shall be void"'.**[2]** (My emphasis.) Recently this Court adequately dealt with **s 341(2)** and dispositions made by a company being wound-up in *Pride Milling Company (Pty) Ltd v Bekker N O and Another***[3]** (*Pride Milling*) holding that:

'The provisions of **s 341(2)** could not be clearer. They, in unequivocal terms, decree that every disposition of its property by a company being wound-up is void. Thus, the default position ordained by this section is that all such dispositions have no force and effect in the eyes of the law ie the disposition is regarded as if it had never occurred. The mischief that **s 341(2)** seeks to obviate is plain enough. It is to prevent a company being wound-up from dissipating its assets and thereby frustrating the claims of its creditors.'**[4]**

[11] In my view, the BRPs conspicuous failure to refer to the recent decision of this Court is telling. Petse AP in *Pride Milling* could not have said it more explicitly that the 'predominant purpose [of **s 341(2)]** is to decree that all dispositions made by a company being wound-up are void.'**[5]** If that is the existing position then these

payments are rendered invalid *ex tunc* at the time that they are made. Further, had they referred to *Pride Milling* they would have appreciated that they had the proviso in **s 341(2)** available to them. The BRPs did not dispute this and did not seek to make out such a case. They reasoned that not engaging the proviso was an issue of inconvenience, as they would have to go to court to seek such an order. By not engaging the proviso, they, in essence, sought that this Court grant them special preference without having a court exercise its discretion to endorse the payments sought, as is provided by **s 341(2).**

[12] In *Pride Milling*, Petse AP went on to explain that persons such as the practitioners are not without a remedy :

'As to the rider to **s 341(2)**, its manifest purpose is to give a court an unfettered discretion to decide whether or not to direct otherwise and thus depart from the default position decreed by the legislature. As already discussed, this discretion is only exercisable in relation to payments made between the date of lodging of the application for winding-up and the grant of a provisional order. In exercising this discretion, a court will, amongst other relevant factors, naturally have regard to the underlying purpose of the provision in the context of winding-up a company unable to pay its debts, the interests of the creditors and those of the beneficiary of the disposition. It bears mentioning that the consequences of visiting dispositions of the kind dealt with in **s 341(2)** with voidness, will not always be harsh. This is so especially when the potential countervailing harshness of allowing the disposition, which would invariably denude the company of its assets in proportion to the value of the disposition to the prejudice of its creditors, is borne in mind. . . '. (References omitted)**[6]**

[13] This Court and the Constitutional Court had the opportunity to pronounce on the status of remuneration claims of BRPs. In *Diener N O v Minister of Justice and Correctional Services and Others* this Court dealt with the status of a claim for remuneration and expenses by a practitioner, when business rescue had failed and was converted into liquidation proceedings. Practitioners' claims for remuneration were not given 'super-preference' and this Court stated that the preference conferred on a practitioner's claim 'after the conversion of business rescue proceedings into liquidation proceedings, [was] no more than a preference in respect of his or her remuneration to claim against the free residue after the costs of liquidation but before

claims of employees for post-commencement wages, of those who have provided other post-commencement finance, whether those claims were secured or not, and of any other unsecured creditors.'**[7]** The Constitutional Court confirmed this position**[8]** and there is thus clear and direct authority on the point.

[14] It must be pointed out that the case argued by the BRPs evolved and was in total contrast to that set out in their heads of argument. Either way, I am not persuaded that the BRPs made out a case that the disposition made are not void *ex tunc*. They had available to them the proviso in **s 341(2)** but did not make out a case for such order. As such, it follows that the high court correctly held that the dispositions were void and set them aside.

[15] The BRPs, having failed to persuade this Court with their submissions, were forced to concede that the payments emanated from the company's bank account and as with payments of other company expenses by the BRPs, the payments in question were made on behalf of the company and therefore amounted to dispositions of the company.

[16] Consequently, for the reasons set out above, there is no basis to upset the high court's finding and the appeal must fail. There is no reason to depart from the general rule that the losing party should pay the costs.

[17] In the result the following order is made:

The appeal is dismissed with costs, including the costs of two counsel.

Naude and Another v Louis Pasteur Medical Investments (Pty) Ltd and Others (31/2021) [2022] ZASCA 139 (24 October 2022)

Business rescue ─ appeal against an order granting a shareholder and a disputed creditor legal standing at meetings of creditors ─ settlement of appeal between primary litigants ─ removal of appeal ─ opposition to removal of appeal by intervening party ─ appellants contending the appeal moot ─ intervening party opposing the declaration of mootness ─ settlement between primary litigants rendering the appeal moot ─ appeal declared moot ─ intervention application struck from the roll.

[1] The second appellant, Louis Pasteur Hospital Holdings (Pty) (Pasteur Holdings) (in business rescue), is a well-known healthcare service provider and operates a standalone hospital in the Pretoria central business district. It commenced voluntary business rescue proceedings (the proceedings) in June 2018 and appointed the first appellant, Mr Etienne Jacques Naude (Naude) as the business rescue practitioner.

[2] The first respondent, Louis Pasteur Medical Investments (Pty) Ltd (Pasteur Investments) and Bonitas Medical Fund (Bonitas) are joint shareholders in Pasteur Holdings. Pasteur Investments holds 74 per cent of the issued shares, while Bonitas holds the balance of 26 per cent. The business of Pasteur Holdings is organised in a complex group structure with several related and connected entities, one of which is the second respondent, First Clinic Properties One Limited (First Clinic).

