SARIPA
South African Restructuring and Insolvency Practitioners Association NPC

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The views expressed in this update are those of the writer, Martinus (Tienie) Cronje.

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A liquidator's refusal to answer questions regarding the merits of the administration of the insolvent estate was sufficient to warrant his removal as liquidator in terms of section 379(1)(b) or (e) of the Companies Act 61 of 1973 without any further notice.

The overall purpose of an enquiry in terms of section 381 of the Companies Act 61 of

1973 appears to be investigative and not that of a procedure which adversely affects the rights and impacts directly and immediately on individuals. The court has difficulty in seeing how the enquiry in question can be characterised as administrative action in terms of the Promotion of Administrative Justice Act 3 of 2000 (PAJA).

The words "observing all the requirements imposed on him by any law or otherwise with respect to the performance of his duties" in section 381(1) would include directions of the Master.

The applicant was given proper notice and also the opportunity to advance reasons why he should not be removed from the Master's Panel of Approved Liquidators and Trustees. He opted to not take advantage of the invitation. It is clear that the applicant not only kept the Master in the dark about his previous convictions, but that he also told a blatant lie on 17 August 2011. Taking into account all these considerations, the court is not convinced that an irregularity has been committed by the Master as alleged. Therefore, there is no reasonable prospect of success on the merits with regard to the decision to remove Motala from the Master's Panel.

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Insolvent entitled to intervene in matters where trustees abide decisions.

Save for a narrow point, the trustees formally stated that they would abide the decision of the court in both matters. In the result, the insolvents were entitled to take steps which, if successful, would enhance the value of the estate, whether by increasing the assets in the estate in the second appeal or reducing the liabilities in the estate in the first appeal. The insolvents were thus entitled to intervene in both matters.

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Application for winding up of a solvent company by Cabinet Minister.

In terms of section 157(1) of the Companies Act 71 of 2008 the Minister may apply for the winding up of a solvent company in terms of section 81(1) on the ground of just an equitable if it is in the public interest to do so.

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BUSINESS RESCUE

Diener N.O. v Minister of Justice

(926/2016) [2017] ZASCA 180 (1 December 2017)

The order of preference of the business rescue practitioner's claim on liquidation for remuneration and expenses.

Section 135(4) and section 143(5) of the Companies Act 71 of 2008 do not create a 'super-preference'. Section 135(4) provides to the BRP, after the conversion of business rescue proceedings into liquidation proceedings, no more than a preference in respect of his or her remuneration to claim against the free residue after the costs of liquidation but before claims of employees for post-commencement wages, of those who have provided other post-commencement finance, whether those claims were secured or not, and of any other unsecured creditors.

In *Panamo Properties (Pty) Ltd & another v Nel & others NNO* 2015 (5) SA 63 (SCA) Wallis JA commenced his judgment by speaking of the commendable goals of chapter 6 being hampered 'because the statutory provisions governing business rescue are not always clearly drafted'. [Para 1.] He then proceeded to say [Para 27]

> that in these circumstances, a court 'must consider whether there is a sensible interpretation that can be given to the relevant provisions that will avoid anomalies' and that this involves the application of two further principles of interpretation: endeavouring to 'give a meaning to every word and every section in the statute' and avoiding construing provisions as having no meaning; and reconciling sections of a statute that appear to be in conflict if that is possible. (Par [18])

Section 135 of the Companies Act 71 of 2008 deals with post-commencement finance, which includes the remuneration and expenses of the Business Rescue Practitioner (BRP). It provides:

‘(1) To the extent that any remuneration, reimbursement for expenses or other amount of money relating to employment becomes due and payable by a company to an employee during the company's business rescue proceedings, but is not paid to the employee-

(*a*) the money is regarded to be post-commencement financing; and

(*b*) will be paid in the order of preference set out in subsection (3)(*a*).

(2) During its business rescue proceedings, the company may obtain financing other than as contemplated in subsection (1), and any such financing-

(*a*) may be secured to the lender by utilising any asset of the company to the extent that it is not otherwise encumbered; and

(*b*) will be paid in the order of preference set out in subsection (3)(*b*).

(3) After payment of the practitioner's remuneration and expenses referred to in section 143, and other claims arising out of the costs of the business rescue proceedings, all claims contemplated-

(*a*) in subsection (1) will be treated equally, but will have preference over-

(i) all claims contemplated in subsection (2), irrespective of whether or not they are secured; and

(ii) all unsecured claims against the company; or

(*b*) in subsection (2) will have preference in the order in which they were incurred over all unsecured claims against the company.

(4) If business rescue proceedings are superseded by a liquidation order, the preference conferred in terms of this section will remain in force, except to the extent of any claims arising out of the costs of liquidation.’ (Par [30])

Section 143 deals with the remuneration of a BRP. It states:

‘(1) The practitioner is entitled to charge an amount to the company for the remuneration and expenses of the practitioner in accordance with the tariff prescribed in terms of subsection (6).

...

(5) To the extent that the practitioner's remuneration and expenses are not fully paid, the practitioner's claim for those amounts will rank in priority before the claims of all other secured and unsecured creditors.

(6) The Minister may make regulations prescribing a tariff of fees and expenses for the purpose of subsection (1).’ (Par [36])

It was argued on behalf of Diener that, in relation to his remuneration and expenses, he enjoyed, after the costs of the liquidation, a ‘super-preference’ over all other

creditors, whether secured or not. The term ‘super-preference’ appears to originate in Henochsberg in relation to the ‘preference’ (if such it be) created by section 143(5) of the 2008 Act. [P A Delport (ed) *Henochsberg on the Companies Act 71 of 2008* (Vol 1) at 500.] This argument was not supported by either of the respondents or any of the *amici curiae*.

Diener’s argument is based on the provisions of section 135(4) and section 143(5) of the 2008 Act which, he says, are clear: in particular, section 143(5) states that a BRP’s claim for remuneration and expenses ‘will rank in priority before the claims of all other secured and unsecured creditors’. The effect, it is conceded by Diener, is that new and significant inroads are made into the security that is held by secured creditors. (Par [39])

Section 135 concerns itself with post-commencement finance and it is in this context, i.e. while business rescue proceedings are in place, that it creates a set of preferences for the payment by the company of certain of its unpaid debts. It does so as part of the regulation of the affairs of the financially distressed company. It is only section 135(4) that is concerned with the consequences of a failed business rescue, retaining the preferences created in respect of post-commencement finance on liquidation, subject only to the costs of liquidation. This section, to the limited extent that it has to do with liquidation, says nothing of the ‘super-preference’ contended for over secured assets. To the contrary, it creates in favour of those claims listed in the section, a preference over unsecured claims. (Section 135(3).) [Par [42])

Section 143 is also not concerned with liquidation. Instead, it regulates the BRP’s right to remuneration during business rescue proceedings. The reference to secured and unsecured creditors in the section must be understood to be a reference back to section 135: to those persons who have, or have been deemed to have, provided the company with post-commencement finance, both secured and unsecured, and not to the company’s pre-business rescue creditors. Simply put, the preference operates within this limited context. Henochsberg’s commentary, referred to above, seen in proper perspective is consonant with that conclusion. Henochsberg (note 36) stated with reference to section 143(5): ‘The purpose of this provision is not entirely clear. It seems unrealistic and impractical to expect a successful business rescue plan to be implemented in circumstances where there are insufficient funds to pay the business

rescue practitioner's fees; however, should this be the case the amount of the practitioner's remuneration and expenses that remain unpaid will be paid as a "super-preference" in priority to all the secured and unsecured claims against the company.' (Par [43])

From the sections of chapter 6 that deal with security, it is apparent that security is treated in the same way as it is in the law more generally. There is, in other words, no indication that, in business rescue proceedings, security is to be diluted or undermined in any way. For instance, section 134(3) provides that if a company wishes, during business rescue proceedings, to dispose of property that is held as security by another person, it may only do so with that person's prior consent, unless the proceeds of the disposal 'would be sufficient to fully discharge the indebtedness protected by that person's security'; and then the company must pay the person promptly up to the company's indebtedness to him or her, or provide satisfactory security for that amount. This is consistent with what was held in *Energydrive Systems (Pty) Ltd v Tin Can Man (Pty) Ltd & others* 2017 (3) SA 539 (GJ) para 18] namely that the 'purpose and context' of business rescue 'are not aimed at the destruction of the rights of a secured creditor'. (Par [44])

What is the place of the preference created by section 135(4) in the broader scheme of the Insolvency Act? Section 135(4) contains a strong indication when it provides that the claims that it deals with rank after the costs of sequestration. (Par [45])

The argument that the BRP's claim for remuneration takes preference over secured claims against the company (other than those in respect of post-commencement finance) also flounders on the wording of section 95 of the Insolvency Act. It provides that the proceeds of property which is secured shall, after deductions in respect of the costs of maintaining, conserving and realising the property, (Insolvency Act 24 of 1936 section 89(1)) be 'applied in satisfying the claims secured by the said property, in their order of preference'. It cannot be said, without doing unjustifiable violence to the language of section 95, that the payment of remuneration to a BRP from the proceeds of property secured in favour of someone else amounts to applying the proceeds of the property to the satisfaction of a claim secured by that property. (Par [47])

The argument advanced on behalf of Diener leads to other anomalies as well. For instance, if, after business rescue proceedings were converted to liquidation proceedings, there was no free residue in an insolvent estate to meet the costs of liquidation, the argument that has been advanced about the 'super-preference' would mean that as a matter of fact, and in conflict with section 97 of the Insolvency Act and section 135(4) of the 2008 Act, the BRP would be paid his or her remuneration out of realised secured property, while the costs of liquidation would not be. In this example, the effect of the 'super-preference' contended for is that the claim for remuneration of the BRP would, in fact, rank ahead of the costs of liquidation. That result could not have been intended. (Par [48])

Section 135(4) and section 143(5), whether taken individually or in tandem, do not create the 'super-preference' contended for on behalf of Diener. Section 135(4) provides to the BRP, after the conversion of business rescue proceedings into liquidation proceedings, no more than a preference in respect of his or her remuneration to claim against the free residue after the costs of liquidation but before claims of employees for post-commencement wages, of those who have provided other post-commencement finance, whether those claims were secured or not, and of any other unsecured creditors. (Par [49])

It was argued that the effective date of the liquidation was the date on which the company filed its resolution to commence business rescue proceedings. On this basis, it is argued that everything done after that date by the BRP is part of the costs of liquidation. (Par [51])

The argument advanced is flawed for three reasons. First, it fails to draw a distinction, as the 2008 Act does, between business rescue proceedings and liquidation proceedings. Section 132(1) of the 2008 Act provides that business rescue commences, inter alia, when the director's resolution is filed and section 132(2)(*a*) provides that business rescue ends, inter alia, when a court converts business rescue proceedings into liquidation proceedings. In the context of this case, the 2008 Act clearly envisages an end to business rescue proceedings and a commencement of liquidation proceedings. (Par [52])

Secondly, the 2008 Act, by creating in section 135(4), the preference on liquidation for post-commencement finance, including the BRP's remuneration, and ranking these claims after the costs of liquidation, drew a clear distinction between the costs of business rescue and the costs of liquidation. (Par [53])

Thirdly, irrespective of whether the 1973 Act or the 2008 Act applied to the liquidation of J D Bester, the effective date of the liquidation would be the same. In terms of item 9 of Schedule 5 of the 2008 Act, despite the repeal of the 1973 Act, chapter XIV of that Act continued to apply to the 'winding-up and liquidation of companies under this Act, as if that Act had not been repealed'. This is made subject , inter alia, to item 9(2) which provides that '[d]espite subitem (1), sections 343, 344, 346 and 348 to 353 do not apply to the winding-up of a solvent company. . .'. The effect of items 9(1) and 9(2) is that the relevant provisions of the 1973 Act are preserved and apply to the winding-up of commercially insolvent companies, while the 2008 Act applies directly to the winding-up of commercially solvent companies. [*Boschpoort Ondernemings (Pty) Ltd v ABSA Bank Ltd* 2014 (2) SA 518 (SCA); [2013] ZASCA 173 paras 22-23.] (Par [54])

In either event, the effective date of the liquidation is the day that the liquidation application was filed. (Par [56])

The general rule is that 'a creditor who wishes to share in the distribution of the assets in an insolvent estate must prove his claim against it at any meeting of creditors therein to the satisfaction of the officer presiding at such meeting'. [Eberhard Bertelsmann, Roger G Evans, Adam Harris, Michelle Kelly-Lowe, Anneli Loubser, Melanie Roestoff, Alistair Smith, Leonie Stander and Lee Steyn *Mars: The Law of Insolvency in South Africa* (9 ed) para 18.1. (hereafter referred to as *Mars*.).] [59]

Those who render services in connection with the sequestration proceedings and the administration of the insolvent estate are identified in section 97. A BRP is not included in this list. He or she could not be included because of the distinction between business rescue proceedings and liquidation proceedings. (Par [61])

In the result, Diener, in his capacity as BRP, was a creditor of J D Bester and, in respect of his remuneration and expenses, he was required to prove his claim in terms of section 44 of the Insolvency Act. (Par [62])

A complaint was made by Diener on behalf of Cawood Attorneys that its fees and disbursements in respect of the urgent application to interdict the sale in execution, on the one hand, and its fees and disbursements in respect of the application to convert the business rescue proceedings into liquidation proceedings, on the other, ought to have been treated differently by the liquidators: either as expenses in the business rescue proceedings or as post-commencement finance, rather than as a concurrent claim, in the first instance, or as costs in the liquidation, rather than as a concurrent claim, in the second instance. Cawood Attorneys proved these claims. It is not a party to these proceedings and Diener has no standing to litigate on its behalf. The issues raised on its behalf are consequently not properly before the court, and do not require attention. (Par [63])

Extracts

The issues

[15] The issues that we are required to consider in relation to Diener are, in the order in which they will be dealt with: (a) the order of preference of the BRP's claim for remuneration and expenses on the liquidation of J D Bester; (b) a determination of the date of liquidation, when business rescue proceedings are converted into liquidation proceedings; and (c) whether the BRP is required to prove his or her claim in terms of s 44 of the Insolvency Act, and the effect of Diener not having proved his claim in this case. In addition, two issues in relation to the claims for fees of Cawood Attorneys have been raised, namely (a) whether its fees in respect of the urgent application of 14 June 2002, referred to in paragraph 7 above, were to be treated as expenses in the business rescue in terms of s 143 of the 2008 Act, or post-commencement finance in terms of s 135, or, as they were dealt with, as a claim by a concurrent creditor; and (b) whether its fees in respect of the application to convert the business rescue proceedings into liquidation proceedings were costs in the liquidation or were to be treated, as they were, as a claim by a concurrent creditor.

