# INSOLVENCY LAW UPDATES SEPTEMBER 2022[1]

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## CASES

### ATLAS PARK HOLDINGS (PTY) LTD v TAILIFTS SOUTH AFRICA (PTY) LTD 2022 (5) SA 127 (GJ)

**Company** — Directors and officers — Director — Personal financial interests — Non-disclosure — Failure to disclose personal financial interest in agreement concluded by company — Application to declare such agreement, approved by board, valid in terms of s 75(8) of Companies Act 71 of 2008 — Ambit and requirements of s 75(3) and 75(5) — Role of common law.

Section 75 of the Companies Act 71 of 2008 sets out the procedures and disclosure rules that apply when company directors, or people or entities related to them, have personal financial interests that conflict with those of the company. Section 75(5) requires directors to, (i) disclose any personal financial interest that they or a 'related person' * have in respect of a matter to be considered at a meeting of the board of directors; and then (ii) to leave the meeting and take no further part in the consideration of the matter. Section 75(3) prohibits a director from entering into agreements in which he or a related person has 'a personal financial interest' (a concept defined in s 1 of the Act), unless the agreement was subsequently ratified by shareholders following disclosure or declared valid by a court under s 75(8), which provides that an interested person may apply to a court to have a board-approved agreement declared valid.

The applicant, Atlas Park, through its director, Van Breda, made an application under s 75(8) to declare valid a purported lease agreement (and a subsequent addendum to it) concluded between Atlas Park, as landlord, and the respondent, Tailifts, as tenant. The application was brought because, when the agreements were signed, Van Breda held directorships in both Atlas Park and Tailifts, as well as in certain 'upstream' (ie holding) entities of Atlas Park. He also had an interest, via a holding company, in the property-owning company.

Atlas Park argued that the requirements of s 75(8) were complied with because the necessary disclosures regarding Van Breda's direct personal financial interest in the matter flowing from his directorship in Tailifts were made. To the extent that any disclosures were not made regarding Atlas Park's upstream entities, this was only in relation to *indirect* interest which, argued Atlas Park, was excluded by s 75. While Atlas Park conceded that there was non-compliance with s 75(5), it contended that this was a simple de jure failure and that it had de facto complied with the disclosure requirements of the Act.

Atlas Park in addition argued that Van Breda's failure to disclose to officers of Tailifts an opportunity to acquire the property for itself was irrelevant because Tailifts would have been unable to obtain funding (a defence of corporate incapacity). It appeared, however, that Van Breda did not disclose to Tailifts the availability of mezzanine financing to acquire the property. Section 1 of the Act defines a 'personal financial interest' as a '*direct* material interest of that person, of a financial, monetary or

economic nature, or to which a monetary value may be attributed'. Atlas Park argued that an indirect financial interest was insufficient to attract an obligation to make a disclosure under s 75(5). It also argued that, in the context of the present case, a related person was limited to a company of which the director was also a director.

The key issues before court were whether Van Breda had a direct personal financial interest in the transaction or knew that a related person had such an interest; what disclosures he was obliged to make to Tailifts; whether Tailifts was prejudiced or potentially prejudiced by the failure on the part of Van Breda to make the required disclosures and, if so, whether the consequences of the prejudice were relevant; and, lastly, the exercise of the court's discretion in granting relief under s 75(8).

In its judgment the court covered the following topics: whether s 75(3) imposed a fiduciary duty not to misappropriate a corporate opportunity (see [57] – [63]); whether s 75(5) included failing to disclose a corporate opportunity (see [64] – [72]); whether the acquisition of the property by the respondent was a corporate opportunity (see [73] – [91]; the applicant's defence of corporate incapacity (see [92] – [105]); and the appropriate remedy (see [106]).

**Held**

The applicant's assertion, that s 75(8) involved asking the court for a simple indulgence to bring a so-called de facto situation into line with some purely formal legislative requirements, was incorrect. However attractive, such an interpretation would minimise the mischief which the section was intended to address and reduce the purpose of the legislation to one requiring the simple ticking of boxes. (See [7].)

The word 'direct' in the definition of 'personal financial interest' could not be taken out of the context of its definition in s 1 of the Act, and therefore had to include the obligation to make a disclosure if the transaction under consideration involved a related person which itself had a personal financial interest — which, by definition, required the interest to be a direct and material one. Such an interpretation would strongly indicate that any shareholding (other than through a unit trust or collective investment scheme) by a director in another company which had an interest in the transaction under consideration would amount to a 'direct' personal financial interest requiring disclosure and recusal. Van Breda's directorship of Atlas Park's upstream entities implied that they possessed, through him, the requisite connection contemplated by s 75(3). (See [50].) The mischief s 75(3) sought to deal with was clear: a director was obliged to make disclosure if he or she was conflicted, and it

made an offending transaction ipso facto void unless a court exercising its discretion declared it valid (see [53] and [56]).

Section 75(3) did not exclude the *common-law* fiduciary duty not to misappropriate a corporate opportunity. Where a director engaged in a transaction by which he effectively usurped a corporate opportunity for personal financial advantage by extracting dividend income or other economic benefits via another company, the requirement of a direct 'personal financial interest' (as defined) was satisfied. (See [59] – [60], [63] and [72].)

Section 75(3) had to be understood to be composed of two parts: the underlying common law which determined when a disclosure had to be made, and the trigger that would void the transaction if it was not made. It required an actual financial benefit which the director, or a related party to the director's knowledge, had obtained through his or her failure to disclose. Any other reading of s 75(3) would lead to the absurdity that a wilful act directed against the company's financial interests or wellbeing would not result in the nullity of the tainted transaction. Section 75(3) served to determine when a transaction would be void in cases of non-disclosure arising from the breach of a fiduciary duty (including a conflict of interest), with the common law identifying when a duty of disclosure would ordinarily arise. (See [80], [90] and [98].)

It was clear that both Van Breda and the entities in which he had an ultimate interest, both in relation to being a shareholder in Tailifts' ultimate holding company and in the property-owning company, had a personal direct and material financial interest, as defined in the Act, of a financial or economic nature, or to which a monetary value could be attributed as required by the Act. (See [91].)

Atlas Park failed to show that Tailifts, had it been properly informed of the availability of the mezzanine finance, would not have taken up the corporate opportunity to acquire the property. Instead, Van Breda had usurped it for his own financial benefit. (See [97].)

To determine whether it should grant the remedy under s 75(8), the court took note of the following factors: whether the applicant, through Van Breda, made the disclosures it failed to make under s 75(3) (it did not); whether there was actual loss or prejudice to the respondent (Tailifts was prevented from acquiring the property); the degree of the director's breach of his fiduciary duty and the advantage obtained by him (Van Breda's breach of his duty to Tailifts was profound); whether a lesser remedy, such as a civil remedy or one of the others provided by the Act, would suffice; and whether the

interests of other potentially affected parties ought to be considered (the onus was on Atlas Park to join them or suffer the consequences). (See [107].)
Thus, besides Van Breda's failure to make a full and frank disclosure to the court, other factors were the nature of the breach of his fiduciary duty; his material and wilful non-disclosure; his abuse of his position as director vis-à-vis the clear interests of Tailifts; and the real and substantial direct economic benefit he had gained. (See [108].) For these reasons, the application would be dismissed with costs.

**COMMISSIONER, SOUTH AFRICAN REVENUE SERVICE v LOUIS PASTEUR INVESTMENTS (PTY) LTD (IN PROVISIONAL LIQUIDATION) AND OTHERS 2022 (5) SA 179 (GP)**

**Company** — Business rescue — Termination — Conversion into liquidation — Application for — Who may apply — Any creditor may apply, not only business rescue practitioner — Companies Act 71 of 2008, ss 132(2)*(a)*(ii).
**Company** — Business rescue — Termination — Conversion into liquidation — Application for — Nature of — Relationship between conversion application and moratorium on legal proceedings — Conversion application distinguishable from debt enforcement, offering distinct way in which business rescue may be ended — Companies Act 71 of 2008, ss 132(2)*(a)*(ii) and 133(1)*(b)*.
**Company** — Business rescue — Business rescue practitioner — Duties — Application for conversion of business rescue to liquidation — Practitioner officer of court and obliged to apply for liquidation or at least not oppose liquidation in circumstances where no prospect of better dividend to creditors through continued implementation of plan — In present case, where business rescue plan sham designed to subvert rights of creditors, practitioner's opposition to conversion unreasonable, meriting censure by court — Companies Act 71 of 2008, s 132(2)*(a)*(ii).

