INSOLVENCY LAW UPDATES NOVEMBER 2022[1]

INDEX

CASE NAMES

Absa Bank Limited v Bjorkman (40848/2020) [2022] ZAGPPHC 896 (7 November 2022)

Bidvest Bank Limited v Moeng (42419/2021) [2022] ZAGPJHC 878 (14 November 2022)

BNS Nominees v Arrowhead Properties [2022] ZAGPJHC 848

Cape 26 (PTY) Limited v Companies and Intellectual Property Commission and Others (2021/31083) [2022] ZAGPJHC 884 (11 November 2022)

CAPITAL APPRECIATION LTD v FIRST NATIONAL NOMINEES (PTY) LTD AND OTHERS 2022 (6) SA 67 (SCA)

Cassim N.O and Another v Strategic Investment Group Africa Asset Finance (Pty) Ltd and Others (2021/54279) [2022] ZAGPPHC 849 (8 November 2022)

Dalmar Konstruksie (Pty) Ltd and Another v Mikaia Boerdery (Pty) Ltd and Another (14801/2020) [2022] ZAGPPHC 806 (7 October 2022)

Goldrush Group v North West Gambling Board [2022] ZASCA 164

Kuttel v Master of the High Court and Others (Case no. 819/2021) [2022] ZASCA 156 (16 November 2022)

Lebashe Financial Services v Prudential Authority [2022] ZASCA 141

Lewis N.O v VDS and Others (14546/21) [2022] ZAGPJHC 889 (28 October 2022)

Mohale v Heads Tractor (Pty) Ltd and Others (23553/2020) [2022] ZAGPPHC 876 (17 November 2022)

Nel N.O and Others v Astrotail 109 (Pty) Ltd and Another (30326/22) [2022] ZAGPPHC 873 (21 November 2022)

Van den Heever and Others v RC Christie Incorporated and Others (21746/2019) [2022] ZAGPJHC 897 (16 November 2022)

Venator Africa (Pty) Ltd v Bekker and another [2022] 4 All SA 600 (KZP)

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

SUBJECT INDEX

Assets-paid into trust by liquidated company-liquidators claims-vests in liquidators Van den Heever and Others v RC Christie Incorporated and Others (21746/2019) [2022] ZAGPJHC 897 (16 November 2022)

Business rescue – applicant failed to show in financial distress Cassim N.O and Another v Strategic Investment Group Africa Asset Finance (Pty) Ltd and Others (2021/54279) [2022] ZAGPPHC 849 (8 November 2022)

Business rescue- BRP could not proof that he was appointed as such Cape 26 (PTY) Limited v Companies and Intellectual Property Commission and Others (2021/31083) [2022] ZAGPJHC 884 (11 November 2022)

Companies — Shares and shareholders — Shares — Purchase by company of more than 5% of any class of its shares — Shareholder voting against special resolution approving company repurchasing shares from shareholders — Shareholder's right to determination by court of its shares' fair value and to order that company pay it such amount — Companies Act 71 of 2008, ss 48(8)*(b)*, 114(4), 115(8) and 164(14). CAPITAL APPRECIATION LTD v FIRST NATIONAL NOMINEES (PTY) LTD AND OTHERS 2022 (6) SA 67 (SCA)

Company – Claim for damages against directors of company for loss caused by company – Exception to particulars of claim – Failure to disclose cause of action – Whether a director of a company can be held liable under section 218(2) of Companies Act 71 of 2008 if the company breaches section 22(1) of the Act – A company is considered to be a legal persona, distinct from its members, with its own separate legal existence – In terms of section 19(2) of the Companies Act, a person is not solely by reason of being inter alia a director of a company, liable for any liabilities or obligations of the company, except where the Companies Act and Memorandum of Incorporation provide otherwise. Venator Africa (Pty) Ltd v Bekker and another [2022] 4 All SA 600 (KZP)

Company – Shares – Dissenting shareholders – Fair value – Determination methods discussed – Variety of methods used – None appear to use net asset value as the sole or proximate indicator – Companies Act 71 of 2008, s 164. BNS Nominees v Arrowhead Properties [2022] ZAGPJHC 848