[18] In *Panamo Properties (Pty) Ltd & another v Nel & others NNO*, [*Panamo Properties (Pty) Ltd & another v Nel & others NNO* 2015 (5) SA 63 (SCA); [2015] ZASCA 76; *African Banking Corporation of Botswana Ltd v Kariba Furniture Manufacturers (Pty) Ltd & others* 2015 (5) SA 192 (SCA); [2015] ZASCA 69 para 43] a case, like this one, concerning the interpretation of the business rescue provisions of chapter 6 of the 2008 Act, Wallis JA commenced his judgment by speaking of the commendable goals of chapter 6 being hampered 'because the statutory provisions governing business rescue are not always clearly drafted'. [Para 1.] He then proceeded to say

> that in these circumstances, a court 'must consider whether there is a sensible interpretation that can be given to the relevant provisions that will avoid anomalies' and that this involves

the application of two further principles of interpretation: endeavouring to 'give a meaning to every word and every section in the statute' and avoiding construing provisions as having no meaning; and reconciling sections of a statute that appear to be in conflict if that is possible. [Para 27.]

[19] In addition, s 5 of the 2008 Act also provides guidance on how its provisions are to be interpreted, particularly in relation to other legislation. The section states:

> (1) This Act must be interpreted and applied in a manner that gives effect to the purposes set out in section 7.
>
> (2) To the extent appropriate, a court interpreting or applying this Act may consider foreign company law.
>
> (3) . . .
>
> (4) If there is an inconsistency between any provision of this Act and a provision of any other national legislation-
>
> (*a*) the provisions of both Acts apply concurrently, to the extent that it is possible to apply and comply with one of the inconsistent provisions without contravening the second; and
>
> (*b*) to the extent that it is impossible to apply or comply with one of the inconsistent provisions without contravening the second-
>
> (i) any applicable provisions of the-
>
> (*aa*) Auditing Profession Act;
>
> (*bb*) Labour Relations Act, 1995 (Act 66 of 1995);
>
> (*cc*) Promotion of Access to Information Act, 2000 (Act 2 of 2000);
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> (*dd*) Promotion of Administrative Justice Act, 2000 (Act 3 of 2000);
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> (*ee*) Public Finance Management Act, 1999 (Act 1 of 1999);
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> (*ff*) Financial Markets Act, 2012;
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> (*gg*) Banks Act;
>
> (*hh*) Local Government: Municipal Finance Management Act, 2003 (Act 56 of 2003); or
>
> (ii) Section 8 of the National Payment System Act, 1998 (Act 78 of 1998). prevail in the case of an inconsistency involving any of them, except to the extent provided otherwise in sections 30(8) or 49(4); or
>
> (ii) the provisions of this Act prevail in any other case, except to the extent provided otherwise in subsection (5) or section 118(4).
>
> (5) If there is a conflict between a provision of Chapter 8 and a provision of the Public Service Act, 1994 (Proclamation 103 of 1994), the provisions of that Act prevail.
>
> (6) . . . '

[26] In terms of s 132, business rescue commences either when the company files its resolution, when an affected person applies to a court or when 'a court makes an order placing the company under supervision during the course of liquidation proceedings, or proceedings to enforce a security interest, as contemplated by section 131(7)'. [Section 132(1).]

[27] Business rescue proceedings end when a court has either set aside the resolution or order that commenced business rescue or converts the proceedings into liquidation proceedings; [section 132(1)] the BRP has filed with the Commission a notice terminating the business rescue proceedings; [section 132(2)(*b*)] or a business plan has either been proposed and rejected and no affected person has endeavoured to extend the business rescue proceedings, or the business plan has been adopted and the BRP has filed a notice of 'substantial implementation of the plan'. [Section 132(2)(*c*).]

[30] Section 135 deals with post-commencement finance, which includes the remuneration and expenses of the BRP. It provides:

> '(1) To the extent that any remuneration, reimbursement for expenses or other amount of money relating to employment becomes due and payable by a company to an employee during the company's business rescue proceedings, but is not paid to the employee-
>
> (*a*) the money is regarded to be post-commencement financing; and
>
> (*b*) will be paid in the order of preference set out in subsection (3)(*a*).
>
> (2) During its business rescue proceedings, the company may obtain financing other than as contemplated in subsection (1), and any such financing-
>
> (*a*) may be secured to the lender by utilising any asset of the company to the extent that it is not otherwise encumbered; and
>
> (*b*) will be paid in the order of preference set out in subsection (3)(*b*).
>
> (3) After payment of the practitioner's remuneration and expenses referred to in section 143, and other claims arising out of the costs of the business rescue proceedings, all claims contemplated-
>
> (*a*) in subsection (1) will be treated equally, but will have preference over-
>
> (i) all claims contemplated in subsection (2), irrespective of whether or not they are secured; and
>
> (ii) all unsecured claims against the company; or
>
> (*b*) in subsection (2) will have preference in the order in which they were incurred over all unsecured claims against the company.
>
> (4) If business rescue proceedings are superseded by a liquidation order, the preference conferred in terms of this section will remain in force, except to the extent of any claims arising out of the costs of liquidation.'

[34] In terms of s 140(2), the BRP may not, except with the approval of a court, appoint any person to the management of the company or as an advisor to himself or herself or to the company who has a relationship with the company that would lead a reasonable person

to infer a lack of integrity, impartiality or objectivity on that person's part, or a person who is related to such a person.

[36] Section 143 deals with the remuneration of a BRP. It states:

> '(1) The practitioner is entitled to charge an amount to the company for the remuneration and expenses of the practitioner in accordance with the tariff prescribed in terms of subsection (6).
>
> (2) The practitioner may propose an agreement with the company providing for further remuneration, additional to that contemplated in subsection (1), to be calculated on the basis of a contingency related to-
>
> > (*a*) the adoption of a business rescue plan at all, or within a particular time, or the inclusion of any particular matter within such a plan; or
> >
> > (*b*) the attainment of any particular result or combination of results relating to the business rescue proceedings.
>
> (3) Subject to subsection (4), an agreement contemplated in subsection (2) is final and binding on the company if it is approved by-
>
> > (*a*) the holders of a majority of the creditors' voting interests, as determined in accordance with section 145 (4) to (6), present and voting at a meeting called for the purpose of considering the proposed agreement; and
> >
> > (*b*) the holders of a majority of the voting rights attached to any shares of the company that entitle the shareholder to a portion of the residual value of the company on winding-up, present and voting at a meeting called for the purpose of considering the proposed agreement.
>
> (4) A creditor or shareholder who voted against a proposal contemplated in this section may apply to a court within 10 business days after the date of voting on that proposal, for an order setting aside the agreement on the grounds that-
>
> > (*a*) the agreement is not just and equitable; or
> >
> > (*b*) the remuneration provided for in the agreement is unreasonable having regard to the financial circumstances of the company.
>
> (5) To the extent that the practitioner's remuneration and expenses are not fully paid, the practitioner's claim for those amounts will rank in priority before the claims of all other secured and unsecured creditors.
>
> (6) The Minister may make regulations prescribing a tariff of fees and expenses for the purpose of subsection (1).'

Does a BRP enjoy a 'super-preference' on the liquidation of a company?

[37] It was argued on behalf of Diener that, in relation to his remuneration and expenses, he enjoyed, after the costs of the liquidation, a 'super-preference' over all other creditors, whether secured or not. The term 'super-preference' appears to originate in Henochsberg in relation to the 'preference' (if such it be) created by s 143(5) of the 2008 Act. [P A Delport (ed) *Henochsberg on the Companies Act 71 of 2008* (Vol 1) at 500.] (I shall revert to this description below.) This argument was not supported by either of the respondents or any of the *amici curiae*.

[39] Diener's argument is based on the provisions of s 135(4) and s 143(5) of the 2008 Act which, he says, are clear: in particular, s 143(5) states that a BRP's claim for remuneration and expenses 'will rank in priority before the claims of all other secured and unsecured creditors'. The effect, it is conceded by Diener, is that new and significant inroads are made into the security that is held by secured creditors.

[40] In determining the correctness of this argument, the starting point is the context and purpose of chapter 6. It is apparent, when regard is had to the central provisions of chapter 6, as I have done above, that it is intended to create an efficient, regulated and effective mechanism to facilitate the rescue of companies in financial distress – as long as they are capable of rescue – in a way that balances the rights and interests of the stakeholders. [*FirstRand Bank Limited v K J Foods CC* 2017 (5) SA 40 (SCA); [2017] ZASCA 50 para 75; *Oakdene Square Properties (Pty) Ltd & others v Farm Bothasfontein (Kyalami) (Pty) Ltd & others* 2013 (4) SA 539 (SCA); [2013] ZASCA 68 para 29; *African Banking Corporation of Botswana Ltd v Kariba Furniture Manufacturers (Pty) Ltd & others* (note 5) para 42.]

[42] The two sections upon which Diener's argument is largely based are cases in point. Section 135 concerns itself with post-commencement finance and it is in this context, i.e. while business rescue proceedings are in place, that it creates a set of preferences for the payment by the company of certain of its unpaid debts. It does so as part of the regulation of the affairs of the financially distressed company. It is only s 135(4) that is concerned with the consequences of a failed business rescue, retaining the preferences created in respect of post-commencement finance on liquidation, subject only to the costs of liquidation. This section, to the limited extent that it has to do with liquidation, says nothing of the 'super-preference' contended for over secured assets. To the contrary, it creates in favour of those claims listed in the section, a preference over unsecured claims. [Section 135(3).]

[43] Section 143 is also not concerned with liquidation. Instead, it regulates the BRP's right to remuneration during business rescue proceedings: it concerns the tariff in terms of which BRP's are remunerated; the additional contingency-based remuneration that the BRP may negotiate, and safeguards in that respect; and the BRP's claim for unpaid remuneration, which ranks 'in priority before the claims of all other secured and unsecured creditors'. The reference to secured and unsecured creditors in the section must, in my view, be understood to be a reference back to s 135: to those persons who have, or have been deemed to have, provided the company with post-commencement finance, both secured and unsecured, and not to the company's pre-business rescue creditors. Simply put, the preference operates within this limited context. Henochsberg's commentary, referred to in paragraph 37 above, seen in proper perspective is consonant with that conclusion. [Henochsberg (note 36) stated with reference to s 143(5): 'The purpose of this provision is not entirely clear. It seems unrealistic and impractical to expect a successful business rescue plan to be implemented in circumstances where there are insufficient funds to pay the business rescue practitioner's fees; however, should this be the case the amount of the practitioner's remuneration and expenses that remain unpaid will be paid as a "super-preference" in priority to all the secured and unsecured claims against the company.']

[44] From the sections of chapter 6 that deal with security, it is apparent that security is treated in the same way as it is in the law more generally. There is, in other words, no indication that, in business rescue proceedings, security is to be diluted or undermined in any way. For instance, s 134(3) provides that if a company wishes, during business rescue proceedings, to dispose of property that is held as security by another person, it may only do so with that person's prior consent, unless the proceeds of the disposal 'would be sufficient to fully discharge the indebtedness protected by that person's security'; and then the company must pay the person promptly up to the company's indebtedness to him or her, or provide satisfactory security for that amount. This is consistent with what was held in

Energydrive Systems (Pty) Ltd v Tin Can Man (Pty) Ltd & others, [*Energydrive Systems (Pty) Ltd v Tin Can Man (Pty) Ltd & others* 2017 (3) SA 539 (GJ) para 18] namely that the 'purpose and context' of business rescue 'are not aimed at the destruction of the rights of a secured creditor'.

[45] This leads me to the place of the preference created by s 135(4) in the broader scheme of the Insolvency Act. Section 135(4) contains a strong indication when it provides that the claims that it deals with rank after the costs of sequestration.

[47] The argument that the BRP's claim for remuneration takes preference over secured claims against the company (other than those in respect of post-commencement finance) also flounders on the wording of s 95 of the Insolvency Act. It provides that the proceeds of property which is secured shall, after deductions in respect of the costs of maintaining, conserving and realising the property, [Insolvency Act s 89(1)] be 'applied in satisfying the claims secured by the said property, in their order of preference'. It cannot, in my view, be said, without doing unjustifiable violence to the language of s 95, that the payment of remuneration to a BRP from the proceeds of property secured in favour of someone else amounts to applying the proceeds of the property to the satisfaction of a claim secured by that property.

[48] The argument advanced on behalf of Diener leads to other anomalies as well. For instance, if, after business rescue proceedings were converted to liquidation proceedings, there was no free residue in an insolvent estate to meet the costs of liquidation, the argument that has been advanced about the 'super-preference' would mean that as a matter of fact, and in conflict with s 97 of the Insolvency Act and s 135(4) of the 2008 Act, the BRP would be paid his or her remuneration out of realised secured property, while the costs of liquidation would not be. In this example, the effect of the 'super-preference' contended for is that the claim for remuneration of the BRP would, in fact, rank ahead of the costs of liquidation. That result could not have been intended.

[49] For these reasons, I conclude that s 135(4) and s 143(5), whether taken individually or in tandem, do not create the 'super-preference' contended for on behalf of Diener. Section 135(4) provides to the BRP, after the conversion of business rescue proceedings into liquidation proceedings, no more than a preference in respect of his or her remuneration to claim against the free residue after the costs of liquidation but before claims of employees for post-commencement wages, of those who have provided other post-commencement finance, whether those claims were secured or not, and of any other unsecured creditors.

The effective date of liquidation

[51] It was argued by Diener that the effective date of the liquidation of J D Bester was 13 June 2012, the date on which it filed its resolution to commence business rescue proceedings. On this basis, it is argued that everything done after that date by the BRP is part of the costs of liquidation.

[52] The argument advanced is flawed for three reasons. First, it fails to draw a distinction, as the 2008 Act does, between business rescue proceedings and liquidation proceedings. Section 132(1) of the 2008 Act provides that business rescue commences, inter alia, when the director's resolution is filed and s 132(2)(*a*) provides that business rescue ends, inter alia, when a court converts business rescue proceedings into liquidation proceedings. In the context of this case, the 2008 Act clearly envisages an end to business rescue proceedings and a commencement of liquidation proceedings.