The first respondent company (LPI) had been placed under business rescue in June 2012, and in November of that year a business rescue plan was adopted for a 10-year period (see [25]. This unbeknownst to the South African Revenue Service (Sars), which in January 2010 and December 2011 had obtained two judgments against LPI (see [24]). In March 2021 an order was granted in favour of Sars, inter alia, converting

LPI's business rescue proceedings to liquidation proceedings (under s 132(2)*(a)*(ii) of the Companies Act 71 of 2008 ) and placing it in provisional liquidation.

The present case concerned Sars' application for a final liquidation order. It was opposed by, inter alia, LPI and **the business rescue practitioner, one Mr Prakke**, against whom Sars also sought a punitive order for costs *de bonis propriis*. The application was set down for hearing in October 2021 but two weeks before the hearing, one Ms Mia, as an 'affected party', brought an application to intervene and for the rescission of the order that set aside the business rescue proceedings and converted them into liquidation proceedings. An order was made at the commencement of the hearing granting her leave to intervene.

Ms Mia claimed that she had received notice of the application, and made common cause with LPI and Mr Prakke's contention that s 132(2), properly construed, meant that only the business rescue practitioner — not a creditor like Sars — could apply for the conversion of business rescue into liquidation proceedings. In the latter regard LPI and Mr Prakke argued that the provisions of s 132(2)*(a)*(ii) could be invoked if there were first an application by the practitioner in terms of s 141(2)*(a)*(ii) 'for an order discontinuing the business rescue proceedings and placing the company in liquidation'. (See [47] – [50].)

In addition, LPI and Mr Prakke submitted that, since the Sars debt arose prior to the adoption of the business rescue plan, the claims could not be enforced except to the extent envisaged in the business rescue plan; and, further, that the business was in fact capable of being rescued despite the business rescue plan expiring in November 2022 (see [17] – [19]).

**Held**

Ms Mia was given notice of these proceedings and was kept apprised of the course of proceedings by Mr Prakke. For this reason, her failure to intervene when the matter was heard in October 2020 was advertent and it certainly could not be said that the order granted in terms of s 132(2)*(a)*(ii) was granted in her absence. (See [38] and [42].)

Section 132(2) envisaged three separate scenarios in which business rescue proceedings, once commenced in terms of s 132(1), may be terminated. One such scenario (s 132(2)*(a)*) was where the court ordered the conversion of business rescue to liquidation proceedings. It was apparent from the plain meaning of the section that

the enforcement of debt was separate and distinct from a conversion application, which was not a proceeding for the enforcement of any debt. (See [45] – [46] and [53].)
The argument that only practitioners and not creditors may apply for conversion, also ignored that the moratorium on legal proceedings against a company under business rescue (s 133(1)) may be lifted. The provisions of s 133(1) did not provide a 'blanket' moratorium which, once 'wrapped around a company', offered an absolute and indefinite protection against action by creditors. Properly considered, s 132(2)*(a)*(ii) provided a separate and distinct way in which business rescue could be ended in the circumstances of the present application (See [56] – [58].)
There was no doubt, on any consideration of the financial status of LPI, that it was hopelessly insolvent, and that the granting of a final winding-up order was apposite. In such circumstances, the court had a limited discretion to refuse such an order. There was no commercial or rational basis for the continuation of the plan. The court had the power to intervene where it was shown that business rescue practitioners had committed a material mistake in concluding that the continued implementation of the business rescue plan would result in a better return for the creditors of the company. LPI would accordingly be placed in final winding-up. (See [74], [82] – [83] and [96].)
Mr Prakke contributed significantly to a number of entirely avoidable delays before the hearing of the application. His opposition was ill-considered and deliberate, in flagrant disregard of his obligations, and how he conducted himself after filing his report was neither bona fide nor reasonable. Costs *de bonis propriis* would accordingly be ordered against Mr Prakke. (See [89], [91], [94] and [96].)

**RAPP VAN ZYL INC AND OTHERS v FIRSTRAND BANK AND OTHERS 2022 (5) SA 245 (WCC)**

**Insolvency applications-** fraudulent scheme that had been uncovered by the fourth defendant attorney (Meintjies),

In an action brought in the Western Cape High Court, the plaintiffs — a law firm (the first plaintiff), and its two then directors (the second and third plaintiffs) — sued the first-defendant bank (the bank), one of the bank's employees (the second defendant), as well as a firm of attorneys (the third defendant) and an ex-director thereof (the fourth defendant), for damages for defamation. The plaintiffs grounded their claim on

statements they alleged were defamatory of them that were made in the founding affidavit of an interdict application the bank had brought against them, in which the bank had sought to stop the perpetuation of a fraudulent scheme that had been uncovered by the fourth defendant attorney (Meintjies), who did work for the bank, and on whose instructions the interdict was launched. The defendants, aside from denying that the statements were defamatory, pleaded that they were not unlawful because they were made during legal proceedings in the discharge of their right and duty to seek the relief which they claimed therein, and were relevant thereto, and were accordingly made on a privileged occasion. The question of quantum was to be determined later.

The statements in question were to the following general effect: Firstly, it was averred that the respondents in the interdict matter — which included the company CGS, its director Muller, and the first plaintiff — either collectively, singly or in separate combinations with one another, in the course of providing advice and assistance to judgment debtors of the bank, had perpetrated a fraud against the bank. This they had done, it was alleged, by causing (1) the publication in the *Government Gazette* of notices of intention to surrender in respect of the bank's judgment debtors; and (2) then the forwarding of covering letters notifying the bank thereof. The representation that this constituted — that the debtors referred to in such notice intended to apply on a certain date for the surrender of their estates — was false; there was never any intention for the debtors to surrender their estates; the notices were published and letters sent solely to cause the bank to cancel the sales in execution which were scheduled in respect of the debtors concerned. Secondly, the bank averred that the above-outlined conduct constituted an abuse of the process and machinery of the Insolvency Act, and an abuse of the rights which the bank had to execute upon judgments which had lawfully been granted in its favour, and sought to 'stymie, stifle or harass' it in the exercise thereof.

The plaintiffs alleged that they had been involved in only a few of the 166 matters referred to in the founding affidavit. In those cases they were acting under instruction from CGS, and their role was limited. They had never received instructions to publish surrender notices, but only to inform the bank via covering letter of the *prior publication* thereof. The plaintiffs alleged that they never had any reason to believe that CGS did not have instructions to proceed with the surrender applications at the time when the surrender notices in respect thereof were forwarded to them by CGS

for the purpose of notifying the bank thereof. The plaintiffs submitted that the bank's decision to join them in proceedings was malicious and calculated to harm the first plaintiff's business and professional reputation, and was made without due and proper regard for the 'true' facts. According to the plaintiffs, the founding affidavit contained no evidence in support of any of the allegations made therein which were made recklessly and were defamatory of the plaintiffs.

The court accepted that the statements in question were indeed defamatory of the plaintiffs (see [60]). The key question was whether the plaintiffs had established their defence of qualified privilege. (See [61].)

*Held*, that a defendant seeking to rely on qualified privilege in respect of defamatory statements made in the course of legal proceedings, had to prove that the statements were relevant (or 'germane' or 'pertinent') to the 'occasion' in question, and also that the maker of the statements had 'a reasonable foundation' or 'reasonable cause' for making them (ie there had to be 'some' foundation for it in the evidence or the 'surrounding circumstances'). (See [64], [67] – [68].)

*Held*, further, having regard to how the above principles had been applied in case law, that it was clear that a legal practitioner who had made defamatory statements in legal proceedings would not be able to rely on qualified privilege where they had made such statements knowing that they were false, or without any proof as to the truth thereof, or where they had made the statements recklessly, not caring whether the averments were true or false. (See [69] – [72].) (The court referred to Canadian legal precedent to the effect that there was a heightened expectation of reasonable due diligence when the person accused of making a defamatory statement was a lawyer; they were duty-bound to take reasonable steps before making statements that were defamatory, especially in cases involving other professional persons, and a court would strictly scrutinise their conduct. (See [94].))