[3] In August 2016, Bonitas obtained a judgment against Pasteur Holdings,**[1]** as a result, Bonitas and SARS are the largest creditors and jointly hold more than 92 per cent of the calculated voting interest. Another creditor is Arjohuntleigh Africa (Pty) Ltd (Arjohuntleigh), cited as the 23rd respondent in the appeal. Its claim of R42 276 against Pasteur Holdings represents less than 0,17 of the voting interest.

[4] On 6 June 2019, Naude convened a meeting of creditors and tabled a business rescue plan for adoption which was rejected. Exercising the election in s 153(1)*(a)(ii)***[2]** of the Companies Act 71 of 2008 (the Act), Naude brought an application to set aside the vote on the grounds that it was 'inappropriate' (the no vote application). He did not launch the application within the 5 days envisaged in the Act. On 21 June 2019, Arjohuntleigh applied for the liquidation of Pasteur Holdings (the liquidation application). In addition, Arjohuntleigh sought an order compelling Naude to file a notice of the termination of the proceedings as contemplated by s 132(2)*(b)* of the Act.**[3]**

[5] The no vote and liquidation applications were amongst several applications**[4]** assigned to Ranchod J as a case manager. On 4 November 2019, Ranchod J issued a directive authorising a meeting of creditors on 12 November 2019. Pasteur Investments objected to this meeting, as a result, Ranchod J retracted the directive and convened a case management meeting with representatives of all affected parties. On 20 November 2019, he issued a second directive authorising Naude to convene a meeting of creditors and holders of voting interests. The purpose of the meeting was to obtain approval from creditors to prepare, publish and vote on a revised business rescue plan.

[6] Pasteur Investments objected to the authorised meeting and, together with First Clinic, launched an urgent application in the Gauteng Division of the High Court, Pretoria (the high court) on the 15 January 2020 which served before Holland-Müter AJ. The learned Acting Judge granted the following order:

'1. The First and Second Applicants are entitled to proceed with this application against the First and Second Respondents and the general moratorium on legal proceedings for purposes of this application is uplifted in terms of section 133(1)(*b*) of the Companies Act 71 of 2008 ("the Act")

2. Leave is granted to the First and Second Applicants to intervene in the pending business rescue of the Second Respondent;

3. This application, including Part B of the application, is subject to case management, together with all pending applications, which case management is conducted by his Lordship Mr Justice Ranchod;

4. [deleted] . . .

5. Pending the finalisation of this application,

5.1 the creditors meeting which is being convened for 15 January 2020 is postponed;

5.2 the First and Second Respondents are interdicted and restrained from considering, publishing or call a meeting to vote and/or adopt a business rescue plan

in terms of section 150, 151 and/or 152 of the Act subject to the finalisation of the pending no-vote application instituted by the Business Rescue Practitioner

6. Costs are reserved.'

Lebashe Financial Services (Pty) Ltd v The Prudential Authority and Others (346/2021) [2022] ZASCA 141 (24 October 2022)

Winding-up application- Insurance Act – interpretation of s 54(5) – precludes commencement of business rescue or winding-up by resolution or court order – proceedings as such not prohibited and not void – nature of powers of curator under s 54(2) – to hold, investigate and report – no duty to seek rescue or recapitalisation of insurer.

Facts: Bophelo and Nzalo (the insurers) are public companies that were licensed to conduct insurance business under the Insurance Act 18 of 2017. They were wholly owned by Bophelo Insurance Group (BIG). Insurers are required to maintain certain capital to cover their obligations, but large losses of funds held with VBS bank led to concerns by the Prudential Authority and issues of their recapitalisation. Lebashe was an investment holding company which was approached to recapitalise BIG. The Authority ended up securing orders placing the insurers under provisional curatorship. The curator's report was of bleak longer-term prospects for the insurers, so the Authority resolved to apply for provisional liquidation.

Appeal: Against the High Court judgment that discharged the provisional curatorship orders and made final liquidation orders. The High Court had granted Lebashe leave to intervene in the liquidation applications.

Discussion: Whether Lebashe had standing in the appeal; whether section 54(5) of the Insurance Act precluded final liquidation orders in respect of the insurers; and whether the curator was in law required to seek or effect the recapitalisation of the insurers.

Findings: Lebashe was only a creditor and shareholder of the holding company of the insurers. There were no legal relationships between Lebashe and the insurers. Lebashe's interest was too indirect and insufficient to clothe it with locus standi in the appeal. By reason of s 54(5), the provisional liquidation orders in respect of the

insurers should not have been granted. However, the final winding-up orders were not precluded by s 54(5), nor by the provisional curatorship orders. Under section 54(2) the nature of the powers of the curator was to hold, investigate and report. There was no duty to seek rescue or recapitalisation of the insurers.

Order: The appeal is dismissed with costs.

[32] Section 54(5) of the Insurance Act reads:

'An insurer or a controlling company may not begin or enter business rescue or be wound-up while under curatorship within the meaning of the **Financial Institutions (Protection of Funds) Act, unless** the curator applies for the business rescue or winding-up.'

Imperial Logistics Advance (Pty) Ltd v Remnant Wealth Holdings (Pty) Ltd (326/2021) [2022] ZASCA 143 (24 October 2022)

Winding up application - for a final order of liquidation – debt admitted by the respondent – indebtedness not disputed on *bona fide* and reasonable grounds – existence of a counterclaim not established – provisional liquidation order granted.