[53] Secondly, the 2008 Act, by creating in s 135(4), the preference on liquidation for post-commencement finance, including the BRP's remuneration, and ranking these claims after the costs of liquidation, drew a clear distinction between the costs of business rescue and the costs of liquidation.

[54] Thirdly, irrespective of whether the 1973 Act or the 2008 Act applied to the liquidation of J D Bester, the effective date of the liquidation would be the same. In terms of item 9 of Schedule 5 of the 2008 Act, despite the repeal of the 1973 Act, chapter XIV of that Act continued to apply to the 'winding-up and liquidation of companies under this Act, as if that Act had not been repealed'. This is made subject , inter alia, to item 9(2) which provides that '[d]espite subitem (1), sections 343, 344, 346 and 348 to 353 do not apply to the winding-up of a solvent company. . .'. The effect of items 9(1) and 9(2) is that the relevant provisions of the 1973 Act are preserved and apply to the winding-up of commercially insolvent companies, while the 2008 Act applies directly to the winding-up of commercially solvent companies. [*Boschpoort Ondernemings (Pty) Ltd v ABSA Bank Ltd* 2014 (2) SA 518 (SCA); [2013] ZASCA 173 paras 22-23.]

[56] In either event, the effective date of the liquidation is 1 August 2012, the day, according to the bill of costs of Cawood Attorneys, that the liquidation application was filed.

[59] The general rule, however, is that 'a creditor who wishes to share in the distribution of the assets in an insolvent estate must prove his claim against it at any meeting of creditors therein to the satisfaction of the officer presiding at such meeting'. [Eberhard Bertelsmann, Roger G Evans, Adam Harris, Michelle Kelly-Lowe, Anneli Loubser, Melanie Roestoff, Alistair Smith, Leonie Stander and Lee Steyn *Mars: The Law of Insolvency in South Africa* (9 ed) para 18.1. (hereafter referred to as *Mars*.).]

[61] Those who render services in connection with the sequestration proceedings and the administration of the insolvent estate are identified in s 97. They are the sheriff, the Master, a debtor who has voluntarily surrendered his or her estate, a creditor who has applied for the sequestration of an estate, a *curator bonis*, a trustee, persons employed by a *curator bonis* or a trustee to administer an insolvent estate and a presiding officer. A BRP is not included in this list. He or she could not be included because of the distinction between business rescue proceedings and liquidation proceedings.

[62] In the result, Diener, in his capacity as BRP, was a creditor of J D Bester and, in respect of his remuneration and expenses, he was required to prove his claim in terms of s 44 of the Insolvency Act.

[63] A complaint was made by Diener on behalf of Cawood Attorneys that its fees and disbursements in respect of the urgent application to interdict the sale in execution, on the one hand, and its fees and disbursements in respect of the application to convert the business rescue proceedings into liquidation proceedings, on the other, ought to have been treated differently by the liquidators: either as expenses in the business rescue proceedings or as post-commencement finance, rather than as a concurrent claim, in the first instance, or as costs in the liquidation, rather than as a concurrent claim, in the second instance. Cawood Attorneys proved these claims. It is not a party to these proceedings and Diener has no standing to litigate on its behalf. The issues raised on its behalf are consequently not properly before us, and do not require our attention.

[64] This matter has significant implications for business rescue proceedings and BRPs. For that reason, the matter was postponed so that *amici curiae* representing the views of as many stakeholders as possible could join the proceedings. Because of the importance of the issues that are dealt with in this judgment, the matter was, in reality, a test case. It was of

considerable importance that the issues raised in this case were clarified. For that reason, we have decided that no order as to costs should be made.

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Kransfontein Beleggings (Pty) Ltd v Corlink Twenty Five

(624/2016) [2017] ZASCA 131 2017 (3) SA 539 (GJ)

Joinder of creditors in application to set aside business rescue plan.

When application is made to set aside a business rescue plan, non-joinder of creditors is fatal to the application.

The test whether there has been a non-joinder is whether a party has a direct and substantial interest in the subject matter of the litigation which may prejudice the party that has not been joined. *Absa Bank Limited v Naude NO & others* [2015] ZASCA 97; 2016 (6) SA 540 (SCA) para 10; *Golden Dividend 399 (Pty) Ltd & another v Absa Bank Ltd (*569/2015*)* ZASCA 78 (30 May 2016). (Par [12])

The amendment to the business rescue plan would inevitably have affected concurrent creditors. If GWK's secured entitlement under the plan were reduced by R7 217 500, its concurrent claim would increase by the same amount. Since the applicant did not allege any basis on which GWK could be required to forfeit this concurrent claim, the dividend payable to concurrent creditors out of the surplus of R560 000 would have reduced from 1.58 cents to 1.31 cents. While one may speculate that this modest reduction would not have affected how creditors voted, the fact remains that the amendment did affect their rights under the plan. (Par [15])

As stated in *Absa v Naude*, if the creditors who voted for the business rescue plan are not joined, their position would be prejudicially affected in that a business rescue plan would be set aside, money that they had anticipated they would receive would not be paid and the money that they had received would have to be repaid. It thus follow that the non-joinder creditors was fatal to the amended relief sought by the applicant for non-joinder. Since the question of joinder had been raised at the previous hearing and since the applicant had taken a deliberate decision not to join

other creditors, the court a quo was not required to afford the applicant a further opportunity to join the other creditors. (Par [16])

Because the applicant did not persist in the relief originally claimed, it is unnecessary to investigate on what grounds a court may set aside an adopted business rescue plan and whether such relief ceases to be competent once the plan has been implemented. The question is whether a court can partially set aside and amend an adopted plan so as to alter its operation in relation to one or more of the creditors. (Par [17])

A business rescue plan can only be implemented if approved by the prescribed majority of creditors in terms of s 152 of the Companies Act 71 of 2008. The court has no power to foist on creditors a plan which they have not discussed and voted on at such a meeting. This is what the applicant was asking the court a quo to do. Concurrent creditors would receive slightly less than the plan promised them. The creditors have not discussed or voted on such a plan. Quite conceivably GWK would have voted against it. (Par [18])

The court does not have enough information to determine whether GWK on its own could have defeated the plan or whether other creditors might have voted differently and in any event it does not matter. A court cannot be asked to delve into these matters. The simple point is that the only plan which practitioners can implement is one adopted by creditors in accordance with section 152 of the Companies Act. (Par [19])

Extracts

Application to set aside business rescue proceedings – creditors have direct and substantial interests – non-joinder of creditors is fatal to the relief sought in the application.

[7] On 9 June 2015, the applicant launched an urgent application in the Free State Division of the High Court, Bloemfontein to interdict the transfer of Corlink's immovable properties and the implementation of the business rescue plan pending determination of a rule nisi to have the plan declared invalid. The only creditors cited as respondents were Absa and GWK, both of whom opposed the application. GWK delivered a notice of opposition in terms of Uniform Rule 6(5)(*d*)(iii) and raised, among other points, the non-joinder of Corlink's other creditors.

[12] The test whether there has been a non-joinder is whether a party has a direct and substantial interest in the subject matter of the litigation which may prejudice the party that

has not been joined. [*Absa Bank Limited v Naude NO & others* [2015] ZASCA 97; 2016 (6) SA 540 (SCA) para 10; *Golden Dividend 399 (Pty) Ltd & another v Absa Bank Ltd (*569/2015*)* ZASCA 78 (30 May 2016).]

[15] However, the amendment to the plan which the applicant sought would inevitably have affected concurrent creditors. If GWK's secured entitlement under the plan were reduced by R7 217 500, its concurrent claim would increase by the same amount. Since the applicant did not allege any basis on which GWK could be required to forfeit this concurrent claim, the dividend payable to concurrent creditors out of the surplus of R560 000 would have reduced from 1.58 cents to 1.31 cents. While one may speculate that this modest reduction would not have affected how creditors voted, the fact remains that the amendment did affect their rights under the plan.

[16] As stated in *Absa v Naude*, if the creditors who voted for the business rescue plan are not joined, their position would be prejudicially affected in that a business rescue plan would be set aside, money that they had anticipated they would receive would not be paid and the money that they had received would have to be repaid. It thus follow that the non-joinder of Corlink's other creditors was fatal to the amended relief sought by the applicant for non-joinder. Since the question of joinder had been raised at the previous hearing and since the applicant had taken a deliberate decision not to join other creditors, I do not think that the court a quo was required to afford the applicant a further opportunity to join the other creditors.

[17] However, and even if non-joinder was not a sufficient basis for dismissing the application, the application was in any event doomed to fail for the reasons elaborated below. Because the applicant did not persist in the relief originally claimed, it is unnecessary to investigate on what grounds a court may set aside an adopted business rescue plan and whether such relief ceases to be competent once the plan has been implemented. The question is whether a court can partially set aside and amend an adopted plan so as to alter its operation in relation to one or more of the creditors. In my view the answer is no.

[18] A business rescue plan can only be implemented if approved by the prescribed majority of creditors in terms of s 152 of the Companies Act. The court has no power to foist on creditors a plan which they have not discussed and voted on at such a meeting. This is what the applicant was asking the court a quo to do. The plan which the creditors discussed and voted on was one in terms of which the applicant was not reflected as a creditor and a specified amount from the proceeds of the farms was to be paid to GWK in settlement of its secured claims. If the applicant was granted the relief it seeks, the plan would become one in which the applicant receives its full secured claim up to a maximum of the ringfenced amount while GWK receives proportionately less. And as I have explained, concurrent creditors would also receive slightly less than the plan promised them. The creditors have not discussed or voted on such a plan. Quite conceivably GWK would have voted against it.

[19] We do not have enough information to determine whether GWK on its own could have defeated the plan or whether other creditors might have voted differently and in any event I do not think it matters. A court cannot be asked to delve into these matters. The simple point is that the only plan which practitioners can implement is one adopted by creditors in accordance with s 152 of the Companies Act.

[21] I therefore find that the court a quo was correct in dismissing the application. The applicant has failed to show that there are prospects of success in the appeal.

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Nedbank Ltd v Zevoli 208 (Pty) Ltd and Others

2017 (6) SA 318 (KZP)

Surety of company under business rescue

The moratorium afforded by section 133(1) of the Companies Act 71 of 2018 does not protect a surety of the company under business rescue.

In *New Port Finance Company (Pty) Ltd and Another v Nedbank Ltd* 2016 (5) SA 503 (SCA) paras 9, 10 and 12, the Supreme Court of Appeal considered the effect of business rescue on obligations of sureties and pronounced as follows:

> "But we were referred to no authority and I have discovered none, in which it has been held that a compromise of the principal debtor's liability under the judgment, whether as a result of business rescue or otherwise, would accrue to the advantage of the surety after judgment had been taken against them. There can be no question of the surety's rights or interests being prejudiced thereby [*Bock and Others v Duburoro Investments (Pty) Ltd* 2004 (2) SA 242 (SCA) ([2003] 4 All SA 103) paras 18 – 21] because the extent of the surety's liability for the debt in question has been fixed and determined. How the creditor thereafter sets about executing the judgment against the principal debtor does not affect either the nature or the extent of the surety's liability. . . . Any default on the part of the principal debtor entitled the bank to sue the sureties. The benefit of excussion was waived. . . . (T)he fact that in any of those situations the principal debtor would be released in whole or in part from its obligations would not disentitle the bank from recovering the outstanding amount from the sureties.' (Par [24])

In *Investec Bank Ltd v Bruyns* 2012 (5) SA 430 (WCC) paras 15 – 17 at 434F – 435C the court considered the statutory moratorium on proceedings against the company undergoing business rescue and held that the statutory moratorium against legal proceedings for the enforcement of debts in terms of section 133(1) of the Companies Act of 2008 in favour of a company that is undergoing business rescue proceedings is a defence *in personam*. The section does not protect a surety in

respect of the debt of a company which is subject to businessrescue proceedings in terms of the Act. (Par [25])

The court in *Investec Bank Ltd v Bruyns* at 436 – 437 said:

> '"But even if the defendant had alleged facts from which one could infer that it was at least a reasonable possibility that the companies would be placed under business rescue proceedings and that a plan involving a reduction of the plaintiff's claims against them would be approved and implemented, this would still not disclose a defence. At this stage the plaintiff's claims against GDI and WC are unimpaired. Whenever a creditor sues a surety there is a possibility that at some stage in the future that creditor may compromise with the principal debtor or for that matter that the principal debtor may even discharge the debt by payment. These possibilities, whether likely or unlikely, do not permit the surety to ward off enforcement if at the time he is sued the principal debt is in existence. If the creditor takes judgment against the surety and the principal debt is later reduced or discharged before execution is levied against the surety, the latter could claim the benefit of the discharge or reduction. If the creditor were to recover from the surety in full, the right to consider a compromise against the principal debtor would pass to the surety because the creditor would fall out of the picture and the surety would take the creditor's place by virtue of his right of recourse against the principal debtor.' (Par [27])

It has been argued in favour of the defendants that the plaintiff's failure to give the defendants notice to bring their arrears up to date in terms of the loan agreement offended the requirement of good faith built into our law of contract. In *African Dawn Property Finance 2 (Pty) Ltd v Dreams Travel and Tours CC and Others* 2011 (3) SA 511 (SCA) para 28 the Supreme Court of Appeal held that —

> 'our Constitution and its value system do not confer on judges a general jurisdiction to declare contracts invalid on the basis of their subjective perceptions of fairness or on grounds of imprecise notions of good faith. Coercive interference by a court may only be allowed in circumstances where

a party to a contract can show either extortion or oppression or something akin to fraud.'