*Held*, that, in order to determine whether the defendants should succeed with their defence of qualified privilege, the question was whether the allegation that the plaintiffs had engaged in a fraud on the bank, and had participated in an unlawful scheme to frustrate it in its rights, was relevant to the proceedings and the issues raised therein, or to the story which needed to be told. (See [85].) The answer to this was no (see [86]). Neither Meintjies nor the bank had had a sufficient foundation to make the allegations necessary to succeed in their claim for interdictory relief against the plaintiffs, ie that the plaintiffs were participating *in an ongoing, unlawful scheme*,

and *with fraudulent intent*. Meintjies and the bank, at the time of launching the interdict proceedings, only had information to the effect that the plaintiffs had, *for a 2 – 3 month period in the past*, participated in the unlawful scheme in question and in a limited way, none of which meant that they were still so involved or had ever acted with fraudulent intent. (See [84] – [87] and [95].) Given the seriousness of the allegations in question, that of accusing an attorney of fraud and of abusing court proceedings, Meintjies should have proceeded with caution, and, before launching proceedings, first verified the current extent of the plaintiffs' involvement in the scheme (see [87] and [95]). In failing to act in the way they ought to have done, the defendants had acted recklessly, and joining the plaintiffs was not reasonably appropriate (see [96]).
*Held*, that, in the result, the defence of qualified privilege could not be upheld, and the plaintiffs had to succeed.

**SAND GROVE OPPORTUNITIES MASTER FUND LTD AND OTHERS v DISTELL GROUP HOLDINGS LTD AND OTHERS 2022 (5) SA 277 (WCC)**

**Company** — Shares and shareholders — Shares — Scheme of arrangement — Approval of — Meeting of shareholders — Whether requirement to convene separate meetings for different classes of shareholders for purposes of seeking approval of proposed scheme of arrangement — Companies Act 71 of 2008, s 115(2)*(a)* and s 114.
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**Company** — Shares and shareholders — Shares — Scheme of arrangement — Approval of — Review — Application for leave to apply to court for review — Requirements — Discussion of — Companies Act 71 of 2008, s 115(3)*(b)*, (6) and (7).

The first-respondent company, Distell Group Holdings Ltd (Distell), sought to enter a scheme of arrangement in terms of s 114 of the Companies Act 71 of 2008 (the Act) with the first and second respondents, respectively Heineken International BV and Sunside Acquisitions Ltd. Shareholders of Distell approved the scheme by special resolution in a meeting convened for such purpose, as provided for in s 115 of the Act. In the present matter, heard before Binns-Ward J in the Western Cape High Court, the five Cayman Islands-registered applicant companies — investment funds managed or advised by Sand Grove Capital Management LLP (the Funds) which had *beneficial ownership of Distell shares held in other parties' name* — in terms of s 115(3)*(b)* of the Act sought leave to apply to court for the review and setting-aside of the scheme. The basis on which the applicants intended to impugn the resolution on review was the following: (i) that the meeting convened to vote on the scheme was unlawfully constituted: separate meetings should have been held for the holders of the two different types of Distell shares — ie one for holders of *ordinary shares* and another for the *holders of B class shares* — instead of, as happened here, a single meeting combining both types; (ii) that the expert report distributed to the shareholders in compliance with s 114(3) contained deficiencies that resulted in inadequate disclosure; (iii) that the vote was materially tainted by a conflict of interest; (iv) in the light of manifest unfairness to a class of holders of the company's securities; and (v) Remgro's votes should have been excluded from consideration.

Aside from contesting the merits of the application, the respondents argued that the applicants did not have standing in the first place to bring an application in terms of s 115(3)*(b)* of the Act; such an application was only available to registered shareholders. The respondents' challenge prompted an application in the names of First National Nominees (Pty) Ltd and Standard Bank Nominees (RF) (Pty) Ltd for leave to intervene in the proceedings as co-applicants in terms of s 115(3)*(b)*. They were indeed the registered shareholders of the ordinary shares in Distell in which the Funds had a beneficial interest, and their representative (Mr Barber) exercised the voting rights attached to those shares to vote against the proposed transaction at the meeting convened in terms of s 115(2)*(a)*. The respondents opposed this application too, on the ground that it was not brought within 10 days of the vote in the shareholders' meeting, as required by s 115(3)*(b)*. Condonation in the circumstances was also not permitted, they argued. At the end of oral argument, the applicants sought an amendment of the notice of motion, such that the relief prayed for under s

115(3)*(b)* was now sought in the alternative to a newly introduced claim for orders declaring that the meeting at which the resolution was adopted was not properly constituted and therefore invalid and void, and that the resolution purportedly adopted at it was accordingly also void.

***Standing*** **—** The court held that in terms of the Act the applicants, *as beneficial holders of Distell ordinary shares*, had no standing to bring an application under s 115(3)*(b)* (see [34]). In terms of such provisions, the application could only be brought by 'person[s] *who voted* against the resolution', and, in terms of s 115(2)*(a)*, when read with defined meanings of 'voting rights' and 'shareholder', only *'registered shareholders' or their appointed proxy* could *vote* at a meeting convened for the approval of a scheme of arrangement (see [22] – [26], [29] and [34]). Furthermore, Distell's MOI explicitly provided that 'only the Securities Holder shall be entitled to be vested with Voting Rights and to exercise the Voting Rights attaching to the Securities or appoint a proxy to do so' (see [30]). The court added that the relevant scheme of the Act and Distell's MOI were reflective of the generally applied principle of company law that a company concerns itself only with the registered holders of its shares (see [31]).

***Application by the nominee companies for leave to intervene as applicants in terms of s 115(3)(b)*** **—** The court upheld the respondents' argument that the nominee companies' intervention application contravened the provision of s 115(3)*(b)*, having been brought more than 10 days after the vote. The court also rejected as being without basis the applicants' claim that, where an application in terms of s 115(3)*(b)* was instituted within the prescribed time by any person with capacity to litigate, even if such person lacked standing to be able to claim relief in terms of the provision, *no difficulty presented with admitting an intervening applicant with the necessary standing to claim relief under the provision, even after the prescribed time period had elapsed*. (See [37] – [43].)

The court further held that it could not condone the lateness of the aspirant intervenors' application: the power to do so could not be found in any interpretative exercise in respect of the relevant parts of the Act (see [61] – [62]). The court confirmed in this regard that a court had no inherent power to condone non-compliance with statutorily imposed time limits for the institution of litigation (see [47] – [60]). The court held accordingly that the application by the nominee companies for leave to intervene had to be dismissed (see [65]).

***The application to amend the notice of motion*** — The court held that the relief sought by the applicants by way of the proposed amendment to their notice of motion — by which means the court held the applicants tried to achieve that which they apprehended they could not by way of the originally sought review relief in terms of s 115 — was not competent. The proceedings the applicant wished to bring impugning the resolution adopted in terms of s 115(2)*(a)* — even though framed as an application for declaratory relief — remained in essence an application for review. And as such, it had to be mounted under s 115 of the Act.

***Whether shareholders' meeting unlawfully constituted*** — The court nevertheless set out its views on the applicants' claim that the meeting convened to vote on the scheme was unlawfully constituted. In this regard, the applicants had relied on the wording of s 114, which provided that 'the board of a company may propose . . . any arrangement *between the company and holders of any class of its securities* . . .'. (See [68].) They contrasted this with the previous s 311 of the old Companies Act, which spoke of a scheme of arrangement between a company and '*its members* or any class of them' (see [68]). In terms of that section, a court had to give directions whether separate meetings had to be convened for different 'classes' of members or creditors (see [71]). It was guided in this task by principles set out in various English judgments, inter alia, that separate meetings should be held for the different classes of shareholders only where there were sufficiently material dissimilarities between shareholders' affected rights to warrant it (see [71] – [78]). Under s 114, the applicants argued, there was no longer scope for this balance weighing with reference to similarity or dissimilarity of rights (see [79]); the effect of s 114 was that, where there was a proposal affecting the rights of the holders of more than one class of shares in a company, separate *schemes had to be put up* to the holders of each class *in separate meetings* held in terms of s 115(2) (see [78]). The court, however, rejected this approach. It held that it would be inimical to effectiveness and efficiency of the scheme of arrangement procedure to adopt an interpretation of s 114 that would require separate meetings of the holders of each class, notwithstanding the absence of a significant dissimilarity between their affected rights and merely because their rights were not identical. The company, when determining how to comply with s 115(2) of the Companies Act, would need to consider whether separate meetings should be held for different classes of shareholders; and in doing so, it had to be mindful of the same considerations the courts used when deciding an application in terms of s 311(1)

of the old Companies Act. If the company's determination were to give rise to any of the grounds for review under s 115(7), it would be open to challenge by any qualifying dissentient securities holder. (See [81] – [83] and [87] – [88].) (The court, in addressing the merits of the application for leave, considered that there was not a sufficient dissimilarity between the rights of the holders of the two classes of securities in the company and the effect of the scheme on such rights to warrant that voting on the resolution should have been undertaken in separate meetings (see [106]).)