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

1 The application for postponement is dismissed with costs.

2 The appeal is upheld with costs, including costs of two counsel.

3 The order of the Gauteng Division of the High Court, Pretoria, is set aside and is replaced with the following order:

'1 The respondent is placed under provisional order of winding-up.

2 A rule nisi is issued calling upon the respondent to show cause on Monday, 10 October 2022 at 10h00 or as soon thereafter as counsel may be heard why:

(a) it should not be placed under a final order of winding-up; and

(b) the costs of this application should not be costs in the winding up.

3 Service of this order shall be effected by the Sheriff:

(a) On the respondent at its registered address, namely 23 Ebbehout Street, Chantelle, Akasia, Pretoria, and care of its attorneys of record, Saleem Ebrahim Attorneys, 37 Quinn Street, The Newton, Ground Floor, Newton, Johannesburg;

(b) On the Companies and Intellectual Property Commission of South Africa;

(c) On the Master of the High Court, Pretoria;

(d) On the South African Revenue Service, Pretoria; and

(e) On the respondent's employees, if any, at the respondent's registered address set out in paragraph 3(a) above, and on any trade union that may represent those employees.

4 A copy of this order is to be published once in both the Government Gazette and the Citizen newspaper.'

[1] This is an appeal against the judgment and order of the Gauteng Division of the High Court, Pretoria (the high court), dismissing Imperial Logistics Advance (Pty) Ltd's (the appellant) application for the final liquidation of Remnant Wealth Holdings (Pty) Ltd (the respondent) for want of urgency. The appeal is with leave of the high court.

[2] The appeal was set down for hearing in this Court on 25 August 2022. On 1 August 2022, the respondent's attorneys addressed a letter to the appellant's attorneys requesting that they consent to the removal of the matter from the roll and tendered costs associated with the removal. The reasons given for this were that the respondent's counsel was not available on 25 August 2022 to argue the matter and that obtaining alternative counsel was not possible as the respondent preferred the

current counsel to proceed with the matter since he was fully acquainted with the facts. The appellant's attorneys refused the request for the removal.

[3] Thereafter the respondent's attorneys wrote a letter to the Registrar of this Court requesting the postponement of the matter. On 15 August 2022, the Registrar informed the parties that if they were unable to agree to a postponement before 25 August 2022, the matter would proceed as scheduled and that any request for a postponement would have to be dealt with on the date of the hearing.

[4] This prompted the respondent to bring an urgent application for a postponement on 23 August 2022, in which the appellant was called upon to file an answering affidavit by 24 August 2022. As expected, the appellant took exception to the time period set for filing the answering affidavit. It instructed its attorneys of record to oppose the application on the basis that it was *mala fide*, designedly late and failed to make out a case for the postponement.

[5] On the date of the hearing, 25 August 2022, counsel for the respondent, informed us that he was new in the matter, his instruction was only to argue the application for a postponement of the matter, and he had no mandate to argue the appeal. After hearing arguments from the parties' legal representatives, we dismissed the application and excused the respondent's counsel as requested by him. The appeal proceeded in the absence of the respondent or its legal representative. Having heard the submissions made by the appellant's counsel, we upheld the appeal, set aside the order of the high court, and replaced it with an order placing the respondent under a provisional order of liquidation. We indicated that the reasons for both orders would be furnished in due course. These are the reasons.

[10] The explanation given by the respondent for postponement is not satisfactory. It is not explained why the secretary of the respondent's firm did not access the email account of Mr Madhi before 25 July 2022. In any event, unavailability of counsel is not an excuse. When the respondent's attorneys of record

became aware that the preferred counsel would not be available, they had almost a month to find an alternative counsel. The application was made only two days before the hearing of the appeal putting the appellant under limited time constraints in which to file an answering affidavit. In addition, the record was not 'voluminous' as suggested by the respondent and neither were the issues of fact and law complex. The application for a postponement was accordingly dismissed with costs.

The merits of the appeal

[11] As regards the merits, the facts are straightforward. The respondent is indebted to one of the appellant's trading divisions, KWS Logistics (KWS), in an amount of more than R80 802 540.29 plus interest. KWS rendered transport services to the respondent as a subcontractor. It rendered these services, on behalf of the respondent, to the respondent's sole client, South 32 SA Ltd (South 32). The respondent received an aggregate amount of more than R304 405 111.03 from South 32 for the services rendered by KWS.

[12] Despite the respondent's receipt of such payments from South 32 and the respondent executing an acknowledgement of debt (AOD) in favour of KWS, it failed to pay the substantial amounts owed by it to KWS. The respondent's reasons for its failure to make such payment to KWS are inexplicable. So too, is its refusal to account for the revenue it received from South 32.

[13] On 27 July 2020, the appellant brought an application for the liquidation of the respondent on an urgent basis, on the grounds that the appellant is a substantial unsatisfied creditor of the respondent as contemplated by s 346(1)*(b)* of the Companies Act, 1973 (the Act); the respondent is commercially and factually insolvent; the respondent is unable to pay its debts as envisaged in s 344*(f),* as read with s 345(1)*(c)* of the Act; and it is also just and equitable that the respondent be wound-up as provided for in terms of s 344*(h)* of the Act.