In the absence of the allegation of extortion, oppression or fraud this court may not simply interfere with the contract deliberately entered into between the parties dealing at arm's length with each other on the mere allegation that the plaintiff was in breach of good faith built into our law of contract. In the circumstances of this case, there is no merit in this defence. (Par [32])

The third defendant contends that the court does not have jurisdiction in respect of him since he does not reside within the jurisdiction of this court. The third defendant is claimed against on the basis of suretyship and in terms of the principle of *continentia causae* (the cohesion of a cause of action). In the surety agreement the third defendant in terms of s 45 of the Magistrates' Courts Act 32 of 1944 consented to the jurisdiction of the magistrates' court having jurisdiction in terms of section 28. There is no merit in this defence. (Par [40])

The bona fides of the defence depend entirely on the state of mind of the defendant and such defence must also be good in law, which means that it must be a valid and acceptable defence in law. The terms of the restated loan agreement and suretyships have been common cause between the parties and the defendants could not reasonably have believed the truthfulness of the defences raised in the present case since none is sanctioned by the terms of the agreements. Nor are they accepted as valid, good defences in law, regard being had to the material facts upon which the defendants rely for such defences. The facts upon which the defendants rely for such defences are devoid of truth and the defendants are fully aware of that position. The court is not satisfied that the defendants have provided any bona fide defence to the plaintiff's claim which is good in law and that such defence has not been delivered solely for the purpose of delay. (Par [43])

Extracts

[8] Against the second, third and fourth defendants the plaintiff's claim is grounded on the surety agreements the defendants entered into with the plaintiff on 16 March 2009, 3 September 2014 and 5 September 2014, respectively. In terms of the agreements the defendants bound themselves jointly and severally to the plaintiff as sureties *in solidum* and co-principal debtors for the due performance of all obligations of whatsoever nature and from

whatever cause arising which might then exist or which might arise in the future for which the first defendant might become liable to the plaintiff, subject to the terms specifically recorded in the suretyships.

[19] The court has first to examine whether there has been sufficient disclosure by the defendants of the nature and grounds of their defence and the facts upon which it is founded. The second consideration is that the defence so disclosed must both be bona fide and good in law. If the court is satisfied that this threshold has been crossed, it is bound to refuse summary judgment. (See *Maharaj v Barclays National Bank Ltd* 1976 (1) SA 418 (A) at 425G – 426E; *Joob Joob Investments (Pty) Ltd v Stocks Mavundla Zek Joint Venture* 2009 (5) SA 1 (SCA) para 32 at 11G – 12D.)

[23] On 17 March 2017 the first defendant voluntarily resolved to commence business rescue proceedings. As a consequence the plaintiff is in terms of s 133(1) of the Companies Act of 2008 precluded from proceeding against the first defendant. The question for decision is whether the second, third and fourth defendants are also entitled to benefit from such privilege or exemption. In *Desert Star Trading 145 (Pty) Ltd and Another v No 11 Flamboyant Edleen CC and Another* 2011 (2) SA 266 (SCA) para 11 Ponnan JA said the following:

> 'It is well settled that the general rule is that a surety may avail himself or herself of any defences that the principal debtor has, save for those defences that are purely personal to the principal debtor.'

[24] In *New Port Finance Company (Pty) Ltd and Another v Nedbank* Ltd 2016 (5) SA 503 (SCA) ([2015] 2 All SA 1; [2014] ZASCA 210) paras 9, 10 and 12, the Supreme Court of Appeal considered the effect of business rescue on obligations of sureties and pronounced as follows:

> "But we were referred to no authority and I have discovered none, in which it has been held that a compromise of the principal debtor's liability under the judgment, whether as a result of business rescue or otherwise, would accrue to the advantage of the surety after judgment had been taken against them. There can be no question of the surety's rights or interests being prejudiced thereby [*Bock and Others v Duburoro Investments (Pty)* Ltd 2004 (2) SA 242 (SCA) ([2003] 4 All SA 103) paras 18 – 21] because the extent of the surety's liability for the debt in question has been fixed and determined. How the creditor thereafter sets about executing the judgment against the principal debtor does not affect either the nature or the extent of the surety's liability. . . . Any default on the part of the principal debtor entitled the bank to sue the sureties. The benefit of excussion was waived. . . . (T)he fact that in any of those situations the principal debtor would be released in whole or in part from its obligations would not disentitle the bank from recovering the outstanding amount from the sureties.'

[25] In *Investec Bank Ltd v Bruyns* 2012 (5) SA 430 (WCC) paras 15 – 17 at 434F – 435C the court considered the statutory moratorium on proceedings against the company undergoing business rescue and held that the statutory moratorium against legal proceedings for the enforcement of debts in terms of s 133(1) of the Companies Act of 2008 in favour of a company that is undergoing business rescue proceedings is a defence in personam. The section does not protect a surety in respect of the debt of a company which is subject to business rescue proceedings in terms of the Act.

[26] Unlike a defence in rem, a statutory moratorium in terms of s 133(1) of the Companies Act of 2008 is a personal privilege or benefit in favour of the company. The essence of a defence in rem is that the defence attaches to the claim itself in the sense that the defence (if upheld) shows that the claim against the principal debtor is invalid or has been

extinguished or discharged. A defence *in personam*, by contrast, arises from a personal immunity of the debtor in respect of an otherwise valid claim existing. Clearly the moratorium afforded by s 133(1) falls into the latter class.

[27] In the present case the plaintiff is in terms of the statutory moratorium imposed by s 133(1) of the Companies Act of 2008 barred from proceeding against the first defendant. The second to the fourth defendant also claim that benefit on the grounds that a possibility exists that after business rescue proceedings the plaintiff may not pursue its claim against the first defendant. In this regard the court in *Investec Bank Ltd v Bruyns* supra para 22 at 436 – 437 said:

> '"But even if the defendant had alleged facts from which one could infer that it was at least a reasonable possibility that the companies would be placed under business rescue proceedings and that a plan involving a reduction of the plaintiff's claims against them would be approved and implemented, this would still not disclose a defence. At this stage the plaintiff's claims against GDI and WC are unimpaired. Whenever a creditor sues a surety there is a possibility that at some stage in the future that creditor may compromise with the principal debtor or for that matter that the principal debtor may even discharge the debt by payment. These possibilities, whether likely or unlikely, do not permit the surety to ward off enforcement if at the time he is sued the principal debt is in existence. If the creditor takes judgment against the surety and the principal debt is later reduced or discharged before execution is levied against the surety, the latter could claim the benefit of the discharge or reduction. If the creditor were to recover from the surety in full, the right to consider a compromise against the principal debtor would pass to the surety because the creditor would fall out of the picture and the surety would take the creditor's place by virtue of his right of recourse against the principal debtor.'

[28] Implicit in the decided authorities is that the statutory moratorium in terms of s 133(1) of the Companies Act of 2008, is only intended to benefit the company which has been placed under business rescue proceedings. The immunity in question is therefore a personal privilege or benefit of the company in question. The sureties cannot claim such benefit since they are sued on the basis of their suretyships with the plaintiff. In the *Investec* case supra para 23 the court held that if the lawmaker had intended to prohibit creditors from enforcing their claims against sureties of companies undergoing business rescue proceedings it would have said so. It accordingly follows that the second to fourth defendants, being sued as sureties in the present matter, cannot claim such immunity in terms of the provisions of s 133(1) of the Companies Act of 2008.

(c) Defective notice

[31] Whether or not the notice was given before issuing summons was in the plaintiff's submission irrelevant since on the occurrence of an event of default all amounts they owed immediately became due and payable without further notice. The second to fourth defendants bound themselves as sureties and co-principal debtors for the due and punctual fulfilment of all obligations of the first defendant to the plaintiff. Should the first defendant fail to make payment of an amount due to the plaintiff or to discharge its obligations in favour of the plaintiff properly and timeously, the plaintiff would in terms of the agreement be entitled to demand immediate payment of all amounts and all performances of obligations then owed by the first defendant to the plaintiff. There is nothing to suggest that the defendants were not aware of the first defendant's failure to honour such obligations to the plaintiff.

[32] It has been argued in favour of the defendants that the plaintiff's failure to give the defendants notice to bring their arrears up to date in terms of the loan agreement offended the requirement of good faith built into our law of contract. In *African Dawn Property Finance*

2 (Pty) Ltd v Dreams Travel and Tours CC and Others 2011 (3) SA 511 (SCA) ([2011] 3 All SA 345; [2011] ZASCA 45) para 28 the Supreme Court of Appeal held that —

> 'our Constitution and its value system do not confer on judges a general jurisdiction to declare contracts invalid on the basis of their subjective perceptions of fairness or on grounds of imprecise notions of good faith. Coercive interference by a court may only be allowed in circumstances where a party to a contract can show either extortion or oppression or something akin to fraud.'

In the absence of the allegation of extortion, oppression or fraud this court may not simply interfere with the contract deliberately entered into between the parties dealing at arm's length with each other on the mere allegation that the plaintiff was in breach of good faith built into our law of contract. In the circumstances of this case, I do not find any merit in this defence.

(e) **Failure to make demand on sureties**

[34] There is nothing in the suretyships which obliges the plaintiff to call on the defendants to remedy the first defendant's default. The defendants have not provided any support for the allegation that the plaintiff was in terms of the contract obliged to make a demand on them as sureties. More so, the fourth defendant is the director of both the first and second defendants. Therefore, they must have known that the first defendant was in default of payment.

(i) **Lack of jurisdiction in respect of the third defendant**

[40] The third defendant contends that this court does not have jurisdiction in respect of him since he does not reside within the jurisdiction of this court. The third defendant is claimed against herein on the basis of suretyship and in terms of the principle of *continentia causae* (the cohesion of a cause of action). In the surety agreement the third defendant in terms of s 45 of the Magistrates' Courts Act 32 of 1944 consented to the jurisdiction of the magistrates' court having jurisdiction in terms of s 28. I therefore agree with Mr *Rood* for the plaintiff that there is no merit at all in this defence.

[43] The bona fides of the defence depend entirely on the state of mind of the defendant and such defence must also be good in law, which, in my view, means that it must be a valid and acceptable defence in law. The terms of the restated loan agreement and suretyships have been common cause between the parties and the defendants could not reasonably have believed the truthfulness of the defences raised in the present case since none is sanctioned by the terms of the agreements. Nor are they accepted as valid, good defences in law, regard being had to the material facts upon which the defendants rely for such defences. The facts upon which the defendants rely for such defences are devoid of truth and the defendants are fully aware of that position. I do not think that the mere stating of possible defences resting on untruthful and incorrect facts satisfies the requirement of rule 32*(b).* In the premises, I am not satisfied that the defendants have provided any bona fide defence to the plaintiff's claim which is good in law and that such defence has not been delivered solely for the purpose of delay.

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Schickerling NO and another v Chickenland (Pty) Ltd trading as Nando's

[2017] JOL 39263 (GP)

Impact of an adopted business rescue plan on the cancellation of an agreement.

The mere fact that there are business rescue proceedings does not impact on the cancellation of a contract.

Clause 17.1 read with 17.1.2, the cancellation clause, constitutes a *lex commissoria (*a clause to the effect that if a party fails to perform an obligation by a set date, the other party may cancel). Thus even if the respondent is an unwilling party to the current situation it does not affect the *lex commissorio* and the cancellation. (Par [28])

The applicant could not provide any section in the Companies Act 71 of 2008, or any case law, that the mere fact that there are business rescue proceedings impact on the cancellation of a contract. Upon a perusal of the sections in the Companies Act relating to business rescue no such prohibition could be found. When interpreting the Companies Act the Act must be interpreted and applied in a manner that gives effect to the purpose of section 7. It could be argued that the cancellation does not conform to the purpose of section 7(d). Section 7(d) reads as follows:

> ". . . reaffirm the concept of the company as a means of achieving economic and social benefits."

The employees have already been approached to work at other franchises and it would seem that they could receive social benefits. The fact that the royalties were not paid for three months by a third party did not reaffirm the concept of the company as a means of achieving economic benefits. (Par [30])

Extracts

[27] The crux of this matter is thus the cancellation. If there was a valid cancellation of the contract then the applicants do not have a *prima facie* right open to some doubt to approach this Court on a cancelled agreement.

[28] I am satisfied that on the common cause facts the royalties were only paid after the date set out in the cancellation letter. I am satisfied that clause 17.1 read with 17.1.2, the cancellation clause, constitutes a *lex commissoria [*a clause to the effect that if a party fails to perform an obligation by a set date, the other party may cancel]. Thus even if the

respondent is an unwilling party to the current *de facto* and *de jure* situation it does not affect the *lex commissorio* and the cancellation.

[30] The only question the court must then ask itself is whether the adopted business rescue plan can in any way impact on the cancellation of the agreement. The applicant could not provide any section in the Companies Act, or any case law, that the mere fact that there are business rescue proceedings impacting on the cancellation. Upon a perusal of the sections in the Companies Act relating to business rescue no such prohibition could be found. When interpreting the Companies Act the Act must be interpreted and applied in a manner that gives effect to the purpose of section 7. It could be argued that the cancellation does not conform to the purpose of section 7(d). Section 7(d) reads as follows:

> ". . . reaffirm the concept of the company as a means of achieving economic and social benefits."

The employees have already been approached to work at other franchises and it would seem that they could receive social benefits. The fact that the royalties were not paid for three months by a third party did not reaffirm the concept of the company as a means of achieving economic benefits.

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INSOLVENCY AND LIQUIDATION

Swart v Starbuck and Others

2017 (5) SA 370 (CC)

Liability for sale of property of insolvent estate

Section 82(8) of the Insolvency Act 24 of 1936, which deals with the liability of a seller of property, does not apply to a sale authorised by the Master in terms of section 80*bis*.

On 12 January 2006 and before their formal appointment as provisional trustees, the trustees submitted a written application to the Master for the authority to sell the properties in terms of section 80*bis* of the Insolvency Act 24 of 1936. (Par [7])

On 24 January 2006 the trustees were appointed as provisional trustees of Mr Swart's insolvent estate. On 31 January 2006 the Master consented to the sale of the properties. Their final appointment as trustees followed on 16 November 2006. On 13 April 2006 the trustees executed written powers of attorney in which they declared that the properties were sold on 1 December 2005 and authorised transfer to the purchaser. The properties were transferred to the Trust on 14 June 2006. On

12 October 2006, at the second meeting of the creditors, the creditors approved the trustees' report reflecting the sale and transfer of the properties to the Trust. [Par [8]

Section 80*bis* of the Insolvency Act provides as follows:

> **'Sale of movable or immovable property on authorisation of Master'**
>
> '(1) At any time before the second meeting of creditors the trustee shall, if satisfied that any movable or immovable property of the estate ought forthwith to be sold, recommend to the Master in writing accordingly, stating his reasons for such recommendation.
>
> (2) The Master may thereupon authorise the sale of such property, or of any portion thereof, on such conditions and in such manner as he may direct: ...