***The merits of the application for leave to take the adoption of the resolution to approve the scheme on review*** — Despite its findings on the applicants' lack of standing and the applications by the nominee companies for leave to intervene, the court deemed it desirable to state its views on the merits of the application for leave to take the approval of the resolution on review. The court had regard to the prerequisites for the granting of such leave under s 115(6) — ie that it was 'satisfied that [the applicants]' *(a)* were 'acting in good faith'; *(b)* appear 'prepared and able to sustain the proceedings', and *(c)* have 'alleged facts which, if proved, would support an order' upholding an application for review under s 115(7) — and concluded that it would have dismissed the application on the merits. (See [96] – [135].)

**Cloete Murray NO and others v Ntombela and others; *In re*: Ntombela and another v Cloete Murray NO and others [2022] 3 All SA 689 (FB)**

Liquidators-election of the liquidators not to ratify the contract –review application- *Liquidators– Leave to appeal – Test – Section 17 of the Superior Courts Act 10 of 2013 – Leave to appeal may only be given, inter alia, where the judge concerned is of the opinion that the appeal would have a reasonable prospect of success.*

In the main application before the court, the applicants (the “Ntombelas”) were a family which had purchased immovable residential property from a close corporation (“Phehla”) prior to its liquidation. The applicants, in terms of rule 53 of the Uniform Rules of Court, sought the review and setting aside of the election of the liquidators not to ratify the contract. The liquidators delivered a Notice in terms of rule 6(5)(d)(iii). The court provisionally set aside the filing of the Notice in terms of rule 6(5)(d)(iii) pending the finalisation of the process prescribed in rule 53 dealing with reviews. In the liquidators’ application for leave to appeal, the present Court identified the issues

for determination as the reviewability of the decision of the liquidators in the circumstances of this case and the ruling on the rule 6(5)(d)(iii) Notice.

Regarding the decision not to proceed with the sale agreement entered into by Phehla, the liquidators maintained that they did not have a record of how the decision was taken and they also did not offer any reasons for their decision.

**Held** – The liquidators could pursue the rule 6(5)(d)(iii) proceedings only once the rule 53 process was finalised. The record had not yet been filed and the rule 53 process could not continue if the record was not supplied. The liquidators were granted permission to access the court on the same papers duly supplemented after the rule 53 process had been finalised.

The core issue in the application for leave to appeal was the liquidators' contention that the decision not to proceed with the sale agreement was not legally reviewable. Having regard to the potential negative effects of the liquidators' stance, the court pointed to the need to protect vulnerable consumers in such scenarios. While the Constitution does not protect against homelessness in absolute terms, it provides that no one may be evicted from his home without an order of court made in consideration of all relevant circumstances. That demands judicial oversight of the decisions of the liquidator.

In deciding whether to grant leave to appeal, the court is called upon to consider whether another court may reach a different conclusion. That requires a careful analysis of both the facts and the law that have supported the judgment *a quo* and a consideration of the possibility that another court may differ either in relation to the facts or the law or both.

Section 17 of the Superior Courts Act 10 of 2013 provides that leave to appeal may only be given, *inter alia*, where the judge concerned is of the opinion that the appeal would have a reasonable prospect of success. The section is peremptory in that it imposes a mandatory requirement that leave may not be granted if there is not a reasonable prospect that the appeal will succeed. It must be a reasonable prospect of success, and not that another court may hold another view.

Finding the test to have been met, the Court granted leave to appeal.

**Moyo v Old Mutual Limited and others [2022] 3 All SA 795 (GJ)**

Company-directors- contempt and delinquency applications

*Corporate and Commercial – Refusal by company to reinstate employee whose employment was terminated due to breakdown of relationship with company – Whether company's actions were in contempt of court and whether company directors were in breach of their fiduciary duties – Where company acted on reasonable legal advice in refusing to reinstate employee, no finding of contempt could be made – In suspending and terminating employee's employment, company directors not acting in a manner amounting to gross negligence, wilful misconduct or breach of trust, and thus not in breach of fiduciary duties.*

During his tenure as Chief Executive Officer of the first respondent ("Old Mutual"), the applicant ("Mr Moyo") was bound by his contract of employment which referred to the employment relationship with Old Mutual being based on trust and mutual respect; and to the fiduciary duties owed by Mr Moyo to Old Mutual. The contract identified a number of specific duties and added that a breach of any of them would warrant termination of his employment. Provision was made for the disclosure and resolution of any conflicts of interest.

Mr Moyo and Old Mutual were shareholders in an entity ("NMT Capital"). His participation in the decision by NMT Capital to declare ordinary share dividends from which he personally benefited to the extent of R28m was in breach of his agreements with Old Mutual. He did not disclose his conflict of interests.

The subsequent decision by the board of Old Mutual to terminate his employment was met with resistance by Mr Moyo. He obtained a reinstatement order and when Old Mutual refused to allow him to resume his duties, he brought an application to declare the company and its directors in contempt of court and to declare the directors to be delinquent.

**Held** – The applicant's case was marked by numerous procedural inadequacies including a failure to satisfactorily define the issues. The Court eventually itself outlined the issues for determination in each of the applications brought by Mr Moyo.

Moving on to discuss the general principles relating to contempt of court, the Court reminded that committal for contempt for non-compliance with court orders should only be engaged as a matter of last resort.

Mr Moyo sought to have the directors of Old Mutual, cited in the application, committed to prison for failing to allow him to resume his duties. However, it was concluded that by locking Mr Moyo out on three separate occasions the respondents did not defy court orders as alleged, as they had acted pursuant to legal advice received – which version could not be labelled either fictitious or palpably uncreditworthy. No finding of contempt could be made.

On the issue of delinquency, the Court referred to the fiduciary duties of company directors. Such duties have been codified in section 76 of the Companies Act. Mr Moyo asked for the directors to be declared delinquent in terms of section 162(5)(c) of the Companies Act. The crucial question was whether Mr Moyo had established that, by suspending and terminating his employment, the directors had acted in a manner that amounted to "gross negligence, wilful misconduct or breach of trust". That question was answered in favour of Old Mutual.

It was common cause that the relationship between the Old Mutual board and Mr Moyo had broken down. The reasons for the breakdown became irrelevant, with the Court satisfied that Mr Moyo had to leave.

Both the contempt and delinquency applications were dismissed.

**Carmody v Kudumela N.O. and Another (2022/17204;2022/2448) [2022] ZAGPJHC 591 (18 August 2022)**

Business rescue-removal of Business Rescue Practitioner-justified

The applicant is a director and sole shareholder in Matsway Steel (Pty) Ltd – Matsway is in business rescue – The applicant seeks the removal of the business rescue practitioner, Mr Kudumela, based on inaction and incompetence on his part, in terms of section 139(2) of the Companies Act, 71 of 2008 – Whether it is appropriate to continue business rescue proceedings, because there is a prospect of rescue, or whether there is no prospect of rescue and Matsway must then be liquidated – Has a case been made out for removal of the practitioner? – It is clear that Mr Kudumela has

not complied with his obligations, timeously or at all – He has been unable to provide satisfactory explanations for his non-compliance – Whether there is a prospect of rescuing Matsway – Court is satisfied that the only prospect of rescue for Matsway is if post-commencement finance is procured – Court not satisfied that there is sufficient evidence that sufficient post-commencment finance is available – It is therefore appropriate that the business rescue proceedings be converted to liquidation – Held, the business rescue proceedings of the first respondent are converted to liquidation proceedings in terms of section 132(2)(a)(ii) of the Companies Act, 71 of 2008, placing the first respondent under final liquidation.
www.saflii.org/za/cases/ZAGPJHC/2022/591.html

**The Spar Group Limited v Meadowview Trading 147 CC t/a Meyerton Spar and Tops (2022/013036) [2022] ZAGPJHC 637 (5 September 2022)**

Urgent application – Applicant seeks leave to perfect its security in terms of two General Notarial Bonds – Issue that remains for decision is whether the court should exercise its discretion in favour of the applicant by granting it leave to perfect the Bonds – The applicant in this matter does not have an alternative remedy for damages and, even if it did, such a claim cannot replace its claim for real security over the respondent's movable property as was agreed between the parties – Contract Forwarding (Pty) Ltd v Chesterfin (Pty) Ltd and others [2003] 1 All SA 267 – Discretion should only be exercised in a case of specific performance where another remedy exists – The respondent has failed to convince this court that the Bonds should not be perfected – Held, the applicant has made out a case for the relief which it seeks and the court makes an order in terms of the draft order which was provided to court by the applicant. www.saflii.org/za/cases/ZAGPJHC/2022/637.html

**Centaur Mining v Murray NO [2022] 37520-2021 (GJ) at [21]-[37]**

Company – Unconscionable abuse of juristic personality – Court powers – Collapsing or integrating into another company in winding-up – Companies Act 71 of 2008, s 20(9).