Company-Locus standi – Shareholder – Declaration of rights affecting company – Own interest litigant – Principles governing standing – Financial interest only – Interests of justice not served – No basis for locus standi. Goldrush Group v North West Gambling Board [2022] ZASCA 164

Company-Trust and trustees – sale of shares owned by trust to company controlled indirectly by two trustees – whether sanction of court required for validity of sale – whether transaction open and bona fide – whether beneficiary who was not a trustee treated unfairly when not given opportunity to bid for shares. Kuttel v Master of the High Court and Others (Case no. 819/2021) [2022] ZASCA 156 (16 November 2022)

Liquidation of 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. Lebashe Financial Services v Prudential Authority [2022] ZASCA 141
Sequestration application– Application for the sequestration of the respondent's estate- action proceedings currently remain pending; Court satisfied that the respondent had demonstrated in his papers that special considerations have come into play; under these circumstances, Court finds that granting a sequestration order is not justified. Absa Bank Limited v Bjorkman (40848/2020) [2022] ZAGPPHC 896 (7 November 2022)

Sequestration application of trust-dismissed on merits Lewis N.O v VDS and Others (14546/21) [2022] ZAGPJHC 889 (28 October 2022)

Sequestration application-withdrawn– Costs of sequestration Bidvest Bank Limited v Moeng (42419/2021) [2022] ZAGPJHC 878 (14 November 2022)

Winding up application-deadlock-not enough based on facts Mohale v Heads Tractor (Pty) Ltd and Others (23553/2020) [2022] ZAGPPHC 876 (17 November 2022)

Winding up or rescue- rescue application was not made, and as such, did not trigger the suspension of the liquidation proceedings Nel N.O and Others v Astrotail 109 (Pty) Ltd and Another (30326/22) [2022] ZAGPPHC 873 (21 November 2022)

Winding up-Final winding up order-claim not disputed on bona fide grounds Dalmar Konstruksie (Pty) Ltd and Another v Mikaia Boerdery (Pty) Ltd and Another (14801/2020) [2022] ZAGPPHC 806 (7 October 2022)

CASES

Mohale v Heads Tractor (Pty) Ltd and Others (23553/2020) [2022] ZAGPPHC 876 (17 November 2022)

Winding up application-deadlock-not enough based on facts

The applicant, a director and shareholder of the first respondent, seeks the final winding-up of the first respondent premised on a deadlock; in the alternative to the winding-up an order directing the valuation and sale of the applicants' shares to the second and third respondents.

Discussed: Respondents defences, the material non-joinder of the second and third respondents trustees; and the Court's lack of jurisdiction premised on the arbitration clause in the shareholder's agreement; lack of jurisdiction; applicant claims that the sole purpose of his removal as a director was to enable the respondents to oust him from the business of the First Respondent and its effective running; applicant contended that the relationship between the applicant and the second and third respondents has irretrievably broken down; having regard to clause 20 of the Shareholder's Agreement the Court concluded that arbitration was freely and readily agreed to between the parties; the deadlock would not constitute grounds for winding-up; and such a contractual term is not contrary to the prevailing legislation.

Order: The application is dismissed with costs.

Goldrush Group v North West Gambling Board [2022] ZASCA 164

Company law-Locus standi – Shareholder – Declaration of rights affecting company – Own interest litigant – Principles governing standing – Financial interest only – Interests of justice not served – No basis for locus standi.

Facts: Goldrush Group held 40% of the shares in licensee companies and the balance of the shares in the licensee companies were held by what were known as local PDI shareholders. The bingo licences contained a requirement that at least 60% of the shareholding in a company with a licence must be held by local PDIs. A local PDI was defined as a black person resident in the North West or a juristic person with majority ownership with natural persons in the North West. Goldrush later purchased more shares resulting in the 60% requirement not being met and an ensuing dispute with the Gambling Board. Goldrush approached the High Court and sought to have the imposition of the licence conditions declared unlawful and invalid.

Appeal: Against the High Court's dismissal of the application.

Discussion: The contentions by the Board that Goldrush had no locus standi and that the application should have been brought by the licensee companies; the submission by Goldrush that it had standing because it was a shareholder whose ability to deal with its shareholding was circumscribed by the local PDI requirement; and the case of Giant Concerts and own-interest standing.