Section 82(1) of the Insolvency Act provides as follows:

> 'Subject to the provisions of sections eighty-three and ninety the trustee of an insolvent estate shall, as soon as he is authorised to do so at the second meeting of the creditors of that estate, sell all the property in that estate in such manner and upon such conditions as the creditors may direct: ... Provided that if the creditors have not prior to the final closing of the second meeting of creditors of that estate given any directions the trustee shall sell the property by public auction or public tender. A sale by public auction or public tender shall be after notice in the *Gazette* and after such other notices as the Master may direct and in the absence of directions from creditors as to the conditions of sale, upon such conditions as the Master may direct.'

Section 82(8) provides:

> If any person other than a person mentioned in subsection (7) has purchased in good faith from an insolvent estate any property which was sold to him in contravention of this section, or if any person in good faith and for value acquired from a person mentioned in subsection (7) any property which the last mentioned person acquired from an insolvent estate in contravention of that subsection, the purchase or other acquisition shall nevertheless be valid, but the person who sold or otherwise disposed of the property shall be liable to make good to the estate twice the amount of the loss which the estate may have sustained as a result of the dealing with the property in contravention of this section.'

The High Court and the Supreme Court of Appeal judgments regarding this claim are well reasoned and cannot be faulted. It cannot be put more plainly: Mr Swart's claim was based on section 82(1) read with section 82(8) of the Insolvency Act. The application of this section depends on, among other things, the absence of a valid authorisation by the Master for the sale of the properties. The Master authorised the sale of the properties in terms of s 80*bis*. This authorisation has legally valid

consequences until it is set aside. This authorisation has not been set aside. Section 82 can find no application in the present matter. (Par [26])

In the circumstances, there is no damages claim to be proved in terms of section 82(8) of the Act. In any event, even if there were a damages claim to be proved under any other branch of the law, the conclusion is inescapable that Mr Swart has not been able to prove any damages. This fact is perspicuous from the judgment of the High Court where, after hearing evidence on this point, it concluded that — there is no basis on which it can be found that the said properties would have been sold at a higher price at auctions. (Par [27])

Having regard to the jurisprudence of the Constitutional Court, it would be imprudent to consider the constitutional challenge, as it is being raised impermissibly for the first time in the court of final appeal. [See *Prince v President, Cape Law Society, and Others* 2001 (2) SA 388 (CC) (2001 (1) SACR 217; (Par [31])

The authorisation in terms of section 80*bis* is an administrative act within the meaning of the Promotion of Administrative Justice Act 3 of 2000. As a result, even if the Master's authorisation in terms of section 80*bis* were unlawful, it remains valid and binding, as it continues to have legally valid consequences until it is set aside. See *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others* 2004 (6) SA 222 (SCA) para 31. These legally valid consequences include the sale of the properties. (Par [33])

It begs reiteration here that the sale agreements were subject to the suspensive condition that the sales would come into effect only once the requisite permissions (including the Master's permission under section 80*bis*) had been obtained. The effect of the suspensive conditions was that once the Master's permission was obtained under section 80*bis*, the suspensive conditions were fulfilled, and legally binding sale agreements came into effect. The effect of the Constitutional Court’s administrative-law jurisprudence is that these valid sales endure, regardless of the validity of the Master's authorisation, until such time as that authorisation is set aside by a court. (Par [34]])

Mr Swart could have challenged the decision of the Master but failed to do so. All he has done is contend that section 80*bis* of the Act was not complied with because at the time that the trustees submitted the recommendation to sell the properties, they had not yet been formally appointed as provisional trustees. However, without a proper challenge to the Master's authorisation, the contention cannot be entertained. Accordingly, the matter must be decided on the basis that the authorisation was granted and remains valid. (Par [36]).

To require Mr Swart to adhere to the process prescribed in rule 53 is not undue formalism. Indeed, as the Constitutional Court held in *Kirland*, the procedural safeguards applicable to mounting a review application perform an important role in ensuring that interested parties are given proper notice of the review application, and an adequate opportunity to be heard on whether the decision should be set aside. Further, they ensure that the full record of the relevant decision is placed before the court, so that the court has all the relevant facts against which to consider the lawfulness of the decision. *MEC for Health, Eastern Cape and Another v Kirland Investments (Pty) Ltd t/a Eye & Lazer Institute* 2014 (3) SA 481 (CC)paras 65 and 67. (Par [38])

A further impediment to Mr Swart's purported attack on the Master's authorisation is s 157 of the Act, which provides:

> '(1) Nothing done under this Act shall be invalid by reason of a formal defect or irregularity, unless a substantial injustice has been thereby done, which in the opinion of the court cannot be remedied by E any order of the court.
>
> (2) No defect or irregularity in the election or appointment of a trustee shall vitiate anything done by him in good faith.' (Par [43])

In addition to subsection (1), subsection (2) makes plain that no defect or irregularity in the appointment of the trustees can vitiate anything done by them in good faith. If there were a defect or irregularity in the appointment of the trustees, this would not vitiate the sale of the properties if the sale of the properties were effected in good faith. Mr Swart makes no averments to indicate bad faith on the part of the trustees. On the contrary, the good faith of the trustees seems evident on the facts. At the time when the properties were sold the trustees had received the authorisation of the Master; they had received the consent of the two secured creditors; and they had

issued a circular alerting all creditors of Mr Swart's insolvent estate of the intention to have the land sold. (Par [36])

It would not be in the interests of justice for the court to consider whether the Master's s 80*bis* authorisation was valid or not. Leave to appeal should be refused on the basis that it is not in the interests of justice to determine the matter. (Par [47])

Extracts

[7] On 12 January 2006 and before their formal appointment as provisional trustees, the trustees submitted a written application to the Master for the authority to sell the properties in terms of s 80*bis* [Section 80*bis* is headed 'Sale of movable or immovable property on authorisation of Master' and provides: '

> (1) At any time before the second meeting of creditors the trustee shall, if satisfied that any movable or immovable property of the estate ought forthwith to be sold, recommend to the Master in writing accordingly, stating his reasons for such recommendation.
>
> (2) The Master may thereupon authorise the sale of such property, or of any portion thereof, on such conditions and in such manner as he may direct: Provided that, if the Master has notice that such property or a portion thereof is subject to a right of preference, he shall not authorise the sale of such property or such portion, unless the person entitled to such right of preference has given his consent thereto in writing or the trustee has guaranteed that person against loss by such sale.'] read with s 18(3)
>
> [Section 18 is headed 'Appointment of provisional trustee by Master' and in relevant part provides: '
>
> > (1) As soon as an estate has been sequestrated (whether provisionally or finally) or when a person appointed as trustee ceases to be trustee or to function as such, the Master may, in accordance with policy determined by the Minister, appoint a provisional trustee to the estate in question who shall give security to the satisfaction of the Master for the proper performance of his or her duties as provisional trustee and shall hold office until the appointment of a trustee.
> >
> > (2) At any time before the meeting of the creditors of an insolvent estate in terms of section forty, the Master may, subject to the provisions of subsection (3) of this section, give such directions to the provisional trustee as could be given to a trustee by the creditors at a meeting of creditors.
> >
> > (3) A provisional trustee shall have the powers and the duties of a trustee, as provided in this Act, except that without the authority of the court or for the purpose of obtaining such authority he shall not bring or defend any legal proceedings and that without the authority of the court or Master he shall not sell any property belonging to the estate in question. Such sale shall furthermore be after such notices and subject to such conditions as the Master may direct.]

of the Act. The application motivated the decision to sell the properties of the insolvent estate prior to the second meeting of the creditors, and included: (i) consents from the two secured creditors; (ii) a circular that was sent to all known creditors regarding the sale of the properties; (iii) valuations of the properties; and (iv) the offers to purchase received from the Trust. [SCA judgment para 6] It is apposite to recapitulate here that the creditors and not the insolvent are the masters of the realisation of the assets in the insolvent estate; hence their consent and involvement were pivotal. [See *Janse van Rensburg v Muller* 1996 (2) SA 557 (A) ([1995] ZASCA 136).]

[8] On 24 January 2006 the trustees were appointed as provisional trustees of Mr Swart's insolvent estate. On 31 January 2006 the Master consented to the sale of the properties.

[Their final appointment as trustees followed on 16 November 2006.] On 13 April 2006 the trustees executed written powers of attorney in which they declared that the properties were sold on 1 December 2005 and authorised transfer to the purchaser. The properties were transferred to the Trust on 14 June 2006. On 12 October 2006, at the second meeting of the creditors, the creditors approved the trustees' report reflecting the sale and transfer of the properties to the Trust.

[12] The High Court held that the offers to purchase could only constitute valid offers once the suspensive condition had been complied with. [High Court judgment para 66.] The High Court found that, because the trustees had been granted the necessary authorisation by the Master to sell the properties in terms of s 80*bis*, s 82 was not applicable [para 75 [High Court judgment para 66.]

[13] As to the allegation that the properties could have been sold for a much higher price, after considering a great deal of evidence on the point, the High Court found that there was *no basis on which it could be said that the properties could have been sold at a higher price.* [Id para 81.] Accordingly, there was no link between the conduct of the trustees and the alleged loss which Mr Swart may have suffered. The action was dismissed with costs, including the costs of two counsel.

[14] Mr Swart then appealed to the Supreme Court of Appeal.

[15] The Supreme Court of Appeal held that Mr Swart's claim was based squarely on s 82(1) read with s 82(8) of the Act, and that Mr Swart's cause of action thus depended on, among other things, the absence of a valid authorisation by the Master for the sale of the properties in terms of s 80*bis* of the Act. The court found that the Master had authorised the sale of the properties in terms of s 80*bis* read with s 18(3) of the Act. [SCA judgment para 6.] The court noted that the application included a consent from the two secured creditors; a circular sent to all known creditors regarding the offers to purchase received from the Trust; valuations of the properties; and the three written offers to purchase received from the Trust. The court also noted that no creditor responded to the circular by objecting to the anticipated sale of the properties.]

[16] In passing, the court noted that the authorisation by the Master is administrative action which has legally valid consequences until set aside. It then held that, as no application was made by Mr Swart to set the authorisation aside, it remained legally valid. Mr Swart's claim should have failed on this basis alone. [Id para 17.]

[18] Finally, the court held that it was of no consequence that at the time of Mr Starbuck's conditional acceptance of the offers to purchase, the trustees had not yet been appointed. Id para 25.] The agreements of sale, resulting from the three offers to purchase, were subject to a suspensive condition and they only became final and binding upon the fulfilment of the condition. [Id para 28.]

[21] Mr Starbuck submits that Mr Swart's application must fail on the basis that the constitutionality of ss 18(3) and 80*bis* of the Act is being raised for the first time. In the circumstances, he argues that Mr Swart is precluded from raising a constitutional challenge at this stage. He also submits that the sale of the properties was authorised by the Master and that the sale of the properties was valid by virtue of the fact that the authorisation has neither been challenged nor set aside by a court of law.

[25] It is apposite, in the light of the relief Mr Swart seeks in this court, to begin with the cause of action that he has actually raised. He claims that he is entitled to R10 627 288, pursuant to the provisions of s 82(8) of the Act. [Section 82(8) is set out at n12 above.]

[26] The High Court and the Supreme Court of Appeal judgments regarding this claim are well reasoned and cannot be faulted. It cannot be put more plainly: Mr Swart's claim was based on s 82(1) read with s 82(8) of the Act. The application of this section depends on, among other things, the absence of a valid authorisation by the Master for the sale of the

properties. The Master authorised the sale of the properties in terms of s 80*bis*. This authorisation has legally valid consequences until it is set aside. This authorisation has not been set aside. Section 82 can find no application in the present matter.

[27] In the circumstances, there is no damages claim to be proved in terms of s 82(8) of the Act. In any event, even if there were a damages claim to be proved under any other branch of the law, the conclusion is inescapable that Mr Swart has not been able to prove any damages. This fact is perspicuous from the judgment of the High Court where, after hearing evidence on this point, it concluded that — there is no basis on which it can be found that the said properties would have been sold at a higher price at auctions'. [High Court judgment para 81.]

Constitutional challenge

[31] Having regard to this court's jurisprudence, it would be imprudent for us to consider Mr Swart's constitutional challenge, as it is being raised impermissibly for the first time in this court of final appeal. [See *Prince v President, Cape Law Society, and Others* 2001 (2) SA 388 (CC) (2001 (1) SACR 217; 2001 (2) BCLR 133; [2000] ZACC 28) para 22, where Ngcobo J stated: 'Parties who challenge the constitutionality of a provision in a statute must raise the constitutionality of the provisions sought to be challenged at the time they institute legal proceedings. In addition, a party must place before the Court information relevant to the determination of the constitutionality of the impugned provisions. . . . I would emphasise that all this information must be placed before the Court of first instance. The placing of the relevant information is necessary to warn the other party of the case it will have to meet, so as [to] allow it the opportunity to present factual material and legal argument to meet that case." See also *Maphango v Aengus Lifestyle Properties (Pty) Ltd* [2012] ZACC 2; 2012 (3) SA 531 (CC) (2012 (5) BCLR 449; [2012] ZACC 2) para 109; and *Phillips and Others v National Director of Public Prosecutions* 2006 (1) SA 505 (CC) (2006 (1) SACR 78; 2006 (2) BCLR 274; [2005] ZACC 15) paras 39 – 40.]

Validity of the s 80bis authorisation

[32] The second judgment would make a declaratory order that the Master's authorisation was unlawful. In my view such an order would be inappropriate. It has neither been sought nor is it of any consequence. In addition, this route gives little regard to settled principles applicable to the review of administrative action.

[33] The authorisation in terms of s 80*bis* is an administrative act within the meaning of the Promotion of Administrative Justice Act [3 of 2000]. As a result, even if the Master's authorisation in terms of s 80*bis* were unlawful, it remains valid and binding, as it continues to have legally valid consequences until it is set aside. [See *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others* 2004 (6) SA 222 (SCA) (*Oudekraal*) para 31: Thus the proper enquiry in each case - at least at first - is not whether the initial act was valid but rather whether its substantive validity was a necessary precondition for the validity of consequent acts. If the validity of consequent acts is dependent on no more than the factual existence of the initial act then the consequent act will have legal effect for so long as the initial act is not set aside by a competent court." (My emphasis) See also *Department of Transport v Tasima (Pty) Limited* [2016] ZACC 39; 2017 (2) SA 622 (CC); 2017 (1) BCLR 1 (CC) Tasima) paras 88 – 93; *Merafong City v AngloGold Ashanti Ltd* 2017 (2) SA 211 (CC) (2017 (2) BCLR 182; [2016] ZACC 35) (*Merafong*) paras 34 – 36; and *MEC for Health, Eastern Cape and Another v Kirland Investments (Pty) Ltd t/a Eye & Lazer Institute* 2014 (3) SA 481 (CC) (2014 (5) BCLR 547; [2014] ZACC 6) (*Kirland*) paras 101 and 106.] These legally valid consequences include the sale of the properties.