Facts: In terms of a previous order, Certain Trillian companies were deemed not to be separate juristic persons and were collapsed into Trillian Management Consulting (TMC) and the subject companies and TMC were to exist as a single entity by ignoring their separate legal existence as contemplated by section 20(9) read with section 22 of the Companies Act 71 of 2008. The liquidators of TMC (in liquidation) instituted the action against Centaur based on two agreements in terms of which it lent money to

two of the subject companies and which had been partially repaid. The liquidators alleged that these payments constituted voidable dispositions and sought to set them aside.

Application: Centaur seeks to rescind the previous order on the basis that it had an interest in the order, which was granted in its absence, and that the court was not competent to issue such order.

Discussion: Whether Centaur had a direct and substantial interest in the s 20(9) order; whether the order was incompetent or fells outside of the jurisdiction of the court that granted it; that the liquidators' version regarding the involvement of Centaur and the fraudulent scheme regarding the transfer of funds was not contested in any serious manner; that Centaur had failed to establish locus standi as its fraudulent conduct, as set out in in the liquidators affidavit, could give it no legitimate interest in the s 20(9) order, based on any purported loans; and the Barak case and the court's jurisdiction to grant the order.

Findings: An order collapsing or integrating companies whose incorporation is found to be an unconscionable abuse of the juristic personality, may be granted in terms of s 20(9) of the Companies Act. The powers granted to a court to make appropriate orders include an order integrating it into a company in winding-up, as the powers contained in s 20(9)(b) are sufficient to encompass an order referring the matter to the Master to perform certain further functions, which was necessary because the company into which the companies declared not to be separate juristic persons was integrated, was in liquidation.

Order: The application is dismissed with costs.

**Matarapro (PTY) Ltd v Mashala Resources (PTY) Ltd (20243/21) [2022] ZAGPJHC 664 (8 September 2022)**

Provisional liquidation application – It is apparent that the applicant is launching this application to enforce the terms of a void agreement

Applicant testify that the basis of the respondent's indebtedness to the applicant emanates from a written agreement – In terms of this agreement, a company called Lateozest (Pty) Ltd (Lateozest) and the respondent agreed jointly and severally to

compensate the applicant for services rendered in the amount of R13 800 000.00 – The applicant says that the Respondent would only become liable for payment of the aforementioned upon the granting of consent by the Minister of Minerals and Energy in terms of section 11 of Act 28 of 2022 – The applicant avers further that the respondent and Lateozest failed to honour the terms of the compensation agreement and are indebted to it in the sum of R14 300 0013.46 – Respondent contends that the compensation agreement was void, in that the agreement was concluded while the respondents was in business rescue as the BRPs did not approve the conclusion of the agreement – Whether the compensation agreement is void under the provisions of Section 137 of the Companies Act 61 of 1973 – It is apparent that the applicant is launching this application to enforce the terms of a void agreement – The indebtedness of the respondent to the applicant has not been established – On this ground alone this application should fail.
www.saflii.org/za/cases/ZAGPJHC/2022/664.html

**ABSA Bank Limited v Lucent Properties 18 CC (13088/2017) [2022] ZAGPJHC 685 (13 September 2022)**

Winding up application-final order granted on admission of liability

The applicant seeks an order placing the respondent under final winding up in the hands of the Master – Respondent has failed to raise factual dispute in his affidavit opposing the granting of a final order of Liquidation – What remains is whether the applicant has established on a balance of probabilities that a final order should be granted –Respondent admitted liability to the Applicant in the amount of R12 330 838 .18 together with interest – Held, the respondent is placed under final winding up in the hands of the Master. www.saflii.org/za/cases/ZAGPJHC/2022/685.html

**Nile Dutch Africa B.V v Crystal Pier Shipping Proprietary Limited and Others (11530/2021P) [2022] ZAKZPHC 47 (14 September 2022)**

Winding up application-just and equitable-business rescue resolution set aside

The applicant and first respondent entered into an Agency Agreement in terms of which the first respondent acted as an exclusive agent for the applicant's owned and/or chartered vessels operating to and from South Africa – The applicant submits that it is a creditor to the first respondent and that the first respondent is unable to pay its debts – The debt arose out of the failure by the first respondent to pay the outstanding

amount due to the applicant at the termination of the Agency Agreement – The Court must have regard to all the evidence in order to determine if it would be just and equitable to place the first respondent under liquidation – In order for the provisional liquidation application to succeed the applicant must satisfy the applicable requirements – The applicant has demonstrated that it has the necessary *locus standi* – The Court is satisfied that the applicant has made out a case for the relief sought – Held, the resolution passed by the directors of the first respondent on 28 January 2021 in terms of s 129(1) of the Companies Act, 2008 voluntarily beginning business rescue proceedings and placing the first respondent under supervision is set aside – The first respondent is placed under provisional liquidation in the hands of the Master of the High Court, Pietermaritzburg. www.saflii.org/za/cases/ZAKZPHC/2022/47.html

**The Land and Agricultural Development Bank of South Africa v Phosfert Trading (PTY) Ltd (28966/2020) [2022] ZAGPJHC 697 (15 September 2022)**

Winding up application- section 344(h) of the Companies Act 61 of 1973-based on a suretyship agreement

This is an application brought for an order that the respondent be provisionally, alternatively, finally wound up in terms of section 344(h) of the Companies Act 61 of 1973, and that its affairs be placed in the hands of the Master based on a suretyship agreement – The applicant alleges that that the respondent is unable to pay its debts, alternatively, that it would be just and equitable to do so, alternatively, that the respondent is not meeting the solvency and liquidity test as set forth in Section 4 of the Companies Act 71 of 2008 – The applicant and Grocapital Financial Services entered into a Sale Agreement and Service Level Agreement whereby Grocap sold, ceded and delegated the rights, title and interest in and to its existing corporate debtors' book to the applicant – The applicant contends that the respondent bound itself as surety and co-principal debtors to both ATS and AOM in favour of Grocap, the full indebtedness of both parties being now due and payable – The respondent contends that the applicant did not make out a proper case for a just and equitable winding-up of the respondent – The respondent contends that the applicant has not proven the underlying principal debts – The law – Section 344 of the Companies Act 61 of 1973, provides that a company may be wound up by a Court if it is unable to

pay its debts or if it appears to the Court that it is just and equitable that the company should be would up – Murray NO & Others v African Global Holdings (Pty) Ltd & Others 2020 (2) SA 93 considered and reiterated the test for commercial insolvency – The respondent has failed to raise a real, material or bona fide dispute of fact – Held, the respondent is placed under provisional liquidation.
www.saflii.org/za/cases/ZAGPJHC/2022/697.html

**Zeelie v Mjejane Farm Management (Pty) Ltd and Others (446/2017) [2022] ZAMPMBHC 72 (27 September 2022)**

Winding up application-whether there is genuine dispute of fact on whether any money is due to the applicant; Court concludes that the Intervening Party's dispute can be best described as consisting of bald or uncreditworthy denials

This is a judgment in the two applications that were heard together; the main application by Petrus Zeelie seeks a final order to provisional liquidation order handed down by this court; in terms of that order, Mjejane Farm Management (Pty) Ltd was placed under liquidation and interested parties were invited to show cause why it should not be made final; the other application is by Paradise Creek Investments 34 (Pty) Ltd for admission as intervening party.

Discussed: The liquidation application; the applicant alleges that subsequent to the registration of voluntary liquidation, he learned that Roux, who is one of the first respondent's directors, was dissipating or attempting to dissipate the assets of the first respondent; a creditor may apply for liquidation of a company and would still have to satisfy all the requirements for liquidation; being on voluntary liquidation is not a requirement for placing a company under liquidation; the creditor still has to prove the indebtedness by the company in an amount not less than R100.00 and that it is unable to pay; is the first respondent insolvent?; whether there is genuine dispute of fact on whether any money is due to the applicant; Court concludes that the Intervening Party's dispute can be best described as consisting of bald or uncreditworthy denials, raises fictitious disputes of fact, is palpably implausible, far-fetched or so clearly untenable that the court is justified in rejecting them merely on the papers.

Order: The order granted by this court in terms of which the first respondent was placed under liquidation is made final.