Findings: At best for Goldrush, its interest is purely financial. Purely financial self-interest may not be enough and the interests of justice must also favour affording standing. Goldrush neither provided focused evidence nor made any submissions concerning the interests of justice. There was no basis on which to find that this was one of those exceptional cases where the public interest cried out for a court to enter into the merits of the matter.

Order: The appeal is dismissed with costs.

CAPITAL APPRECIATION LTD v FIRST NATIONAL NOMINEES (PTY) LTD AND OTHERS 2022 (6) SA 67 (SCA)

Companies — Shares and shareholders — Shares — Purchase by company of more than 5% of any class of its shares — Shareholder voting against special resolution approving company repurchasing shares from shareholders — Shareholder's right to determination by court of its shares' fair value and to order that company pay it such amount — Companies Act 71 of 2008, ss 48(8)*(b)*, 114(4), 115(8) and 164(14).

Appellant, a company, notified its shareholders that it planned to repurchase more than 5% of its issued share capital and it advised that this transaction would be subject to ss 48, 114 and 164 of the Companies Act 71 of 2008, and conditional on shareholders' approval by special resolution in terms of s 115 (see [3]). At the general meeting concerned, a shareholder voted against the resolution but it was nonetheless passed, and the shareholder then asked that the company buy its shares for their fair value (see [4]).

The company offered 80 cents for each share, but the shareholder rejected its offer, and applied to the High Court for it to determine its shares' fair value in terms of s 164(14) (see [4]). The company then contended that s 164 did not apply, with the consequence that the shareholder had no right to an appraisal, and it had no obligation to pay the court-appraised amount (see [5]).

The High Court found that s 164 did apply, and it ordered, inter alia, the appointment of an appraiser to aid it in the appraisal task (see [6]).
The company later asked the High Court for, and was granted, leave to appeal to the Supreme Court of Appeal.
The Supreme Court of Appeal *held*, following on interpretation of the provision concerned, that s 48(8)*(b)* was linked by way of ss 114 and 115 to s 164, and the shareholders' compliance with the requirements of s 115 and s 164 entitled it to the appraisement it had prayed for (see [28] – [29]). Appeal dismissed (see [30]).

Lebashe Financial Services v Prudential Authority [2022] ZASCA 141
Liquidation of 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.

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.

BNS Nominees v Arrowhead Properties [2022] ZAGPJHC 848
Company – Shares – Dissenting shareholders – Fair value – Determination methods discussed – Variety of methods used – None appear to use net asset value as the sole or proximate indicator – Companies Act 71 of 2008, s 164.
Facts: BNS is the registered shareholder of the shares in Arrowhead, while Breede is the beneficial owner of these shares held by BNS. Arrowhead and Gemgrow advised the market of a potential transaction that was later indicated as a share swop. BNS voted against the resolutions but was later advised that the special

resolution approving the scheme had been adopted. BNS demanded to be paid full value for its shares and Arrowhead made an offer of R3,75 per share, which was rejected.
Application: Breede and BNS seek in terms of the Companies Act 71 of 2008 to request the court to appoint appraisers to make the determination of the fair value of the shares and also seek further information from the company. Arrowhead's counter-application seeks an order determining the fair value of the shares at R3,75 per share.
Discussion: The section 164 process; whether the court should appoint an appraiser; defining fair value; the net asset value (NAV) of Arrowhead and the contention that the value was R6,90; a "market based" approach; the cash value of the swap value; and that there are a variety of methods used to establish fair value and none appear to rely on NAV as the sole or proximate indicator of fair value. As to appointing an appraiser, in this case it would amount to the abdication of a judicial function to an expert.
Findings: The applicants have not made out a case that the offer of R 3,75 per share does not represent fair value.
Order: The main application is dismissed. The counter application is upheld in that it is determined that R3,75 per share was the fair value of the shares held by all dissenting shareholders in Arrowgem.

Dalmar Konstruksie (Pty) Ltd and Another v Mikaia Boerdery (Pty) Ltd and Another (14801/2020) [2022] ZAGPPHC 806 (7 October 2022)

Winding up-Final winding up order-claim not disputed on bona fide grounds

In this application for final winding up of the respondents, the Court is called to determine factors relevant to the outcome of the application; whether or not the parties' business relationship is that of a partnership.