[34] It begs reiteration here that the sale agreements were subject to the suspensive condition that the sales would come into effect only once the requisite permissions (including the Master's permission under s 80*bis*) had been obtained. [This is of relevance because pending the fulfilment of a suspensive condition, the contract is inchoate (see *Joseph v*

Halkett (1902) 19 SC 289 at 293). In the context of sale, the Supreme Court of Appeal has held that a contract of sale subject to a suspensive condition that has not yet been fulfilled is not a sale. In *Corondimas v Badat* 1946 AD 548 at 551 Watermeyer CJ enunciated the principle relating to a contract of sale subject to a suspensive condition: '[W]hen a contract of sale is subject to a true suspensive condition, there exists no contract of sale unless and until the condition is fulfilled . . . . Until that moment, in the case of a sale subject to a true suspensive condition, such as this is, it is entirely uncertain whether or not a contract of sale will come into existence at some future time.' See also above 5 -- generally speaking, a suspensive condition *suspends the operation* of all obligations flowing from a contract until the occurrence of a future uncertain event. If the uncertain future event does not occur, the obligations never come into operation. See *Command Protection Services (Gauteng) (Pty) Ltd t/a Maxi Security v South African Post Office Ltd* 2013 (2) SA 133 (SCA) ([2012] ZASCA 160) para 21; and *Diggers Development (Pty) Ltd v City of Matlosana* [2012] 1 All SA 428 (SCA) ([2011] ZASCA 247) para 29. See also *Southern Era Resources Ltd v Farndell NO* 2010 (4) SA 200 (SCA) ([2009] ZASCA 150) para 11.] The effect of the suspensive conditions was this: once the Master's permission was obtained under s 80*bis*, the suspensive conditions were fulfilled, and legally binding sale agreements came into effect. The effect of this court's administrative-law jurisprudence is that these valid sales endure, regardless of the validity of the Master's authorisation, until such time as that authorisation is set aside by a court.

[36] Mr Swart could have challenged the decision of the Master but failed to do so. [See SCA judgment n4 para 13, where it was correctly pointed out that —
See also *Francis George Hill Family Trust v South African Reserve Bank* [1992] ZASCA 50; 1992 (3) SA 91 (A) at 107 B-H; *Nieuwoudt v The Master and Others NNO* 1988 (4) SA 513 (A) ([1988] ZASCA 72); *Muller v De Wet NO and Others* 1999 (2) SA 1024 (W) ([1999] 2 All SA 163) at 1029D – 1030H; and *Mears v Rissik, Mackenzie NO and Mears' Trustee*1905 TS 303 at 305. In addition, s 151 of the Act specifically makes provision for an aggrieved person to review any decision of the Master. The section, in relevant part, provides: '(A)ny person aggrieved by any decision . . . of the Master . . . may bring it under review by the court and to that end may apply to the court by motion, after notice to the Master or to the presiding officer, as the case may be, and to any person whose interests are affected: Provided that if all or most of the creditors are affected, notice to the trustee shall be deemed to be notice to all such creditors . . . .'.] All he has done is contend that s 80*bis* of the Act was not complied with because at the time that the trustees submitted the recommendation to sell the properties, they had not yet been formally appointed as provisional trustees. However, without a proper challenge to the Master's authorisation, the contention cannot be entertained. Accordingly, the matter must be decided on the basis that the authorisation was granted and remains valid.

[38] To require Mr Swart to adhere to the process prescribed in rule 53 is not undue formalism. [Rule 53 requires that proceedings for judicial review be 'by way of notice of motion directed and delivered by the party seeking to review such decision' to all affected persons. The notice of motion must 'set out the decision or proceedings sought to be reviewed' and 'be supported by affidavit setting out the grounds and the facts and circumstances upon which the applicant relies to have the decision or proceedings set aside or corrected'. The notice must call on the relevant decision-maker whose decision will be brought under review, and all other parties affected, to show cause why the decision should not be reviewed and set aside. It must also call upon the decision-maker concerned to send a record of the offending proceedings to the registrar within 15 days of receiving the notice, together with any reasons the decision-maker wishes to give or which the law requires her to give, and notify the applicant that she has done so.]Indeed, as this court held in *Kirland*, the procedural safeguards applicable to mounting a review application perform an important role in ensuring that interested parties are given proper notice of the review application, and an adequate opportunity to be heard on whether the decision should be set aside. Further, they ensure that the full record of the relevant decision is placed before the court, so that the

court has all the relevant facts against which to consider the lawfulness of the decision. [*MEC for Health, Eastern Cape and Another v Kirland Investments (Pty) Ltd t/a Eye & Lazer Institute* 2014 (3) SA 481 (CC)paras 65 and 67.]

[40] Of course, the rule 53 process is not required to be followed in instances where a collateral or reactive challenge is brought. However, I am not convinced that the issue of a collateral challenge comes into play here. [The Supreme Court of Appeal in *Oudekraal Oudekraal Estates (Pty) Ltd v City of Cape Town and Others* 2004 (6) SA 222 (SCA) para 35 described a collateral challenge thus: 'It will generally avail a person to mount a collateral challenge to the validity of an administrative act where he is threatened by a public authority with coercive action precisely because the legal force of the coercive action will most often depend upon the legal validity of the administrative act in question. A collateral challenge to the validity of the administrative act will be available, in other words, only 'if the right remedy is sought by the right person in the right proceedings".'] In the light of this, my view is that the validity of the Master's s 80*bis* authorisation was never properly challenged by Mr Swart, either directly or collaterally.

[43] A further impediment to Mr Swart's purported attack on the Master's authorisation is s 157 of the Act, which provides:

> '(1) Nothing done under this Act shall be invalid by reason of a formal defect or irregularity, unless a substantial injustice has been thereby done, which in the opinion of the court cannot be remedied by any order of the court.
>
> (2) No defect or irregularity in the election or appointment of a trustee shall vitiate anything done by him in good faith.'

[44] Subsection (1) makes it clear that nothing that has been done by the Master or the trustees pursuant to the provisions of the Act can be deemed invalid simply because of a formal defect unless, in the opinion of a court, it has resulted in substantial injustice that cannot be rectified by an order of court. The directions of this court specifically asked Mr Swart to point to any substantial injustice which he may have suffered as a result of the purported formal defects in the granting of the Master's authorisation.

[45] In this regard he merely contends that the properties could have been sold at a higher price. However, as already stated in this judgment, Mr Swart cannot prove this. Mr Swart has failed to point to any other substantial injustice.

[46] In addition to ss (1), ss (2) makes plain that no defect or irregularity in the appointment of the trustees can vitiate anything done by them in good faith. If there were a defect or irregularity in the appointment of the trustees, this would not vitiate the sale of the properties if the sale of the properties were effected in good faith. Mr Swart makes no averments to indicate bad faith on the part of the trustees. On the contrary, the good faith of the trustees seems evident on the facts. At the time when the properties were sold the trustees had received the authorisation of the Master; they had received the consent of the two secured creditors; and they had issued a circular alerting all creditors of Mr Swart's insolvent estate of the intention to have the land sold.

[47] For the above reasons it would not be in the interests of justice for this court to consider whether the Master's s 80*bis* authorisation was valid or not. Leave to appeal should be refused on the basis that it is not in the interests of justice to determine the matter.

Dissenting judgment per Jafta J H

Leave to appeal should be granted and the appeal upheld. Since the trustees purported to exercise a power under s 80*bis* when no such power vested in them, and the Master knew when he granted the approval that he lacked the required recommendation, there was no compliance with s 80*bis* (see [89] – [94]). Since the nature and extent of non-compliance could not be described as a mere formal defect, it was fatal to the Master's approval (see [95], [103]).

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Motala v Master of the North Gauteng High Court and 12 Others

(48748/11) [2017] (GNP) (9 October 2017)

Removal of liquidator

A liquidator's refusal to answer questions regarding the merits of the administration of the insolvent estate was sufficient to warrant his removal as liquidator in terms of section 379(1)(b) or (e) of the Companies Act 61 of 1973 without any further notice.

The overall purpose of an enquiry in terms of section 381 of the Companies Act 61 of 1973 appears to be investigative and not that of a procedure which adversely affects the rights and impacts directly and immediately on individuals. The court has difficulty in seeing how the enquiry in question can be characterised as administrative action in terms of the Promotion of Administrative Justice Act 3 of 2000 (PAJA).

The words "observing all the requirements imposed on him by any law or otherwise with respect to the performance of his duties" in section 381(1) would include directions of the Master.

The applicant was given proper notice and also the opportunity to advance reasons why he should not be removed from the Master's Panel of Approved Liquidators and Trustees. He opted to not take advantage of the invitation. It is clear that the applicant not only kept the Master in the dark about his previous convictions, but that he also told a blatant lie on 17 August 2011. Taking into account all these considerations, the court is not convinced that an irregularity has been committed by the Master as alleged. Therefore, there is no reasonable prospect of success on the merits with regard to the decision to remove Motala from the Master's Panel.

At an enquiry in terms of section 381 of the Companies Act 61 of 1973 the Motala refused to answer any question put to him by the Master relating to the merits of the administration of the insolvent estates. (Par [21])

It was pointed out by counsel for the Master that it was not only Motala who had been summoned to a section 381 enquiry. All other liquidators (but for Gainsford), immediately after argument, testified and made themselves available to do so. Furthermore, the Master had also removed Gainsford and pursued the investigations with the liquidators who did testify. Therefore, so it was submitted, there is no merit in the contention that the purpose of the enquiries was to target the applicant. The court agrees with this submission.

The relevant part of section 381 provides as follows:

> "381. Control of Master over liquidators. - (1) The Master shall take cognizance of the conduct of liquidators and shall, if he has reason to believe that a liquidator is not faithfully performing his duties and duly observing all the requirements imposed on him by any law or otherwise with respect to the performance of his duties, or if any complaint is made to him by any creditor, member or contributory in regard thereto, enquire into the matter and take such action thereanent as he may think expedient.
>
> (2) The Master may at any time require any liquidator to answer any enquiry in relation to any winding-up in which such liquidator is engaged, and may, if he thinks fit, examine such liquidator or any other person on oath concerning the winding-up.
>
> (3) The Master may at any time appoint a person to investigate the books and vouchers of a liquidator." (Par [24])

Subsection (1) imposes a duty on the Master to enquire into the matter if he or she has reason to believe that a liquidator is not faithfully performing his duties. Taking into account the alleged removal of valuable equipment from the mines and the conditions regarding employees of the mines, the court had no doubt that the Master was not only entitled, but also obliged to conduct an enquiry in terms of section 381. Subsection (2) empowers the Master to require any liquidator at any time to answer any enquiry in relation to any winding-up in which such liquidator is engaged. The effect of this subsection, is twofold: first, it empowers the Master to conduct an enquiry and, second, it puts the liquidator under an obligation to answer any such enquiry. The Master's right and the liquidator's obligation are to be inferred from the words "may at any time require ... to answer". Any other interpretation, negating this right and obligation, would render this subsection without any force and meaning. (Par [25])

As was pointed out in **Ma-Africa Groepbelange (Pty) Ltd and Another v Mil/man and Powell NNO and Another** 1997 (1) SA 547 (C) at 566 it goes without saying

that the removal of a liquidator is a radical form of relief which will not be granted, unless the Court is satisfied that a proper case is made out therefore. The Court is obliged to assess the conduct of the liquidator in its full context with reference to all relevant facts and circumstances. In this regard the court took into account the following:

(a) the alleged removal of value equipment from the mines;

(b) the circumstances relating to employees of the mines;

(c) all of the duties Aurora had undertaken, had been undertaken subject to the supervision, direction and control of the liquidators;

(d) the fact that Master had already met with the liquidators in this regard when the liquidators undertook to furnish the Master with a comprehensive report which, according to the Master, they have never done;

(e) the fact that the Master had already requested documentation which, according to the Master, "flowed into my office sporadically and in no particular order';

(f) the fact that the Master on 3 May 2011 summoned the applicant and the other joint provisional liquidators to a section 381 enquiry which was to be held on 16 and 17 May 2011;

(g) the applicant's initial response, i.e. that he would continue to cooperate with the office of the Master, that he did not dispute the Master's right to receive information regarding the winding-up of the companies and that he was "more than happy to appear ... in the spirit of ... continued cooperation";

(h) the fact that the applicant (and the other joint liquidators) was given the assurance that he could answer the questions he was able to answer and that he was entitled to object to those questions he was unable to deal with.