**Van Wyk Van Heerden Attorneys v Gore N.O and Another (828/2021) [2022] ZASCA 128 (30 September 2022)**

Impeachable transactions-dispositions without value as contemplated by s 26(1)(b) of the Insolvency Act 24 of 1936 read with s 340 of the Companies Act 61 of 1973-deposit into attorney's account –attorneys paying out on instructions of client-attorneys unaware of client's scheme- when attorneys operate on their trust accounts, they do so as principals and not as agents- 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'. – section 26 (1) (b) person on whom that obligation rests is only one who 'benefited by the disposition'. –this section 's construction does not allow for liability to attach to one who did not benefit by it. – attorneys did not benefit from the R1 250 000 – In turn, Utexx benefited by that amount - As regards the deposit of R1.25 million, the attorneys acted in accordance with the instruction of their client.- the deposits of R75 000 and R200 000? They were not paid on to a third party-taken as fees - 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.-must pay.

On appeal from: Western Cape Division of the High Court, Cape Town (Magona Acting Judge, sitting as court of first instance): This appeal concerns the application of the provisions of s 26(1)(b) of the Insolvency Act 24 of 1936 (the Act) to trust accounts of attorneys.[1] Three deposits were made into the trust account of the appellant, a firm of attorneys (the attorneys). Two were made on 23 February 2018 and one on 30 April 2018. The first two were of R1 250 000 and R75 000 respectively and the third of R200 000. All three were made from the account of Brandstock Exchange (Pty) Ltd (Brandstock). The sole director of Brandstock was one Bruce Robert Philp (Philp). Brandstock was provisionally wound up on 3 July 2018 and finally wound up on 20 August 2018. The deposits excited the attention of the respondents who are the liquidators of Brandstock (the liquidators). They applied to have them set aside under s 26(1)(b) of the Act. Their contention was that the deposits into the trust account amounted to dispositions to the attorneys.

**Chronological:** Deposits: 23 February 2018 and 30 April 2018.

Brandstock provisionally wound up 3 July 2018 and finally wound up on 20 August 2018.

BRP Livestock CC (BRP) on 3 November 2017 and finally wound up on 8 March 2018.

[2] The application was brought in the Western Cape Division of the High Court, Cape Town (the high court). It found favour with Magona AJ, who declared the deposits to have been dispositions to the attorneys and set them aside. Pursuant to that declaration, the attorneys **were ordered to pay R1 525 000** to the liquidators, along with interest and costs. The high court dismissed an application by the attorneys for leave to appeal. The appeal is before us with the leave of this Court.

[5] It is necessary to sketch the plain, unvarnished, material facts of the application. At the time of the deposits, the attorneys acted for Philp and another entity controlled by him, BRP Livestock CC (BRP). The attorneys neither represented, nor even knew of the existence of Brandstock. BRP was provisionally liquidated on 3 November 2017 and finally wound up on 8 March 2018 by an order of court. At the time the three deposits were made, Philp was confronting a sequestration application.

[6] The insolvency proceedings against Philp and BRP were pursued by an acknowledged creditor, the **Utexx Trust (Utexx).** The attorneys were involved in negotiations for a person well-disposed to Philp to **purchase its claims against BRP and Philp.** Philp indicated to the attorneys that a certain Muir would be the purchaser. The attorneys were requested to draft a cession and sale agreement to that effect.

[7] On **13 February 2018,** the attorneys transmitted the first draft to attorneys representing Utexx. They had been informed that Muir had not decided which of his corporate entities would purchase the claims and were to leave the identity of the purchaser blank. The purchase price was R1.25 million. Utexx's attorneys sent back an amended draft. This reflected (incorrectly, but the attorneys did not notice it) that the attorneys represented the purchaser. Utexx also required payment to be made from the trust account of the attorneys.

[8] On 23 February 2018, the attorneys informed Utexx that the purchase price of R1.25 million had been deposited into their trust account. The agreement was signed by both parties on 26 February. It is unclear from the affidavit of the attorneys at what point they realised that the purchaser was one Sandra Pratt (Pratt) rather than Muir. They explained:

'On 23 February 2018, I advised [Utexx's attorney] that the purchaser was in Johannesburg and would only be able to sign the Agreement on 24 February 2018 and provide me with a copy of it by 26 February 2018. I pause to mention that, at this point in time, I was still under the impression that Muir would be purchasing the claim of [Utexx]. On 21 February 2018, I transmitted an e-mail to Philp again requesting him to complete the details of the purchaser. On 23 February 2018, I addressed a letter to Philp requesting the aforesaid payment upon which Philp responded by confirming in writing that the purchaser disclosed in the Agreement had made payment of the purchase consideration and attached the proof of payment to his aforesaid letter. It was only upon receipt of the signed Agreement from Philp that I noticed that Muir was not the purchaser but instead Sandra Pratt's details were included as the purchaser.'

[9] After seeing the signed agreement, the attorneys sought clarification from Philp. According to them, 'he indicated that Pratt was his aunt and that she had offered to purchase the **claim from [Utexx**] and to then allow him some additional time to repay the indebtedness of BRP to her.' **What is clear is that Philp misled, or at best for him failed to tell, the attorneys that the funds deposited into their trust account came from Brandstock.** On the contrary, he informed them that the funds were those of the purchaser. The attorneys transferred the R1.25 million purchase price to Utexx on 27 February. It is accepted by the liquidators that the attorneys were entirely unaware of the existence or involvement of Brandstock at this time.

[10] The other two amounts of R75 000, deposited on 23 February, and of R200 000, **deposited on 30 April, were used by the attorneys to settle their fees, counsel's fees and further disbursements.** These all related to the attorneys' representation of Philp and BRP.

[11] It is against this factual backdrop that the claims by the liquidators against the attorneys under s 26(1)(b) fall to be considered.

[12] In support of their contention that the deposits amounted to impeachable dispositions to the attorneys, the liquidators relied on a line of cases. These cases have held that, when attorneys operate on their trust accounts, they do so as principals

and not as agents.[3] They submitted that this demonstrated that the dispositions were made to the attorneys as envisaged under s 26(1)(b).

[13] On the other hand, the attorneys called in aid a dictum of this Court concerning a deposit into the trust account of an attorney who acted for the nominated payee.[4] In that matter, this Court held that 'the disposition was to Iprolog [the payee on whose behalf it was received] and occurred . . . when the money was paid into the attorney's trust account'.[5] They further relied on a series of cases where trustees or liquidators of insolvent estates sought unsuccessfully to contend that amounts deposited in bank accounts were dispositions to the banks.[6]

[14] I shall deal more fully with both sets of contentions with reference to the cases relied on. Before doing so, however, it is worth rehearsing some of the legal principles concerning the position of bank accounts in general and trust bank accounts of attorneys in particular. General banking principles are clear that the bank owns the money deposited into accounts held with it. A debtor-creditor relationship is established as was explained by Holmes JA in S v Kearney:[7]

'[I]t has long been judicially recognised in this country that the relationship between bank and customer is one of debtor and creditor. When a customer deposits money it becomes that of the bank, subject to the bank's obligation to honour cheques validly drawn by the customer . . .'.

Under the banker-customer relationship, the bank is indebted to the customer. The bank owns the money but is obliged to comply with instructions of the account holder concerning a positive balance in the account. Account holders thus have the power of disposal over the credit balance of funds held by the bank on their behalf.

[15] This holds no less true of trust bank accounts held by attorneys. Money deposited into attorneys' trust accounts gives rise to the same relationship with the bank as with any account holder. The bank owns the money, but becomes obliged to give effect to instructions by the attorney holding the account. It is indebted to the attorney and to no other party. No one else is entitled to instruct the bank on how to deal with it.

[16] **At the same time, the credit balance in trust accounts is held by the attorney on behalf of particular clients.** A similar debtor-creditor relationship obtains between the attorney and the client. The attorney is obliged to give effect to

instructions of clients concerning the credit balance held for them. But vis-a-vis the bank, the attorney has the power of disposal over credit balances in the trust account. This is at least partly why our courts have held that, when attorneys deal with funds in a trust account, they generally do so as principals and not as agents.

[17] Section 86(2) of the Legal Practice Act 28 of 2014 (the LPA) applies to attorneys:

'Every trust account practice must keep a trust account at a bank with which the Fund has made an arrangement as provided for in section 63(1)(g) and must deposit therein, as soon as possible after receipt thereof, money held by such practice on behalf of any person.'

Trust accounts of attorneys held with banks have, for a considerable time, enjoyed special characteristics. Chief among these is that reflected in s 88(1) of the LPA, which provides:

'(a) Subject to paragraph (b), an amount standing to the credit of any trust account of any trust account practice-

(i) does not form part of the assets of the trust account practice or of any attorney, partner or member thereof or of any advocate referred to in section 34(2)(b); and

(ii) may not be attached by the creditor of any such trust account practice, attorney, partner or member or advocate.