Discussed: Second applicant avers that there existed an irresoluble deadlock and breach of trust between the Dalmar and Lee groups concerning a cattle farming enterprise engaged in Mozambique; applicants contend that in the circumstances it was just and equitable that the respondent be wound up; true purpose of the application sought to address certain questions; whether there was a partnership; whether there are grounds for liquidation; does Embondeiro offer a better solution than the winding up of the respondent; Embondeiro has not discharged it onus that that the indebtedness is disputed on bona fide and reasonable grounds.

Order: The respondent is finally wound-up.

Cassim N.O and Another v Strategic Investment Group Africa Asset Finance (Pty) Ltd and Others (2021/54279) [2022] ZAGPPHC 849 (8 November 2022)

Business rescue – applicant failed to show in financial distress

The applicants rely on the provisions of Section 131 (1) of Act 17 of 2008 in seeking an urgent order for placing the first respondent under supervision and business rescue proceedings to commence.

Discussed: The issues to be decided are whether the first respondent should be placed under supervision and whether business rescue proceedings should be commenced against it; whether it would be just and equitable that an order be

granted for placing the first respondent in business rescue; whether the first respondent is financially distressed; in terms of Section 131 (4) the applicants are vested with an onus to establish to the satisfaction of the Court stipulated requirements; having found that the applicants failed to make out a case for financial distress and that it is good and just to do so, the determination of whether there is reasonable prospect that the first respondent can be rescued is neither here nor there; Court finds that there is no justification to rescue the first respondent as it is not financially distressed to make such determination under the circumstances of this matter.

[34] Except the unreasonable demand that the first respondent effect payment of R46.8 million on a four days' notice, it is contended that the applicants failed to establish any factual basis for alleging that the first respondent is in financial distress. According to the first respondent, there is no evidence provided by the applicants to prove that the first respondent will be unable to honour its obligations apart from a letter of demand addressed on four days' notice to the first respondent.

[35] The only distress that may exist in the first respondent's view, is a relational distress between the applicants and the first respondent which cannot result in the first respondent being placed in business rescue. The contention by the applicants that it is just and equitable that the first respondent be placed in business rescue according to the first respondent is not justified if one considers the common facts in this matter.

[36] The first respondent argues that the main reason why this application was launched is that the first respondent and the applicants could not agree to terms of a written agreement formalizing their relationship in which the third applicants must be appointed to manufacture and deliver forty five buses to the first respondent to be delivered to Rustenburg Transit. The view of the first respondent is that the intention of the applicants in launching this application is to gain control of the first respondent, conclude agreements with the third applicant as well as the Rustenburg Transit. The first respondent contends that the application was not brought in good faith and it is in fact an abuse of the court process.

[37] The contention by the applicants that they are entitled to assume control of the first respondent by instituting business rescue proceedings and that the first respondent is duty bound to conclude an agreement with the third applicant is unacceptable according to the first respondent as it amounts to an agreement to agree. The first respondent's view is that since there is no agreement with the applicants and as such there is no deadlock breaking mechanism, any possible agreement to agree between the parties herein is unenforceable.

[38] The first respondent submits that it is entitled to freely enter into agreement with any manufacturer for the supply of forty five buses in order to fulfil its obligations in terms of the tender awarded to it by Rustenburg Transit.

Careful reading of the papers herein reveal that the distrust and deadlock in not agreeing to terms of formalizing the relationship between the parties is in my view, the reason that resulted in this application being instituted. The motive and purpose of bringing this application is highly questionable and cannot be regarded as just and equitable as I have already found that the applicants failed to make out a case for financial distress against the first respondent. I therefore find that it is not just and equitable to place the first respondent under business rescue as there is no evidence

presented justifying same. It is therefore not far-fetched for the first respondent to assert that the only reason why this application was launched is to gain control of its affairs. The applicants clearly indicated that with the business practitioners appointed, the affairs of the first respondent will be better controlled for the benefit and interests of all affected parties. According to the applicants, the success of the first respondent is reliant in it concluding an agreement with the third applicant. The applicants contended that there is a reasonable prospect of rescuing the first respondent from insolvency and that it has not secured an independent funder from any institution.