[14] This liquidation application was preceded by an application brought on an *ex parte* basis, in which the appellant sought the freezing of the respondent's bank

accounts, getting access to its bank statements and their financial interest, and interdicting and restraining the respondent and its director, Mr Mulinda Neluheni (Neluheni), the deponent to the answering affidavit, from disposing of, encumbering or dealing with their property and vehicles pending the outcome of the proceedings that were to be brought (anti-dissipation application). The anti-dissipation order was granted on 30 June 2020 with a return date of 25 August 2020.

[15] The liquidation and anti-dissipation applications were later consolidated, and heard by Hughes J. On 1 December 2020, the learned judge discharged the rule *nisi* relating to the anti-dissipation application and dismissed the application for the liquidation of the respondent for want of urgency. The appellant's application for leave to appeal against the discharge of the rule *nisi* was dismissed. Nothing further needs to be said about the anti-dissipation application. The high court granted the appellant leave to appeal against an order dismissing the liquidation application. It is this appeal that concerns this Court. As I have already stated, the appeal is with leave of that court.

[16] The issues are, firstly, whether the high court was correct in determining that the winding-up application was not urgent and dismissing it on that ground, and secondly, whether a case for the winding-up of the respondent had been made out.

[17] The issues must be considered against the following factual background. During 2018, the respondent submitted a bid for the provision of logistical services to South 32, for the transportation of manganese products from South 32's operations in Hotazel and Meyerton to, among others, the Durban, Saldana Bay, and Richard's Bay ports or the South 32 Alloys Meyerton Branch. The transportation of the manganese products was to be done with 34-ton capacity tipper trucks. The respondent was the successful bidder and entered into a contract with South 32 to render the logistical services for South 32 on about 13 December 2018. The respondent did not have sufficient trucks to transport South 32's manganese

products. The appellant offered to make its trucks available for use by the respondent on a sub-contract basis.

[18] Initially, KWS rendered the transport services in terms of the oral agreement, which covered the initial period of the respondent's 'onboarding' with South 32. On 7 February 2020, KWS and the respondent concluded a formal three-year transport services agreement in terms of which KWS would render logistics services to the respondent as an independent contractor to allow it to perform and meet its obligations under the agreement with South 32.

[19] KWS complied with its contractual obligations by providing services to the respondent and invoicing it for services rendered. KWS alleged that the respondent is indebted to it in the sum of R80 802 540.29 plus interest for the services it rendered in terms of the transport services agreement. On or about January 2020, the respondent admitted that it was indebted to KWS in the sum of R68 011 880.16, in respect of which the respondent signed an AOD.

[20] On 24 April 2020, the appellant, through its attorneys, addressed a letter of demand to the respondent demanding payment of the amount owing in terms of the AOD and transport services agreement. The amount outstanding under the AOD was R42 309 259.07 plus R34 893 142.80 for unpaid invoices for January 2020 to March 2020.

Van Wyk Van Heerden Attorneys v Gore NO [2022] ZASCA 128

Insolvency – Deposit into attorney's account – Application to set aside – Test whether attorney benefits or not – Onus to show solvency on attorney – Insolvency Act 34 of 1926, s 26(1)(b).

Facts: Three deposits were made from the account of Brandstock Exchange (Pty) Ltd to the trust accounts of attorneys. Brandstock was later provisionally and then finally wound up. The deposits attracted the attention of the liquidators, who

contended that the deposits were dispositions and sought to have them set aside in terms of s 26(1)(b) the Insolvency Act 24 of 1936.

Appeal: Against the findings of the High Court that the deposits were dispositions and setting them aside. The attorneys were ordered to pay R1,525,000 to the liquidators.

Discussion: That the sole director of Brandstock was one Mr Philp and that the attorneys acted for him; that the attorneys were unaware of the source of the deposits into their account; the material facts of the application; the characteristics of trust accounts held with banks; that attorneys operate on their trust accounts as principals and not as agents; and that at the heart of section 26(1)(b) is the requirement that the party to whom the disposition was made is put to the proof that "immediately after the disposition was made, the assets of the insolvent exceeded his liabilities".

Findings: The person to whom the disposition is made for the purpose of section 26(1)(b) must have benefited from it. Regarding the deposit of R1,25 million, the attorneys acted as a conduit in the onward transmission of the funds. Since the attorneys did not benefit, they did not attract the onus to show the solvency of Brandstock immediately after the deposit was made. The deposit into their account was not a disposition to the attorneys and was thus not impeachable under s 26(1)(b). Regarding the other two deposits, the attorneys made them part of their assets when they appropriated them to settle their fees and pay disbursements incurred on behalf of their clients. As such, they clearly benefited from the deposit of those two amounts. This despite their not having breached the principles governing the operation of the trust account.

Order: The appeal is upheld relating to the largest deposit and the order is amended such that the two other deposits are declared dispositions without value. The attorneys are ordered to pay the liquidators R275,000.

Valerio Engineering CC v Designatech (Pty) Ltd (36816/2021) [2022] ZAGPPHC 706 (21 September 2022)

Winding up application – Unable to meet payments of debt – Factual and commercial insolvency-Applicant seeks a provisional winding-up order against the respondent.

Discussed: Point in limine; issues; applicant's case is that the respondent is indebted to the applicant in the amount of R440 458.27 for goods sold and delivered and services rendered; in Kali v Decotex (Pty) Ltd and Another 1988 (1) SA 943, the court held that if the applicant establishes a prima facie case on affidavit, then, a provisional order of winding up should be granted; the respondent is deemed to be unable to pay its debts and is factually and commercially insolvent.