(b) Any excess remaining after all claims of persons whose money has, or should have been deposited or invested in a trust account referred to in paragraph (a), and all claims in respect of interest on money so invested, are deemed to form part of the assets of the trust account practice concerned.'

This echoes similar provisions in prior legislation governing attorneys' trust accounts.[8] It can be seen that these provisions circumscribe the rights of attorneys and their creditors in relation to trust accounts.

[18] The rights of banks are similarly curtailed by s 91 of the LPA, the relevant part of which reads:

'. . . a bank at which a trust account practice keeps its trust account, or any separate account forming part of a trust account, does not, in respect of any liability of the trust account practice to that bank not being a liability arising out of, or in connection with, any such account, have or obtain any recourse or right, whether by way of set-off, counter-claim, charge or otherwise, against money standing to the credit of that account.'

[19] With that in mind, I turn to the cases called in aid by the parties. The first, relied on by the liquidators….

[23] From the above examples, it is clear **that attorneys operate on their trust accounts as principals and not as agents.** This is because they, and only they, can instruct a bank to dispose of amounts to the credit in that bank account since clients have no legal relationship with the bank concerning that account. When attorneys operate on a trust bank account in accordance with their instructions, however, they may function at two levels. In the first place, because only they have the right to dispose of funds to the credit in that account pursuant to the banker-customer relationship, they do so as principal. In the second place, however, if they give effect to a mandate from the client in whose name the moneys are held in trust, they do so as agent. **What is relevant for present purposes, however, is that the power to operate a trust account does not determine whether a deposit into that account amounts to a disposition to the attorney. The contention of the liquidators to this effect must therefore be rejected.**

[25] ……The whole scenario envisaged by the plaintiff is, in my view, repugnant to logic and law as it would create a situation where a principal could visit liability on his agent for performing precisely the mandate which it had given to its agent.'[20]

**This reasoning strikes me as unassailable and equally applicable to an attorney who is merely instructed to make a payment.**

[30] The approach in our law to what constitutes an impeachable disposition is a matter of interpretation. It is now trite that, when it comes to interpretation:

‘A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document . . . The “inevitable point of departure is the language of the provision itself”, read in context and having regard to the purpose of the provision and the background to the preparation and production of the document.’[33]

[31] As to language, it will be recalled s 26(1)(b) provides in its relevant parts:

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

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

[32] At the heart of s 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’. The person on whom that obligation rests is only one who ‘benefited by the disposition’. **The construction of the section does not allow for liability to attach to one who did not benefit by it.** The plain language requires the disponee to have benefited.

[33] This is buttressed by a sensible and businesslike approach. As Goldblatt J held in Zamzar, to hold a party liable who simply acted as an intermediary and gave effect to instructions by the client but did not benefit from the disposition gives rise to an absurd and unbusinesslike outcome. In that regard**, an attorney would generally have the same lack of knowledge of the source of the funds deposited as would a bank. Where they on-pay those funds to a third party as instructed by their client, they also function purely as intermediaries.**

[34] And the purposive approach articulated so clearly in Hollicourt lends further strength to this interpretation. This applies no less in our law since s 26(1)(b) is clearly aimed at only the person who benefits from (or claims under) the disposition. It is also not envisaged that there is a ‘double disposition’ where successive persons both become subject to the section. **Where attorneys give effect to pay the third party**

**nominated by their clients without themselves benefiting, it can be said that they simply function as conduits.** This situation must be distinguished from that in Kaplan. There Katz did not give effect to instructions from clients when he appropriated moneys held on their behalf to pay his gambling debts. As a result of his having utilised those funds for his personal purposes, his estate was thereby benefited.[34]

[35] Finally and decisively, this Court held in Reynolds that, 'a disposition without value which is liable to be set aside is one in which the person who benefited by the disposition runs the risk of having such disposition being set aside in certain specified situations'.[35] This forms part of the ratio of that judgment and, unless we are convinced that it is clearly wrong, binds us in this matter. On the contrary, that position accords with the above reasoning and interpretation.

[36] This then is the relevant touchstone for liability under s 26(1)(b). In our law, the clear language of the provision requiring benefit fortifies the purposive approach to interpretation in the unitary interpretative exercise. This is consistent with the context of banking law and that relating to the operation of trust accounts of attorneys. It all points to the need for the person to whom the disposition is made for the purpose of s 26(1)(b) to have benefited from it.

[37] This brings into sharp focus the essential enquiry in the present matter. The attorneys were unaware of the source of the deposits into their account. A client had instructed them to pay the R1.25 million to Utexx as the purchase price under the agreement. They complied with that mandate. Moneys of whose origin they were unaware were deposited into their trust account as was the case with the bank in Zamzar. They paid them to Utexx as instructed by their client, Philp. They testified **without challenge that it was 'common cause that [the attorneys] did not receive any benefit or retain any portion of the purchase consideration.'**

[38] Who then benefited from the disposition? During argument, the parties were ad idem that Utexx benefited by the deposit of R1.25 million which was thus hit by the provisions of s 26(1)(b). This must be correct. Utexx received moneys of Brandstock without Brandstock receiving value since it was not party to the transaction**.** In turn, Utexx benefited by that amount since its claim for the purchase price under the agreement was satisfied.

[39] As regards the deposit of R1.25 million, the attorneys acted in accordance with the instruction of their client. As was said of the bank in Zamzar: ‘If the defendant was authorised to make the payments, then it was authorised and entitled to debit plaintiff's account with the moneys paid and was merely a conduit or 'neutral payment functionary' through which a disposition was made to Sferopoulos by the plaintiff itself.’[36]

In giving effect to their mandate, therefore, the attorneys acted as a conduit in the onward transmission to Utexx and for its benefit. The disposition of Brandstock was one to Utexx. 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).

[40] What, then, of the deposits of R75 000 and R200 000? They were not paid on to a third party. On the other hand, they were dealt with in accordance with the principles governing trust accounts. Unlike in Kaplan, there was no breach of mandate by the attorneys. Attorneys are entitled to account to their clients for fees and disbursements and to then appropriate moneys held in trust for that purpose. This is what was done by the attorneys. This does not, however, necessarily render them immune to the machinery of s26(1)(b). The same enquiry governs the outcome of these two deposits. Who benefited from those deposits?

[41] 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. As between the attorneys, BRP and Philp, the application of these funds to settle fees and disbursements was lawful and appropriate. If BRP or Philp had deposited these amounts, they would have received value for them. But the deposit was made by Brandstock, which did not receive value. When applied to amounts due by BRP and Philp, these two deposits became dispositions which fall within the provisions of s 26(1)(b). Before us the attorneys only argued faintly to the contrary.

[42] As regards those two dispositions, then, the onus rested on the attorneys to prove that, at the relevant times, the assets of Brandstock exceeded its liabilities. This

is clearly a full onus and not a mere duty to adduce evidence. If unable to discharge the onus, the section provides that the disposition is void and must be set aside.

[43] Because the deposits were made on different dates, the onus operates for each such date. It was candidly conceded in argument that, as regards the R200 000 deposited on 30 April 2018, the attorneys could not discharge the onus. This concession was well made. At that time, the liabilities of Brandstock clearly exceeded its assets. This was clear from the claim of one Louw, the creditor at whose instance Brandstock was liquidated. That claim arose during April 2018.

[44] The attorneys submitted, however, that the position on 23 February 2018 was different. Both parties accepted that Brandstock had cash of R102 308 in its account after 23 February 2018. The liquidators testified as follows concerning that date in the founding papers:

'Brandstock had no assets. . . Brandstock was indebted to Brodie Farming (Pty) Ltd at the date of the disposition, in the amount of R1 052 055.84 which indebtedness arose on 19 February 2018.

This was responded to by the attorneys as follows: 'I deny that Brandstock was factually insolvent on 23 February 2018 . . . Brandstock had livestock in its possession and had enough assets including its claims against BRP, Philp and Pratt and cash reserves which exceeded its liabilities which according to the Applicants were in any event only 1 (one) creditor being Brodie Farming (Pty) Ltd. This Honourable Court is reminded of the fact that Brodie Farming (Pty) Ltd is not an approved creditor of Brandstock and full legal arguments will be presented at the hearing of this application in this regard.'