[57] The first respondent stated that it is entitled to freely contract with any manufacturer to supply the forty five buses for Rustenburg Transit and refutes that its success is dependent on the third applicant. The court has a discretion in determining whether there is a reasonable prospect of rescuing the companies from its insolvency by placing it under business rescue. I hold the view that the first hurdle to be crossed is that the company is under financial distress and that there is a good and just cause to place it under supervision and business rescue.

[58] Having found that the applicants failed to make out a case for financial distress and that it is good and just to do so, the determination of whether there is reasonable prospect that the first respondent can be rescued is neither here nor there. I find that there is no justification to rescue the first respondent as it is not financially distressed to make such determination under the circumstances of this matter. I am not convinced that it is important and necessary to appoint the applicants and any person a business practitioners as there are no justifiable reasons to do so.

Order: The application is dismissed.

Bidvest Bank Limited v Moeng (42419/2021) [2022] ZAGPJHC 878 (14 November 2022)

Sequestration application-withdrawn– Costs of sequestration

Applicant brought an application to sequestrate the estate of the respondent; the debt has been fully settled and that the sequestration application is withdrawn; the issue before this court is who is to pay for the costs of the sequestration.

Discussed: The evidence is that just two days before the sequestration application was to be heard it had to be removed from the unopposed roll as the respondent filed an opposition, despite having been served with a set down and informed of a date for filing of the opposition; the wasted costs of this removal were reserved and the applicant is entitled to recover those costs; counsel submitted that the respondent pursued four unmeritorious applications and in each one he changed his versions, contradicted himself, knowing that he had no defence to the claim and to avoid sequestration; respondent was vexatious in the litigation and continued his mala fide conduct as it filed supplementary papers, and the applicant was obliged to reply at a substantial cost in preparation for arguments.

Order: The respondent shall pay the applicants attorney client costs of the sequestration, including the costs for removal of the matter on 11 November 2021.

Cape 26 (PTY) Limited v Companies and Intellectual Property Commission and Others (2021/31083) [2022] ZAGPJHC 884 (11 November 2022)

Business rescue- BRP could not proof that he was appointed as such

Mr Tayob seeks leave to appeal the whole order dismissing the application in which Mr Tayob sought of the Court an extension of the period in which a business rescue plan is to be published, as provided for in section 150(5)(a) of the Companies Act, 2008, and ordering that he pay the costs personally.

Discussed: The primary basis for dismissing the application was that Mr Tayob had not established that he was the business rescue practitioner of the Company and so was not in a position to seek an extension; whether Mr Tayob can demonstrate that he is the business rescue practitioner of the company is antecedent to a determination as to whether he is entitled to an extension of the period in which a plan to be published; Court not persuaded that there is a sound rationale basis to reach a conclusion that there are prospects of success; the applicant has not advanced some other compelling reason why the appeal should be heard; he has not established that he litigates on behalf of the Company.

Order: An order is made that the application for leave to appeal is dismissed, and that the costs of David Bannai as the second respondent in opposing this application for leave to appeal are to be paid by Mr Tayob personally.

Van den Heever and Others v RC Christie Incorporated and Others (21746/2019) [2022] ZAGPJHC 897 (16 November 2022)

Assets-paid into trust by liquidated company-liquidators claims-vests in liquidators

COMPANY – Repayment

Plaintiffs' case is that Water Africa's attorneys held the amount of R1,664,207 in trust on behalf of Water Africa, that it was an asset or property of Water Africa, and that on liquidation the liquidators became entitled to this amount; they contend that payments to the defendants stand to be reversed or repaid.

Discussed: The causes of action; there are two claims; claim A can only apply if claim B is unsuccessful; claim B, whether the plaintiffs have in law a claim for repayments in terms of the Law of Insolvency; whether the money which Water Africa's attorneys kept in its trust account is the property or an asset of Water Africa as it is understood in Insolvency Law; grounds on which a liquidator seeks repayment of an amount that has been paid by or on behalf of a company which has been placed under winding-up depends on the stage when the payment was made; at the time when the payments were made to the second and third defendants, Water Africa had already been placed under winding-up by the court; the payments were therefore per se void; first defendant is accordingly liable, jointly and severally, with the second and third defendants respectively for the amounts paid to them; Court found in favour of the plaintiffs in respect of claim B and Claim A has thus fallen away.