(i) the fact that the applicant subsequently, through his legal representatives, refused to answer any question "concerning the merits of their administration". (Par [26])

As far as procedural fairness is concerned, was it not necessary, before having removed the applicant as a liquidator, to afford him an opportunity of being heard? Section 3(2)(a) of the Promotion of Administrative Justice Act 3 of 2000 (PAJA) provides that a fair administrative procedure depends on the circumstances of each case. Subsection (2)(b) seems to impose five compulsory elements and three discretionary ones. One of the compulsory elements is an opportunity to make representations. (Par [27])

In this case Matola was given the opportunity to attend the section 381 enquiry, to answer questions put to him by the Master and to give whatever explanation that was necessary. He was not only entitled to answer the enquiry, but also obliged to do so. He refused to cooperate and to answer any questions concerning the merits of the administration of the insolvent estates. His refusal to answer questions undermined the Master's ability to control the administration of the companies in provisional liquidation. It also undermined the Master's ability to carry out a statutory duty imposed in terms of section 381. He left the Master with no alternative - he had to be removed. A party need not necessarily be afforded in every case an audience to make representations in answer to prejudicial administrative action that may be taken (cf also **Pellow NO v The Master of the High Court** 2012 (2) SA 491 (GSJ) at 510). This is such a case. The court was therefore not convinced that the Motala was entitled to be given another opportunity to make any further representations before he was removed as a liquidator. His refusal to answer questions regarding the merits of the administration of the insolvent estate was sufficient to warrant his removal as liquidator in terms of section 379(1)(b) or (e) without any further notice. In view of the conclusion in this regard, is not necessary to also consider the applicant's conflict of interest with regard to the payment of R3 million to Aurora or the fraudulent letter prepared by the attorney. The review application with regard to the decision of 23 May 2011 to remove the applicant as a joint provisional liquidator of the Pamodzi group of companies can therefore not succeed. (Par [29])

The relevant part of section 7(1) of PAJA provides that "any proceedings for judicial review" must be instituted without unreasonable delay and not later than 180 days after the date on which the person concerned was informed of the administrative action, became aware of it or might reasonably have been expected to have become

aware of it. Section 9(1) makes provision for the extension of time-periods. It provides that the 180-day period may be extended for a fixed period, by agreement between the parties or, failing such agreement, by a Court on application by the person or administrator concerned. In terms of section 9(2) the Court may grant such an application "where the interests of justice so require". (Par [32])

Two different stages are envisaged by section 7(1), i.e. a stage before the effluxion of 180 days and another one thereafter. It has been explained as follows by Brand JA in **Opposition to Urban Tolling Alliance v SANRAL** [2013] 4 All SA 639 (SCA) par 26:

> "Before the effluxion of 180 days, the first enquiry in applying section 7(1) is still whether the delay (if any) was unreasonable. But after the 180-day period the issue of unreasonableness is predetermined by the Legislature; it is unreasonable *per se*. It follows that the Court is only empowered to entertain the review application if the interest of justice dictates an extension in terms of section 9. Absent such extension the Court has no authority to entertain the review application at all. Whether or not the decision was unlawful no longer matters. The decision has been 'validated' by the delay ... ". (Par [33])

The onus is on an applicant who has delayed in bringing review proceedings to make out a proper case that the delay be condoned in the interests of justice. An application for condonation must give a full explanation for the delay. In addition, the explanation must cover the entire period of the delay. In short, a reasonable explanation must be given (**Van Wyk v Unitas Hospital & Another** 2008 (2) SA 472 (CC) par 22). The other factors ordinarily considered by a Court in deciding whether "the interests of justice so require" are, inter alia, the nature of the relief sought, the extent and cause of the delay, the importance of the issue to be raised in the intended proceedings and the prospects of success (**Camps Bay Ratepayers' and Residents' Association v Harrison** [2010] 2 All SA 519 (SCA) par 54). (Par [34])

Taking into account all the considerations, the court was not convinced that a full and reasonable explanation had been given by the applicant for the extraordinary long delay in bringing review proceedings with regard to the two decisions introduced for the first time in the amended notice of motion. However, a reasonable explanation (or the absence thereof) for the delay is not the only consideration in deciding whether the interests of justice require that condonation be granted. The court also considered the prospects of success. (Par [52])

When considering the prospects of success the court has to consider whether the decision to enquire under section 381 constitutes administrative action as contended for by the applicant. In terms of section 1 of PAJA *"administrative action"* means (insofar it is relevant) any decision taken which adversely affects the rights of any person and which has a direct, external legal effect. Both these requirements, i.e. *"which adversely affects the rights"* and *"direct external legal effect"* have been explained as follows by Nugent JA in ***Grey's Marine Hout Bay (Pty) Ltd v Minister of Public Works*** 2005 (6) SA 313 (SCA) at par 23:

> "The qualification, particularly when seen in conjunction with the requirement that it must have a 'direct and external legal effect', was probably intended rather to convey that administrative action is action that has the capacity to affect legal rights, the two qualifications in tandem serving to emphasise that administrative action impacts directly and immediately on individuals. " (Par [54])

According to the wording of section 381(1), (2) and (3), it appears that the purpose of the procedure set out therein is to enquire into and investigate matters in relation to a winding-up. The operative words indicating this are to *"enquire into the matter"* (subsection (1)), *"to answer any enquiry"* (subsection (2)) and *"to investigate"* (subsection (3)). According to the wording of these subsections the overall purpose appears to be investigative and not that of a procedure which adversely affects the rights and impacts directly and immediately on individuals. The court therefore has difficulty in seeing how the enquiry in question can be characterised as administrative action *(cf* **Nedbank Ltd v Master of the High Court, Witwatersrand Local Division** 2009 (3) SA 403 (W) par 96 and further with regard to section 417 of the Companies Act). However, in the event that the court has misdirected itself in this regard, it also considered whether, factually, an irregularity occurred. (Par [55])

The alleged irregularity must be legally evaluated to determine whether it amounts to a ground of review under PAJA *(**Allpay Consolidated v Chief Executive Officer, SASSA*** 2014 (1) SA 604 (CC) par 28). It would have to include a consideration of whether the irregularity or non-compliance was material or, put differently, egregious *(**SANRAL v Cape Town City*** 2017 (1) SA 468 (SCA) par 81). Having said that, the court bears in mind, when considering the application for condonation, that this requires a consideration of the merits, not a determination thereof. (Par [56])

The Master, in her letter dated 20 July 2011, clearly indicated what the nature of the proceedings was, i.e. that of an enquiry. According to this letter the purpose of the enquiry was to discuss the content of the Citizen article and the applicant's various responses with which the Master was not satisfied. It is also clear from this letter, that the motivation for the enquiry was not about a complaint, but the applicant's responses which did not find favour with the Master. It related to the question whether or not the applicant (at that stage) had previous convictions for theft and fraud which, on the face of it, appear to be a serious matter. Why should the Master not be entitled to enquire about these allegations under circumstances where the applicant's responses thereto were unsatisfactory? Taking into account that at this stage the applicant's name was still appearing on the Master's panel of approved liquidators and trustees, there is no reason why the Master should not be entitled to enquire about the suggestion that the applicant had previous convictions for theft and fraud. Having regard to these considerations, the court is not convinced that, factually, an irregularity occurred as contended for by the Matola. (Par [61])

It was contended that section 381(1) cannot be used for something other than its intended purpose, because doing so would amount to using the powers under subsection (1) for an ulterior purpose as envisaged by section 6(2)(e)(ii) of PAJA. The intended purpose of subsection (1) appears not to be so tightly formulated as suggested by counsel for the applicant. The words "observing all the requirements imposed on him by any law or otherwise with respect to the performance of his duties" would also include directions of the Master or the Court (Henochsberg on the Companies Act, No 71 of 2008, Vo/2, Appendix 1, p 173, commentary on section 381). There is no reason why a lawful request by the Master should not also be included. In this matter the Master requested the applicant on more than one occasion to indicate whether or not he had previous convictions for dishonesty. This was obviously of great concern to the Master. As pointed out by the Master, also of great concern was that the general public must have confidence in the process whereby the Master appoints liquidators and that the Master would not, in principle, appoint persons suspected of involvement in crime. Unfortunately the applicant failed to give a proper and direct answer to the Master's enquiry. On 18 July 2011 and in a last attempt to get a proper answer, the following question was posed to the applicant: "*Do you have previous convictions for theft and/or fraud? If yes, please*

provide the details of such convictions ... ". To this the applicant replied as follows: "*I ... have no previous convictions that disqualify me from acting as a trustee or liquidator*". Thereafter, on 20 July 2011, the applicant was requested to attend another enquiry at the Master's office in terms of section 381(1) of the Companies Act. (Par [62])

Having regard to these circumstances, there is no doubt that the Master was entitled to enquire about the applicant's previous convictions. A conviction of theft or fraud may have a bearing on the suitability of a person to act as a liquidator or to continue to act in that capacity, not only for the present, but also in future. It may also be relevant to the question whether or not a liquidator should remain on the Master's panel of approved liquidators and trustees. The various requests by the Master to obtain the necessary information in this regard should be regarded as an attempt by the Master to exercise control over the applicant as a liquidator. The issue with regard to the applicant's previous convictions is directly linked to both his ability to faithfully performing his duties as well as his perceived ability to do so. Put differently, a dishonest man may not be trusted of performing his duties faithfully. Therefore the reason for having conducted a formal enquiry in terms of section 381 was justified as the previous informal enquiry by means of correspondence proved to be unsuccessful. (Par [63])

Taking into account the facts, all the above considerations and the onus of proof, the court is not convinced that a reasonable prospect of success on the merits with regard to the decision of 20 July 2011 (to conduct an enquiry in terms of section 381(1) of the Companies Act) has been demonstrated. The court next considers the merits of the decision of 5 September 2011 (to remove Motala from the Master’s panel of persons suitable for appointment). (Par [64])

Does the decision to remove the applicant's name from the Master's list, constitute administrative action as contemplated in PAJA. In **Musenwa v Master of the North Gauteng High Court** 2010 JDR 1354 (GNP) Tuchten J also had to consider the question whether removing the applicant's name from the list was an administrative action. He dealt with this issue as follows (in paragraphs 10 and 11):

> "The sole ground on which the interim relief was sought was that in removing names from the list, the Master performs an administrative act, thus engaging the Promotion of Administrative Justice Act, 3 of 2000, (PAJA') and that the Master had not heard him before taking the decision to remove him from the list. ". I do not agree that the compilation of the list constitutes administrative action. The list is not compiled in the process of implementing legislation but in the process of implementing the socio-political policy of the Minister. In these circumstances, it seems to me that the principle articulated by Chaskalson J in **President of the Republic of South Africa & Others v South African Rugby Football Union & Others** 2000 (1) SA 1 (CC) par 142 is applicable". (Par [69])

The court stated that the policy referred to by Tuchten J (as far as the court could ascertain) is a policy determined by the Minister of Justice and Constitutional Development (and not the Master) in terms of, inter alia, section 158 of the Insolvency Act, No 24 of 1936 read with section 339 of the Companies Act. Although the court was not addressed on the meaning and import of this policy, it appears that the last edition thereof was published in GR 77 of 7 February 2014 and was to come into operation on 31 March 2014. The constitutional validity of this policy was considered in South African Restructuring and Insolvency **Practitioners Association v Minister of Justice and Constitutional Development and Others** [2015] 1 All SA 589 (WCC) when the Court (par 232) made a declaration in terms of section 172(1)(a) of the Constitution that the policy is inconsistent with the Constitution and therefore invalid. This was confirmed on appeal in **Minister of Justice v SA Restructuring & Insolvency Practitioners** [2017) 1 All SA 331 (SCA). Notwithstanding this outcome, the Master's list or panel still exists and arises from policy determined by the Master (and not the Minister) as explained in the supplementary answering affidavit. [***Comment: It is submitted that the policy applied by the Master is not a policy determined by the Minister of Justice and Constitutional Development in terms of section 158 of the Insolvency Act 24 of 1936. It is an earlier policy applied by the Master.***] However, it still remains a compilation according to policy. The court therefore agrees with Tuchten J that the compilation thereof does not constitute administrative action. Furthermore, action taken by the Master in adding or removing a person's name, i.e. by restructuring the compilation of the list according to the current policy and discretion of the Master, is likewise not administrative action as contemplated in PAJA. However, the court need not make a determination or finding in this regard as it only has to consider the merits. (Par [71])

From the above it appears that the applicant was given proper notice and also the opportunity to advance reasons why he should not be removed from the Master's Panel of Approved Liquidators and Trustees. He opted to not take advantage of the invitation. Furthermore, from all the correspondence it is clear that the applicant not only kept the Master in the dark about his previous convictions, but that he also told a blatant lie on 17 August 2011 (at the Master's Office) by stating that *"I don't have any previous convictions".* Taking into account all these considerations, the court is not convinced that an irregularity has been committed by the Master as alleged. Therefore, there is no reasonable prospect of success on the merits with regard to the decision of 5 September 2011. (Par [76])

CONCLUSION

Will it be in the interests of justice to grant condonation and to allow for an extension of time as envisaged by section 9 of PAJA? In this regard the court takes into account the excessive delay of more than three years after the decision of 20 July 2011 and 5 September 2011 had been taken. It also takes into account the inadequate explanation given for this delay as well as the absence of reasonable prospects of success on the merits with regard to both these decisions. Furthermore, there is also a public interest element in the finality of decisions taken and the exercise of functions in connection therewith (**Associated Institutions Pension Fund v van Zyl** 2005 (2) SA 302 (SCA) par 46). Ultimately, the decision whether to condone a delay is based on whether the interests of justice so require. That has not been demonstrated and therefore condonation for the late introduction of review proceedings with regard to these two decisions is refused. The result is that these two decisions, and the decision of 23 May 2011, remain valid and in force. (Par [77])

In the result the court makes the following order: The application is dismissed with costs, including the costs consequent upon the employment of two counsel. (Amongst others the applications reviewing and setting aside the decision of the Master on 23 May 2011 to remove the applicant as a joint provisional liquidator of the companies concerned; reviewing and setting aside the decision of the Master on 20 July 2011 to conduct an inquiry in terms of section 381 of the Companies Act and the entire proceedings conducted in terms of that decision; and ordering the Master to reinstate the applicant to the approved panel of liquidators and trustees.)

Extracts

[13] The relief sought by the applicant in his amended notice of motion (reduced to its essential features) are the following:

(a) Reviewing and setting aside the decision of the Master on 23 May 2011 to remove the applicant as a joint provisional liquidator of the companies concerned;

(b) Declaring that the applicant is entitled to be reinstated as a joint provisional liquidator and joint final liquidator of the companies concerned;

(c) Alternatively to the relief sought in paragraph (b) above, appointing the applicant as a liquidator to those of the companies that have subsequently been placed in final liquidation;

(d) Reviewing and setting aside the decision of the Master on 20 July 2011 to conduct an inquiry in terms of section 381 of the Companies Act and the entire proceedings conducted in terms of that decision;

(e) Declaring that the applicant is qualified to be nominated or appointed as a liquidator or trustee in terms of the Companies Act 61 of 1973 and the Insolvency Act 24 of 1936;

(f) Reviewing and setting aside the decision of the Master on 5 September 2011 to remove the applicant from the panel of approved liquidators and trustees;

(g) Ordering the Master to reinstate the applicant to the approved panel of liquidators and trustees. (Par [13])

[21] [At an enquiry in terms of section 381] Counsel for the applicant was then requested to indicate whether his clients would be prepared to testify on the basis that as and when an objection or question is raised, objection thereto may be taken. In response thereto it was indicated, *inter alia,* that if the questions are directed towards *"their administration and any* '" *and there is any implication in any question conceming the merits of their administration, they will not reply - they are advised not to reply now, because of the irregularity of these proceedings".* It therefore appears that the applicant refused to answer any question put to him by the Master relating to the merits of the administration of the insolvent estates.