Order: The respondent is placed under provisional liquidation in the hands of the master.

Cooper NO v Miftah Ul Junainah CC [2022] ZAWCHC 195

Impeachable transactions – Void dispositions – Jurisdiction to order return of property disposed of – High Court having exclusive jurisdiction – Liquidators entitled to costs on High Court scale – Companies Act 61 of 1973, s 341(2).

Facts: Six payments totalling over R183,000 were paid by Cape Basic Products (Pty) Ltd (in liquidation) to respondent after the company was provisionally wound-up.

Application: The liquidators sought an order in terms of section 341(2) of the Companies Act 61 of 1973 for the repayment of what they contend were dispositions. The respondent abandoned its defence and offered to settle the full amount and interest, but only offered to pay the party and party costs of the applicant on the magistrate's court tariff. The offer is to be made an order of court and the court is to decide on the appropriate costs.

Discussion: Whether the applicants were compelled to bring the application in the High Court; that the Companies Act declares the disposition void and all that is required is an order for the return of the disposition; the reference to "the court" in section 341(2) of the Companies Act; and the contention that only the High Court can validate such dispositions.

Findings: The provisions regarding “court” in the Companies Act provide that, except for offences, only the High Court has jurisdiction under this Act in respect of companies. The magistrate’s court does not have jurisdiction to order the return of property disposed of by a company being wound-up and unable to pay its debts in contravention of section 341(2) of the Companies Act, irrespective of whether the disposition was made before or after a provisional winding-up order was granted.

Order: Payment plus interest is ordered, with costs on the High Court scale.

The Standard Bank of South Africa Limited v Chakane Properties (Pty) Ltd (2709/2022) [2022] ZAFSHC 250 (29 September 2022)

Winding up application – Just and equitable provisional liquidation

Applicant applies for an order in terms of which the respondent must be placed under provisional liquidation; under the allegation that the respondent is unable to pay their debt.

Discussed: Sequestration/liquidation proceedings are not legal proceedings for enforcement of a credit agreement under the National Credit Act 34 of 2005 or ex contractu; cause of action is a deed of insolvency and the Law of Insolvency is the scope wherein the judgment must be decided; the inability of the respondent to pay and the lack of any response or explanation are strongly indicative of the fact that the business is operated at a loss; it is, on a balance of probabilities, commercially insolvent; it will not be to the benefit of the applicant and other creditors if the court allows the respondent to operate on an insolvent basis.

Order: The respondent company is placed under provisional liquidation.

Business Partners Limited v Fair Deal Select CC (4426/2021P) [2022] ZAKZPHC 56 (4 October 2022)

Winding up application– Whether the debt is bona fide disputed on reasonable grounds

The applicant seeks an order for the provisional winding-up of the respondent

Discussed: The issue arising is whether the debt is disputed by the respondent on reasonable and bona fide grounds; see Kalil v Decotex (Pty) Ltd and another 1988 (1) SA 943; the allocation of the R4 000 000 had become the central issue for determination; whether such an allocation was permitted in the light of the relevant applicable legal principles; for relevant legal principles see Ebrahim (Pty) Ltd v Mahomed and others 1962 (1) SA 90; this application was ill-conceived and should be dismissed with costs.

Order: A rule nisi is issued calling upon all persons interested to show cause why the respondent should not be finally wound-up; this order operates with immediate effect as a provisional order for the winding-up of the respondent.

Business Doctor Consortium v Old Mutual Finance [2022] ZAWCHC 196

Company – Minority shareholders – Oppressive or unfairly prejudicial conduct – Allegations relying on reference to group of companies – Separate entities – Applicant failing to establish jurisdictional requirements – Companies Act 71 of 2008, s 163.

Facts: There is cross-ownership and shareholding among the six Old Mutual (OM) companies (respondents) with OM Finance invoicing OM Life for its services in terms of various agreements to govern the amounts to be levied. The two Business Doctor companies are minority shareholders of OM Finance and contend that it has been undercharging OM Life for a decade and that they have accordingly suffered prejudice.

Application: Seeking relief for minority shareholder oppression in terms of section 163 of the Companies Act 71 of 2008.

Discussion: The commercial agreements regulating the relationship between the respondents; the understanding reached between the group and the applicants; the pricing terms; the threshold for relief in terms of section 163 in motion proceedings; that to bring the respondents under the umbrella of the provisions of section 163 the applicants seek to obscure the distinction between the respondent entities; and that

the applicants' case is predicated by references in vague and general terms to the "group".

Findings: The entities within the group are separate and independent and fall to be legally treated as such. The relief sought that OM Finance be ordered to institute proceedings to recover payment was not competent relief under section 163(2). The applicants have failed to adduce the necessary primary facts to establish the required jurisdictional requirements. The group entities are not essentially part of the same financial enterprise and that the agreements referenced by the applicants do not support the argument for a compact or a bargain.

Order: The application is dismissed.

Taljaard v Land and Agricultural Development Bank [2022] ZANCHC 59

Business rescue -constitutional challenge – Equality before the law – Business rescue only applying to companies – Not to natural persons, sole proprietorships and trusts – Not discrimination – Rational connection between differentiation and legitimate government purpose to facilitate business rescue for companies – Companies Act 71 of 2008, Ch 6 – Constitution, s 9(1).