Order: As against the first and second defendants, jointly and severally, the one paying the other to be absolved: the amount of R600 000; and Interest on the amount of R400 000 at the rate of 10,25% per annum from 24 March 2016 to date of payment.

Lewis N.O v VDS and Others (14546/21) [2022] ZAGPJHC 889 (28 October 2022)

Sequestration application of trust-dismissed on merits

Applicant has launched the present application for an order placing the estate of the Ludan Trust under sequestration in the hands of the Master of the High Court and directing that the costs of the application form part of the costs of the sequestration of the estate of the Trust.

Discussed: On the merits, the question is whether the applicant has established the facts for the grant of a sequestration order; the second respondent states that the Trust was established as a family Trust for the benefit of the first and second respondents and their three children; by seeking an order sequestrating the Trust, the applicant is acting detrimental to the joint estate or at least the beneficiaries of the joint estate which is the first and second respondents; it is not just and equitable to sequestrate the Trust as same will be detrimental to the joint estate; whether the applicant has proven insolvency; applicant has failed to prove that sequestration will be to the advantage of creditors; sequestration will be to the detriment of the joint estate; Court finds the applicant has failed to make out a case for sequestration of the Trust.

[17] The next question is whether the applicant has proven insolvency. It is trite that the applicant must make out a case in the founding affidavit. In this case I find that the applicant has not established on the facts that the Trust is insolvent. The applicant says that he does not have all the information at his disposal about the extent of the Trust assets and liabilities. This is an indication that the applicant has jumped the gun by applying for sequestration. On the applicant's own version, the only major creditor of the Trust is the joint estate. The joint estate entails the first and second respondents as the beneficiaries and owners of the joint estate. After his investigation, the applicant could not mention any other creditor other than the joint estate. The applicant is certainly not acting in the interest of the second respondent, who is the owner of half of the joint estate and also having entitlement to half of the loaned amount to the Trust. The second respondent has not mandated the applicant to call up the loan account nor did he say that he wanted the Trust to be sequestrated. The applicant did not consult the second respondent on the sequestration before it was launched.

Order: The application is dismissed with costs.

Nel N.O and Others v Astrotail 109 (Pty) Ltd and Another (30326/22) [2022] ZAGPPHC 873 (21 November 2022)

Winding up or rescue- rescue application was not made, and as such, did not trigger the suspension of the liquidation proceedings

The applicants issued an application seeking the provisional winding up of the respondent; the intervening party seeks to have the respondent placed under supervision and for business rescue proceedings as contemplated in s 131 (4)(a) of the Companies Act 71 of 2008 (the Act) to commence.

Discussed: It is necessary to consider whether a business rescue application was 'made' that will suspend the liquidation proceedings, since the business rescue application is not ripe for hearing, see in Lutchman N.O. and Others v African Global Holdings (Pty) Ltd and Others 2022 (4) SA 529; Court is of the view that the business rescue application was not made, and as such, did not trigger the suspension of the liquidation proceedings as contemplated in s 131(6) of the Companies Act, and a case is made out for the provisional winding up of the respondent, the provisional winding-up order stands to be granted.

Order: The respondent is placed in provisional liquidation in the hands of the Master of the High Court.

Absa Bank Limited v Bjorkman (40848/2020) [2022] ZAGPPHC 896 (7 November 2022)

Sequestration application– Application for the sequestration of the respondent's estate- action proceedings currently remain pending; Court satisfied that the respondent had demonstrated in his papers that special considerations have come into play; under these circumstances, Court finds that granting a sequestration order is not justified.

It is the applicant's case that the respondent is indebted to it in terms of a written loan agreement; the issue for determination is whether the sequestration application is appropriate and justified in the circumstances.