None of these averments carries much evidential weight. Possession of cattle does not equate to ownership. One does not know what the financial relationships between Brandstock, BRP, Philp and Pratt were at the time. The fact that Brodie Farming had not proved a claim in the estate of Brandstock does not negate the existence of the claim testified to by the liquidators. There are any number of reasons why creditors refrain from proving claims in an insolvent estate. At least one is that the creditor might be required to contribute to the costs of the administration of the insolvent company instead of receiving payment of the whole or a portion of their claim.

[45] Before us the attorneys conceded that these averments did not amount to positive evidence that, on 23 February 2018, the assets of Brandstock exceeded its liabilities. They amounted to little more than surmise. They agreed that the best evidence of the state of affairs of a company is to produce and prove books of account showing the assets and liabilities of a company. Although they were not in possession of such books, **the machinery of the Uniform Rules of Court was available to the attorneys to require discovery of any such books by the liquidators.** I do not believe that what was asserted by the attorneys gave rise to a factual dispute. But, if it did so, since the attorneys bore the onus and did not request that any such dispute be resolved by way of oral evidence or trial, it must be resolved in favour of the liquidators. This all means that the attorneys failed to discharge the requisite onus under s 26(1)(b). It follows that these two dispositions, totalling R275 000, were correctly set aside by the high court, albeit for different reasons.

[46] Since the attorneys have succeeded before us in setting aside the order for repayment of R1.25 million, they are entitled to the costs of the appeal. The liquidators conceded that, in view of the complexity of the matter and the importance of the issues, the costs of two counsel would be warranted. I view that as a correct concession. As to costs in the high court, the liquidators were obliged to go to court to obtain payment of the R275 000 and were thus entitled to costs of the application. The costs order in the high court must therefore stand.

[47] It remains to mention a matter of grave concern which, if not corrected, could have serious adverse ramifications for the attorneys. In the judgment on both the application and the application for leave to appeal, the learned acting judge made strongly deprecatory comments and drew adverse inferences concerning the conduct of the attorneys. Counsel representing the liquidators made it plain before us that the papers did not support any such adverse remarks or inferences. I agree. There is nothing in the record which in any way warrants an adverse comment or inference of improper conduct on the part of the attorneys. **It is important that this Court makes it clear that it dissociates itself from those undeserved criticisms.**

ORDER: To the extent set out in paragraph 2 hereof, the appeal is upheld with costs, including costs of two counsel. Paragraphs 2 and 3 of the order of the high court are set aside and substituted with the following: It is declared that the following payments made by Brandstock Exchange (Pty) Ltd to the respondent: On 23

February 2018 in the sum of R75 000;  On 30 April 2018 in the sum of R200 000;are dispositions without value as contemplated by s 26(1) of the Insolvency Act 24 of 1936 read with s 340 of the Companies Act 71 of 1973 and they are set aside.
The respondent is ordered to pay to the applicants the sum of R275 000.'

**Venator Africa (Pty) Limited v Bekker and Another (8800/2021P) [2022] ZAKZPHC 50 (16 September 2022)**

Company-section 22(1) of the Companies Act 71 of 2008liability of company directors for loss suffered by third parties

The plaintiff alleged that a company ("Siyazi") in which defendants were directors had caused it loss in the amount of R41 407 220 by short-paying SARS amounts which plaintiff had paid Siyazi to that end. Plaintiff contended that the short payment occurred as a result of fraud and/or theft by Siyazi's employees and/or the defendants. With reference to section 22(1) of the Companies Act 71 of 2008, plaintiff pleaded that Siyazi was reckless or grossly negligent, or that the business was conducted with the intention to defraud the plaintiff. The second defendant filed two exceptions to the claim.

The first exception averred that the particulars of claim failed to disclose a cause of action. Section 22 of the Companies Act prohibits reckless trading [para 9]; and section 19 deals with the legal status of companies [paras 71-72]. Section 77(3) deals with the liability of directors, and sets out the circumstances under which a director is liable for any loss, damages or debts sustained by the company [para 74].

Upholding the exception, court states "the so-called lacuna created by the legislature in not providing expressly for the liability of directors to other persons, such as creditors, for loss or damage suffered, is a clear indication that it was not its intention to do so, thereby continuing to recognise what has been referred to as a foundation of company law" [para 88].

Exception is upheld. The plaintiff's particulars of claim are set aside. www.saflii.org/za/cases/ZAKZPHC/2022/50.html

**Timelink Cargo (Pty) Ltd v Ciba Packaging (Pty) Ltd (19378/2021) [2022] ZAGPJHC 695 (15 September 2022)**

Business rescue- Section 154(2) of the Companies Act 71 of 2008- business rescue plan does not provide for the enforcement of the plaintiff's debt, the plaintiff ought to have pleaded any facts to support a cause of action considering the explicit prohibition on a creditor to enforce any debt in terms of section 154(2) of the Act- plaintiff's cause of action is not dependent on the allegations relating to business rescue proceedings

This is an exception to the plaintiff's particulars of claim – The issue for determination is whether the plaintiff's particulars of claim disclose a cause of action considering the provisions of Section 154(2) of the Companies Act 71 of 2008 – In the main action, the plaintiff claims damages from the defendant arising from an alleged breach of an oral contract – The plaintiff avers that it complied with its obligations in terms of the oral agreement and claims payment from the defendant in the sum of R1 652 678.80 as the alleged balance owing for the services rendered – The defendant has excepted to the particulars of claim, contending that the particulars of claim do not disclose a cause of action as the plaintiff seeks to enforce a debt allegedly owed by the defendant immediately before the beginning of the business rescue process – The respondent argues that as the business rescue plan does not provide for the enforcement of the plaintiff's debt, the plaintiff ought to have pleaded any facts to support a cause of action considering the explicit prohibition on a creditor to enforce any debt in terms of section 154(2) of the Act – Section 154 of the company's Act 71 of 2008 – The claim in respect of the breach of oral contract has been set out to enable the excipient to respond to it – The Court finds that the plaintiff's cause of action is not dependent on the allegations relating to business rescue proceedings pleaded in paragraph 10 of the particulars of claim – The exception is dismissed. www.saflii.org/za/cases/ZAGPJHC/2022/695.html

In terms of Section 154 of the company's Act 71 of 2008- A business rescue plan may provide that if it is(1) implemented in accordance with its terms and conditions, a creditor who has acceded to the discharge of the whole or part of a debt owing to that creditor will lose the right to enforce the relevant debt or part of it.

(2) If a business rescue plan has been approved and implemented in accordance with this Chapter, a creditor is not entitled to enforce any debt

owed by the company immediately before the beginning of the business rescue plan,"

[8] It is now trite that a cause of action which is not disclosed by a pleading cannot succeed, unless it is shown that ex facie the allegations made by a plaintiff and any document upon which his or her cause of action may be based, the claim is (not may be) bad in law. The Supreme Court of Appeal in Steward v Botha 2008[1] held that the excipient must satisfy the court that the conclusion of law pleaded by the plaintiff cannot be supported by any reasonable interpretation of the particulars of claim.

[9] Particulars of claim must comply with the requirements for pleading set out in rule 18 of the Uniform Rules of court. Rule 18(4) provides that every pleading shall contain a clear and concise statement of the material facts upon which the pleader relies for his claim, defence or answer to any pleading, as the case may be, with sufficient particularity to enable the opposite party to reply to it.

[10] The Supreme Court of appeal in Van Zyl[2] reaffirmed the rights of creditors to enforce shelter ships, notwithstanding the business rescue of the principal debtor. In that matter a business rescue plan was proposed and sanctioned by the creditors, and various dividends were paid to creditors. After substantial implementation of the business rescue plan, the business rescue proceedings were terminated, and the business returned to its shareholders. An action was instituted against the surety for over 6 million. The surety resisted the claim relying on section 154, arguing that the claim against Blue Chip Mining was compromised, and so were any claims against the surety. The court held that section 154(2) only seeks to prevent creditors from pursuing claims for the balance of the debt against principal debtors and does not extinguish claims against sureties.

[11] Although Van Zyl dealt with suretyship, it established the principle that the approval and implementation of the business rescue plan do not necessarily

discharge the debt. It cannot be said that the pleadings are excipiable on every interpretation that can reasonably be attached to it.

[12] On a reading of the particulars of claim, the claim in respect of the breach of oral contract has been set out to enable the excipient to respond to it. I find that the plaintiff's cause of action is not dependent on the allegations relating to business rescue proceedings pleaded in paragraph 10 of the particulars of claim. I, therefore, find that the excipient can respond to the claim for breach of the oral agreement, and it follows that the exception must fail.

[13] In the result, the following order is made:

1. The exception is dismissed

2. The defendant shall pay the costs of the exception.

END-FOR NOW