Facts: Project Multiply and Velvetcream (two companies), the Merwede Trust and Mr Van der Merwe operate as a "group" under the name of Merwede Farming. Drought and the covid pandemic saw the group in financial distress. It was financed by the Land Bank. Business rescue proceedings were commenced and sequestration was launched against the Trust and Mr Van der Merwe. The Landbank then launched liquidation applications against Project Multiply and Velvetcream.

Application: The main application seeks an order dismissing the provisional winding-up and sequestration orders for the group and an order instead placing the companies, the Trust and Mr Van der Merwe under supervision and that business rescue proceeding be commenced. The constitutional challenge is on the basis that individuals and trusts are excluded from business rescue as envisaged in Chapter 6 of the Companies Act 71 of 2008.

Discussion: Equality before the law and section 9(1) of the Constitution; the contention that the differentiation in the applicability of business rescue between companies on the one hand, and sole proprietorships, natural persons and trusts on the other, was arbitrary; the purposes of business rescue; the position in other countries; and the definition of “company” in the Act.

Findings: The exclusion of Mr Van der Merwe and Merwede Trust does not amount to discrimination. Even if it were, such discrimination may be justifiable under section 36 of the Constitution, the limitation clause. There was a rational connection between the differentiation and a legitimate government purpose to facilitate business rescue for companies.

Order: The main application is dismissed.

Business Doctor Consortium Limited and another v Old Mutual Finance (RF) (Pty) Ltd and others [2022] JOL 55914 (WCC)

Company law-alleged minority oppression of shareholders

As minority shareholders in the first respondent, applicants alleged a material under-recovery of costs by first respondent from the third respondent. Alleging further that the corporate respondents who were alerted to the under-recoveries refused or neglected to take steps to rectify the irregularities, applicants contended that the above amounted to minority oppression because the corporate respondents acted in a manner that was unfairly prejudicial to applicants’ interests.

Wille J sets out relief afforded a shareholder in section 163 of the Companies Act 71 of 2008 [para 53]. Courts will be slow to interfere in the management of companies and will be cautious in the exercise of wide discretion [para 54-55]. Court points to jurisdictional requirements to be established before its power to grant just and equitable relief is triggered [para 55]; and requirements of minority shareholder seeking to rely on the remedy [paras 56-57]. The enquiry is whether a reasonable bystander observing the consequences of the conduct would regard it as having a prejudicial effect [para 59]. Judgment traverses principle of separate legal personality [para 69]; and test for unfair prejudice [para 72].

Applicants failing to establish jurisdictional facts, and should have pursued remedy in terms of section 165 of the Companies Act. Application dismissed.

ABSA Bank Limited v Longchamp Turf Investments (PTY) Ltd and Others (7753/2015) [2022] ZAGPJHC 784 (11 October 2022)

Application for leave to appeal an order granted for the final winding up of Longchamp at the behest of ABSA.

Discussed: ABSA's grounds for winding up Longchamp were based on two claims; the term loan; and repayment of an overdraft facility; whilst Longchamp is correct that the Court a quo erred in stating in its reasons that it was the mortgage bond, which was destroyed not the term loan agreement, this does not make a difference to the outcome; in attempting to avoid the consequences of the term loan agreement Longchamp advances two defences which are inconsistent with one another; one hand it seeks to assert that there was no sine causa; on the other, it asserts that the agreement was induced by a fraudulent misrepresentation; test for leave to appeal in terms of section 17(1)(a)(i) of the Superior Courts Act was set out in Mont Chevaux Trust v Goosen 2014 JDR 2325; the Court does not consider that another court would come to a different conclusion.

Order: The application for leave to appeal is dismissed.

Lebashe Financial Services (Pty) Ltd v The Prudential Authority and Others (346/2021) [2022] ZASCA 141 (24 October 2022)

Company – Insurer – Curatorship and liquidation – Standing on appeal – Directness and sufficiency of interest in relief claimed – Creditor and shareholder of holding company of insolvent insurer has no locus standi to seek curatorship of insurer – Nature of powers of curator – Insurance Act 18 of 2017, s 54.

VAN DER MERWE JA (PONNAN JA, MOTHLE JA, BASSON AJA and WINDELL AJA concurring.)

STRYDOM AND ANOTHER NNO v SNOWBALL WEALTH (PTY) LTD AND OTHERS 2022 (5) SA 438 (SCA)

Insolvency — Unlawful alienations and preferences — Dispositions without value — Meaning of 'not made for value' — Insolvency Act 24 of 1936, s 26(1).

A company, of which appellants were the liquidators, had sold shares to respondents at less than their alleged reasonable market value, and appellants had applied to the High Court for the setting aside of the transactions as 'dispositions of property not made for value', as intended in s 26(1) of the Insolvency Act 24 of 1936 (see [1] and [5]). Respondents met this with an exception that the allegation failed to ground a s 26(1) claim, contending that 'not made for value' meant for no value at all (see [6]). The High Court accepted respondents' argument, dismissing the notion that paying a discounted price was a giving of no value at all (see [1] and [8]). In an appeal to the Supreme Court of Appeal the issue was the meaning of 'not made for value' (see [3] and [36]).

Held, that it meant for no value at all. This conclusion followed on consideration of the plain words of the phrase, its context, the absurd results that could flow from appellants' interpretation, and case law holding that 'value' need not even be monetary (see [33] – [35]). Appeal dismissed (see [37]).