Discussed: Respondent's initial indebtedness was due to four mortgage bonds registered over two immovable properties; action proceedings; ABSA contends that the first counterclaim has no basis, in fact and in law; it was argued that the delay was caused by the applicant not registering the mortgage bonds timeously; sequestration proceedings; respondent's main contentions were that he is not insolvent, he explained that the current estimated value of the property exceeds his liabilities; these proceedings are not appropriate as there is a dispute on the valuation of the property in question; requirements for sequestration met; it is the applicant's case that the jurisdictional requirements in terms of the Insolvency Act have been met and thereby it is entitled to its sequestration order; once the jurisdictional factors for insolvency are met, an applicant would ordinarily be entitled to its order unless certain factors come into play and which I am required to take into consideration; these proceedings were instituted after a frustrated attempt in the action proceedings and which action proceedings currently remain pending; Court satisfied that the respondent had demonstrated in his papers that special considerations have come into play; under these circumstances, Court finds that granting a sequestration order is not justified.

Order: The application is dismissed with costs.

Kuttel v Master of the High Court and Others (**Case no. 819/2021) [2022] ZASCA 156 (16 November 2022)**

Company-Trust and trustees – sale of shares owned by trust to company controlled indirectly by two trustees – whether sanction of court required for validity of sale – whether transaction open and bona fide – whether beneficiary who was not a trustee treated unfairly when not given opportunity to bid for shares.

Venator Africa (Pty) Ltd v Bekker and another [2022] 4 All SA 600 (KZP)

Corporate and Commercial – Company law – Claim for damages against directors of company for loss caused by company – Exception to particulars of claim – Failure to disclose cause of action – Whether a director of a company can be held liable under section 218(2) of Companies Act 71 of 2008 if the company breaches section 22(1) of the Act – A company is considered to be a legal persona, distinct from its members, with its own separate legal existence – In terms of section 19(2) of the Companies Act, a person is not solely by reason of being inter alia a director of a company, liable for any liabilities or obligations of the company, except where the Companies Act and Memorandum of Incorporation provide otherwise.

The defendants were directors in a company ("Siyazi") with whom the plaintiff ("Venator") had contracted in 2006. Venator alleged that Siyazi had caused it loss in the amount of R41 407 220 by short-paying SARS amounts which plaintiff had paid Siyazi to that end. That resulted in SARS raising assessments against Venator for VAT and penalties. With reference to section 22(1) of the Companies Act 71 of 2008, which prohibits reckless trading by a company, Venator pleaded that Siyazi was reckless or grossly negligent, or that the business was conducted with the intention to defraud Venator. It was contended that the defendants, as directors of Siyazi, were reckless or grossly negligent in controlling the activities of Siyazi.

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. It was argued that section 22(1) regulates companies, which are distinct juristic persons, and therefore does not regulate what directors may do, nor does it impose duties on directors. It was averred that there was no allegation in the particulars of claim that section 22 regulated directors' conduct. A further contention was that allegations in the particulars of claim, regarding fraud, recklessness and gross misconduct, mirrored the jurisdictional requirements of section 22(1) but that section 22(1) did not impose obligations on, and could not apply to the defendants as directors. The second defendant maintained that the particulars of claim did not aver any breach by the defendants of an obligation imposed on them by the Companies Act, in order to bring them and the alleged loss said to have been caused by them within the purview of section 218(2), which deals with civil actions for contraventions of the Act, and accordingly did not sustain a cause of action. The exception distinguished between Siyazi as the company and the defendants as directors and entities separate from the company.

Held – The approach taken by courts when considering exceptions requires an excipient who alleges that a summons does not disclose a cause of action to establish that, upon any construction of the particulars of claim, no cause of action is disclosed.

The main thrust of the second defendant's argument centred around whether a director of a company can be held liable under section 218(2) if the company breaches section 22(1) of the Companies Act. A cornerstone of company law is that a company is considered to be a legal persona, distinct from its members, with its own separate legal existence. Section 19 of the Companies Act deals with the legal status of companies. In terms of section 19(2), a person is not solely by reason of being *inter alia* a director of a company, liable for any liabilities or obligations of the company, except where the Companies Act and Memorandum of Incorporation provide otherwise. Section 22 contains no express provision that a director will be held liable for acting in the manner prohibited by the section. The remedy in section

77(3)(b) against directors where recklessness is found, is only available to the company itself and not to creditors.

Upholding the exception, the court described 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, as a clear indication that it was not its intention to do so, thereby continuing to recognise a foundational principle of company law.

The first exception was upheld, rendering it unnecessary to consider the second exception raised. Venator was granted leave to file amended particulars of claim.

End for now