SUPER GROUP TRADING (PTY) LTD t/a SUPER RENT v BAUER AND ANOTHER 2022 (5) SA 622 (WCC)

Company — Proceedings by and against — Proceedings against, based on directing mind doctrine — Particulars to state that action taken by directing mind was (i) within the field of company's operation assigned to directing mind; (ii) not totally a fraud on company; and (iii) by design or result partly for benefit of company — Even then, applicability of doctrine depending on correct context, which must also be pleaded.

Practice — Pleadings — Exception — To particulars of claim on ground that vague and embarrassing — May be upheld, even if defective, where particulars especially vague and embarrassing — In such circumstances, dismissing exception and allowing matter to proceed would compound embarrassment and prevent trial court from effectively delimiting issues — Uniform Rules of Court, rule 23(3).

It is not competent for a plaintiff to advance its claim on a jumble of causes of action. If a plaintiff intends to advance a claim based on more than one cause of action, it must do so by pleading them in the alternative, otherwise the particulars will, at best, be vague and embarrassing. If alternatives are inadequately pleaded, then the defendant must except to all of them. But where the defendant has difficulty in disentangling a jumble of causes of action, the court should take an accommodating approach to non-compliance by the defendant with its obligation under 23 of the Uniform Rules to set out the grounds of exception clearly and concisely. In such circumstances, dismissing the exception and allowing the matter to proceed to trial would compound the embarrassment and complicate the trial court's task of delimiting the issues. It would be preferable to make an order upholding the exception and directing the plaintiff to deliver amended particulars.

In proceedings against a company based on the 'directing mind' doctrine, the particulars must state that the action taken by the directing mind was (i) within the field of the company's operation assigned to the directing mind; (ii) not totally a fraud on the company; and (iii) by design or result partly for the benefit of the company. Even then, the applicability of the doctrine will depend on the correct context, which must also be pleaded.

Atlas Park Holdings (Pty) Ltd v Tailifts South Africa (Pty) Ltd [2022] 4 All SA 28 (GJ)

Company law – Misappropriation by director of a corporate opportunity – Whether lease agreements concluded by company were invalid due to director having conflict of interest and failing to make proper disclosure – Fiduciary duties of company directors – Companies Act 71 of 2008, section 75(8) – Director is obliged to make disclosure where he is conflicted and failure to make proper disclosure renders transaction ipso facto void unless a court exercising its discretion declares it valid.

In terms of section 75(8) of the Companies Act 71 of 2008, the applicant (“Atlas”) sought to declare valid a lease agreement purportedly concluded between it and the respondent (“Tailifts”). The latter denied that the main lease was signed when alleged – effectively claiming that it was a document manufactured by Mr Van Breda, who happened to be a director in both Atlas and Tailift. Atlas accepted that Van

Breda had a direct financial interest in the lease agreements by reason of his directorship in Atlas, but contended that any financial interest that he might have had in any of the upstream entities was indirect. Essentially, Atlas claimed to be entitled to relief under section 75(8) because all necessary disclosures were made regarding its direct personal financial interest in the lease agreements as a related party (due to Van Breda's directorship in Tailifts), but if any necessary disclosures by the entities upstream of Atlas were not made regarding their personal financial interest in the lease agreements (which was disputed by it) then that was only an indirect interest which section 75(5) is designed to exclude from consideration.

While accepting that there was non-compliance with the requirements of section 75(5), Atlas referred to that as a simple failure of de jure compliance on its part, contending that it had de facto complied with the disclosure requirements of the Act. Tailifts refused to abide by the lease agreements on the grounds that Van Breda was conflicted and the agreement was tainted due to his failure to make proper disclosure and his breach of the provisions of sections 75(5)(e) and (g).

Held – The three questions for determination were whether the provisions of section 75(5) imposed a fiduciary duty on Van Breda to disclose to Tailifts the existence of finance which would allow Tailifts to consider acquiring the property itself; whether an offending director can claim that the company was not able to exploit the opportunity (the corporate incapacity defence); and whether the court should exercise its discretion in favour of validating the lease agreements under section 75(8).

One of the legal issues raised by Atlas was whether a director only has to disclose a direct personal financial interest that he may have in the transaction or a direct personal financial interest that the director knows a related person has in that transaction. Van Breda, as a director of Tailifts, had a personal financial interest in the lease agreement because he was both a director of Atlas and a person who controlled both it, and the beneficial owners of shares in Atlas by reason of the extended meaning given to the term "control" in section 2(2)(c) and (d). A director is obliged to make disclosure where he is conflicted and failure to make proper disclosure renders the transaction ipso facto void unless a court exercising its discretion declares the transaction valid.

The Court finds that section 75 does not exclude a common law fiduciary duty not to misappropriate a corporate opportunity, and that where a director engages in a transaction where he has effectively usurped a corporate opportunity for personal financial advantage through extracting dividend income or other economic benefits via another company, then the requirements of a direct personal financial interest in respect of the matter to be considered is satisfied.

The corporate incapacity defence was rejected by the court, as Tailifts could have accessed the same financing available to Van Breda.

The application was dismissed with costs.

Trustees for the Time Being of the Hunter Family Trust v Duin-en-See (Pty) Ltd and others [2022] 4 All SA 260 (WCC)

Property – Ownership of property by company – Operation of share block scheme – Rights of shareholders to enjoyment of property – Share Block Control Act 59 of 1980, section 4 – A company shall be presumed to operate a share block scheme if any share of the company confers a right to or an interest in the use of immovable property – Essential requirement is some connection between the holding of shares in the company and the holders' entitlement by virtue thereof to a right or interest in the use of the company's immovable property.

The first defendant ("Duin-en-See") was incorporated in 1958, as a vehicle to acquire land in Plettenberg Bay. An agreement entered into by the original shareholders set out how each would subscribe for a shareholding in the company and acquire a portion of the land for their own benefit. As shareholders in the company, the plaintiffs exercised their rights in respect of their parcel in accordance with the agreement. Alleging that Duin-en-See intended to dispose of their portion without their consent, the plaintiffs sought an order declaring the company to be operating a share block scheme in terms of section 4 of the Share Block Control Act 59 of 1980, and confirming their rights to the property they acquired as shareholders in the company.

Duin-en-See noted an exception to the particulars of claim.

Held – The first ground of the exception was that the allegations pleaded in support of the declaratory relief sought were insufficient to trigger the presumption in section 4 and/or to satisfy the definition of “share block scheme” in the Share Block Control Act. In terms of section 4, a company shall be presumed to operate a share block scheme if any share of the company confers a right to or an interest in the use of immovable property or any part of immovable property. A share block scheme is defined in section 1 of the Act to mean “any scheme in terms of which a share, in any manner whatsoever, confers a right to or an interest in the use of immovable property”.

The agreement pleaded by the plaintiffs would, if established at trial, constitute a manner by which the holding of the respective blocks of shares referred to therein conferred a right to the use of identified parts or parcels of the company’s immovable property. It would not be necessary for the relevant right or interest in the use of the immovable property to be provided for in the definition of the relevant class of shares in the company’s memorandum of incorporation in order for the alleged agreement to be effective. The extremely wide definition of the term “share block scheme” acknowledges that such schemes might be devised in various ways. The essential requirement is some connection between the holding of shares in the company and the holders’ entitlement by virtue thereof to a right or interest in the use of the company’s immovable property. The court dismissed the first ground of exception.

The second ground related to the validity of the transfer of rights to the plaintiffs, with Duin-en-See maintaining that the transfer of rights to the plaintiffs had to be in writing to be valid. That contention was based on the provisions of the General Law Amendment Act 68 of 1957 or the Alienation of Land Act 68 of 1981. However, the transactions which culminated in the trust’s acquisition of the shares were sale of shares agreements and not contracts in respect of the sale of land or for the cession of rights in land. The agreements were therefore not subject to the formalities prescribed in either the General Law Amendment Act or the Alienation of Land Act. Exception dismissed

Van Rooyen NO and another v Mokwena NO and another [2022] 4 All SA 274 (LP)

Insolvency – Application for sequestration of trust on ground that it had impermissibly benefited from funds originating from insolvent company – Admissibility of evidence given at insolvency enquiry into the affairs of insolvent company as contemplated in sections 417 and 418 of the Companies Act 61 of 1973 – Testimony of witnesses who testified before the insolvency enquiry only admissible against such witnesses – In absence of evidence that trust was factually insolvent or unable to pay debts, sequestration is refused.

In their capacities as liquidators of an insolvent estate, the applicants applied for the sequestration of a trust and piercing of the trust veneer on the ground that the trust was the alter ego of the insolvent company ("TMI") and its sole director (Mr Mokwena). At the core of the application were allegations that the trust improperly benefited from funds originating from TMI. The applicants alleged that TMI funds were irregularly transferred to the trust and as such the trust's property was tainted rendering the trust invalid and liable to sequestration.

In February 2021, the applicants obtained the necessary authority to convene an insolvency enquiry into the affairs of TMI as contemplated in sections 417 and 418 of the Companies Act 61 of 1973. They attached copies of the transcription of the enquiry to their founding affidavit and set out a summary thereof in the founding affidavit. The respondents contended that the evidence based on the extracts of transcripts of the insolvency enquiry could not be relied upon in the present proceedings as it constituted hearsay evidence and was obtained in breach of the confidentiality rule applicable between attorney and client.

Apart from disputing that the evidence was hearsay, the applicants sought the admission of the evidence in terms of section 3(1)(c) of the Law of Evidence Amendment Act 45 of 1988.

Held – On the issue of the admissibility of evidence given at the insolvency enquiry, that section 3(1)(c) permits the court to admit otherwise inadmissible hearsay evidence if, having regard to the factors set out in subparagraphs (i) - (vii) of the provision, it is of the opinion that such evidence should be admitted in the interest of

justice. Based on case law, 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, which was not the subject of the enquiry. The applicants failed to make out a case why the hearsay evidence should be admitted as evidence in terms of section 3(1)(c).

As one of the witnesses at the insolvency enquiry was the legal representative of Mr Mokwena and TMI in all relevant litigation, his testimony at the enquiry was protected under the professional privilege principle. Communications between a lawyer and a client may not be disclosed without the client's consent.

No case was made for the trust veneer being pierced based on alleged trust form abuse by Mr Mokwena.

On the question of whether the applicants' claim was disputed on bona fide grounds, the court referred to the 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. While a respondent in an application for winding-up is not required to prove the truth of his defence, it is necessary for it to establish sufficient facts to show that the debt is bona fide disputed on reasonable grounds.

The court found that it had not been established that the trust was either factually insolvent or that it had failed to pay its debts. The application was dismissed.

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