[23) It was also pointed out by counsel for the Master that it was not only the applicant who had been summoned to a section 381 enquiry. All other liquidators (but for Gainsford), immediately after argument, testified and made themselves available to do so. Furthermore, the Master had also removed Gainsford and pursued the investigations with the liquidators who did testify. Therefore, so it was submitted, there is no merit in the contention that the purpose of the enquiries was to target the applicant. I agree with this submission.

[24] The relevant part of section 381 provides as follows:

> "381. Control of Master over liquidators. - (1) The Master shall take cognizance of the conduct of liquidators and shall, if he has reason to believe that a liquidator is not faithfully performing his duties and duly observing all the requirements imposed on him by any law or otherwise with respect to the performance of his duties, or if any complaint is made to him by any creditor, member or contributory in regard thereto, enquire into the matter and take such action thereanent as he may think expedient.

(2) The Master may at any time require any liquidator to answer any enquiry in relation to any winding-up in which such liquidator is engaged, and may, if he thinks fit, examine such liquidator or any other person on oath concerning the winding-up.

(3) The Master may at any time appoint a person to investigate the books and vouchers of a liquidator."

[25] Subsection (1) imposes a duty on the Master to enquire into the matter if he or she has reason to believe that a liquidator is not faithfully performing his duties. Taking into account the alleged removal of valuable equipment from the mines and the conditions regarding employees of the mines, I have no doubt that the Master was not only entitled, but also obliged to conduct an enquiry in terms of section 381. Subsection (2) empowers the Master to require any liquidator at any time to answer any enquiry in relation to any winding-up in which such liquidator is engaged. The effect of this subsection, as I understand it, is twofold: first, it empowers the Master to conduct an enquiry and, second, it puts the liquidator under an obligation to answer any such enquiry. The Master's right and the liquidator's obligation are to be inferred from the words "may at any time require ... to answer". Any other interpretation, negating this right and obligation, would render this subsection without any force and meaning. In this case the liquidators were given notice on 3 May 2011 of a section 381 enquiry which was to be held on 16 and 17 May 2011. Having regard to the circumstances and the fact that the Master had already requested copies of the documentation during November 2010, this period of twelve days was, in my view, sufficient notice.

[26] As was pointed out in **Ma-Africa Groepbelange (Pty) Ltd and Another v Mil/man and Powell NNO and Another** 1997 (1) SA 547 (C) at 566 it goes without saying that the removal of a liquidator is a radical form of relief which will not be granted, unless the Court is satisfied that a proper case is made out therefore. The Court is obliged to assess the conduct of the liquidator in its full context with reference to all relevant facts and circumstances. In this regard I take into account the following:

(a) the alleged removal of value equipment from the mines;

(b) the circumstances relating to employees of the mines;

(c) all of the duties Aurora had undertaken, had been undertaken subject to the supervision, direction and control of the liquidators;

(d) the fact that Master had already met with the liquidators in this regard on 19 November 2010 when the liquidators undertook to furnish the Master with a comprehensive report which, according to the Master, they have never done;

(e) the fact that the Master had already by 20 December 2010 requested documentation which, according to the Master, "flowed into my office sporadically and in no particular order';

(f) the fact that the Master on 3 May 2011 summoned the applicant and the other joint provisional liquidators to a section 381 enquiry which was to be held on 16 and 17 May 2011;

(g) the applicant's initial response, i.e. that he would continue to cooperate with the office of the Master, that he did not dispute the Master's right to receive information regarding the winding-up of the companies and that he was "more than happy to appear ... in the spirit of ... continued cooperation";

(h) the fact that the applicant (and the other joint liquidators) was given the assurance that he could answer the questions he was able to answer and that he was entitled to object tö those questions he was unable to deal with.

(i) the fact that the applicant subsequently, through his legal representatives, refused to answer any question "concerning the merits of their administration".

[27] As far as procedural fairness is concerned, was it not necessary, before having removed the applicant as a liquidator, to afford him an opportunity of being heard? Section 3(2)(a) of PAJA provides that a fair administrative procedure depends on the circumstances of each case. Subsection (2)(b) seems to impose five compulsory elements and three discretionary ones. One of the compulsory elements is an opportunity to make representations. According to the learned authors Curry & De Waal, The Bill of Rights Handbook, 6tM Edition, p 677 this apparently mandatory nature is deceptive. They give the following explanation:

> "First, the elements are a/ways subject to interpretation informed by a circumstance-based understanding of procedura/ fairness. Their content will thus tend to vary from case to case. Secondly, in several elements the scope for variation is increased by the use of inherently flexible standards. Third/y, the Constitutional Court has held that s 3(2)(a) must be read as giving the Courts discretion in enforcing the minimum requirements under s 3(2)(b) even when s 3(4) is not invoked. In other words, the Court is not bound to enforce even the compulsory requirements, and an administrator may be able to depart from them without relying on s 3(4)."

[28) In Joseph & Others v City of Johannesburg & Others 2010 (4) SA 55 (CC) the following was pointed out by Skweyiya J (par 57-59) in this regard:

> "A literal approach to s 3 of PAJA would hamstring the Courts in cases such as this one, where an administrator fails to recognise that it is bound by the procedural fairness requirement under PAJA . Section 3(2)(a) must therefore be read as an empowering provision that allows Courts to exercise a discretion in enforcing the minimum procedural fairness requirements under s 3(2)(b)".

[29] In the case before me the applicant was given the opportunity to attend the section 381 enquiry, to answer questions put to him by the Master and to give whatever explanation that was necessary. He was not only entitled to answer the enquiry, but also obliged to do so. He refused to cooperate and to answer any questions concerning the merits of the administration of the insolvent estates. His refusal to answer questions undermined the Master's ability to control the administration of the companies in provisional liquidation. It also undermined the Master's ability to carry out a statutory duty imposed in terms of section 381. He left the Master with no alternative - he had to be removed. As was also pointed out above, a party need not necessarily be afforded in every case an audience to make representations in answer to prejudicial administrative action that may be taken (cf also Pellow NO v The Master of the High Court 2012 (2) SA 491 (GSJ) at 510). This is in my view such a case. L am therefore not convinced that the applicant was entitled to be given another opportunity to make any further representations before he was removed as a liquidator. His refusal to answer questions regarding the merits of the administration of the insolvent estate was sufficient to warrant his removal as liquidator in terms of section 379(1)(b) or (e) without any further notice. In view of my conclusion in this regard, I do not deem it necessary to also consider the applicant's conflict of interest with regard to the payment of R3 million to Aurora or the fraudulent letter prepared by Mr Smit. The review application with regard to the decision of 23 May 2011 can therefore not succeed.

[32] The relevant part of section 7(1) of PAJA provides that "any proceedings for judicial review" must be instituted without unreasonable delay and not later than 180 days after the date on which the person concerned was informed of the administrative action, became aware of it or might reasonably have been expected to have become aware of it. Section 9(1) makes provision for the extension of time-periods. It provides that the 180-day period may be extended for a fixed period, by agreement between the parties or, failing such agreement, by a Court on application by the person or administrator concerned. In terms of section 9(2) the Court may grant such an application "where the interests of justice so require".

[33] Two different stages are envisaged by section 7(1), i.e. a stage before the effluxion of 180 days and another one thereafter. It has been explained as follows by Brand JA in Opposition to Urban Tolling Alliance v SANRAL [2013]4 All SA 639 (SCA) par 26:

> "Before the effluxion of 180 days, the first enquiry in applying section 7(1) is still whether the delay (if any) was unreasonable. But after the 180-day period the issue of unreasonableness is predetermined by the Legislature; it is unreasonable *per se*. It follows that the Court is only empowered to entertain the review application if the interest of justice dictates an extension in terms of section 9. Absent such extension the Court has no authority to entertain the review application at all. Whether or not the decision was unlawful no longer matters. The decision has been 'validated' by the delay ... ".

[34] The onus is on an applicant who has delayed in bringing review proceedings to make out a proper case that the delay be condoned in the interests of justice. An application for condonation must give a full explanation for the delay. In addition, the explanation must cover the entire period of the delay. In short, a reasonable explanation must be given (**Van Wyk v Unitas Hospital & Another** 2008 (2) SA 472 (CC) par 22). The other factors ordinarily considered by a Court in deciding whether "the interests of justice so require" are, inter alia, the nature of the relief sought, the extent and cause of the delay, the importance of the issue to be raised in the intended proceedings and the prospects of success (**Camps Bay Ratepayers' and Residents' Association v Harrison** [2010] 2 All SA 519 (SCA) par 54).

[35] The original notice of motion in this matter was issued on 25 August *2011* and served on 9 September *2011.* Prior to the launching of his amended notice of motion no relief was sought with regard to the Master's decision on 20 July *2011* (to conduct an inquiry in terms of section 381 of the Companies Act) and the decision of 5 September *2011* (to remove the applicant from the panel of approved liquidators and trustees). That relief was introduced for the first time in the amended notice of motion attached (as annexure "SFA1") to the supplementary founding affidavit dated 23 January *2015* which is more than three years after the impugned decisions were taken. Having regard to the dictum of Brand JA in OUTA above it means that in this matter the delay fits into the second stage (after the 180-day period) where the issue of unreasonableness is pre-determined by the Legislature and the Court is only empowered to entertain the review application with regard to those decisions, if the interest of justice dictates an extension in terms of section 9 of PAJA.

[43] The Master's decision of 20 July 2011 to conduct an inquiry in terms of section 381 of the Companies Act was conveyed to the applicant in a letter dated 20 July 2011 (annexure "AA23"). Shortly thereafter it transpired that the applicant had left the country on the same date. However, in a letter dated 22 July 2011 (annexure "AA2S") the applicant's attorney pointed out that the Master's letter of 20 July 2011 only came to the applicant's attention *"late on 20 July 2011 after he left the office".* Bearing in mind that the present application was launched on 9 September 2011, it is clear that the applicant had already known about this decision on 20 July 2011. The question is why did the applicant not include this

impugned decision for review in his initial notice of motion and founding affidavit? No specific explanation has been given in this regard.

[44] The applicant was able to formulate his initial review application without the assistance of any record. After an incomplete record was obtained, he could still amplify the application by adding or amending the terms of the notice of motion and supplement the supporting affidavit. Put differently, if an incomplete cause of action was set out with regard to a particular decision to be reviewed and set aside, the applicant could still amplify his papers after the record had been obtained. Fact of the matter is the decision in question was not introduced at all. It was not necessary to wait for such a long time before this decision could be taken on review. In terms of section 7(1) of PAJA any proceedings for judicial review must be instituted without unreasonable delay.

[45] The subsequent decision of 5 September 2011 (to remove the applicant from the panel of approved liquidators and trustees) was preceded by a letter dated 25 August 2011 addressed by the Master to the applicant (annexure "AA34"). In that letter reference was made to *"matters that are* of *great concern to this office"* and also to an instruction to Masters not to appoint the applicant as provisional liquidator *and/or* provisional trustee in any new estates. In the last paragraph thereof the applicant was invited *"to advance reasons by close* of *business on Monday* 29 *August 2011, why he should not be removed from the Master's panel* of *liquidators and trustees".* The implication of this letter is clear. If the applicant tails to take advantage of the invitation extended to him, he runs the risk of being removed from the panel of liquidators and trustees.

[46] On 29 August 2011 the applicant's attorney replied to the Master's letter of 25 August 2011 without advancing reasons why he should not be so removed (annexure "AA36"). A few days later, on 29 August 2011, the applicant personally responded to the letter of 25 August 2011 without taking advantage of the invitation to advance reasons why he should not be removed from the panel (annexure "AA37"). It was only thereafter, on 5 September 2011, that the Master informed the applicant of the decision to remove him from the panel of approved liquidators and trustees. It is not explained by the applicant when the letter of 5 September 2011 (informing him of the decision to remove him from the panel) came to his attention. The Master points out in the answering affidavit that he has never contradicted that letter or responded to it. According to the Master the applicant's conduct demonstrates acquiescence in the Master's decision to remove him from the panel. In reply to these allegations the applicant states the following:

> "I deny that I have 'acquiesced' in my removal. The purpose of this application is precisely to have the decision to remove me reviewed and set aside. Given Rossouw's clear prejudice against me there is no point to debating her reasoning with her in correspondence as there is no prospect that she would reverse her decision."

[47] The fact that the applicant was notified by letter dated 5 September 2011 of the decision to remove him from the panel, the absence of any explanation in the supplementary founding affidavit about when the contents of this letter came to his attention and the applicant's failure to address this issue in his replying affidavit, justify the conclusion that he knew about this decision before his initial notice of motion and founding affidavit were served and filed on 9 September 2011.

[48] This again raises the question why did the applicant not include the decision of 5 September 2011 (to remove him from the panel) for review in his initial notice of motion and founding affidavit, or soon thereafter? According to the applicant it was necessary for him to await the processing and the granting of the requested expungement before proceeding with

his application in this matter. He was advised that such an expungement would be a complete answer to the decision of the Master to remove him from the panels.

[49] There are, in my view, two problems with this approach. First, on 5 September 2011 when the decision was taken, the applicant was still a convicted person. It was an existing and relevant fact which could be taken into account by the Master. Furthermore, the initial application for pardon was only submitted during September 2011 (without specifying the date), whereas the application for expungement was made on 28 May 2012, long after the impugned decision had already been taken.

[50] Second, I find it difficult to understand how an expungement granted more than two years after the impugned decision had been taken, can render that decision reviewable. Expungement was not even a relevant consideration which could and should have been taken Into account when the decision was taken. Furthermore, it is only the applicant who is to be blamed for his failure to apply timeously for the expungement of his previous convictions.

[51] In an attempt to overcome the 180 days requirement of PAJA, counsel for the applicant contended that, to the extent that the applicant in his supplementary founding affidavit seeks to defend himself against the counter application, this constitutes a collateral defence, It was submitted that there is no time bar on the right to raise such a defence in response to an attempt by the State to enforce administrative action that the respondent challenges as invalid, There is, in my view, no merit in this argument. The relief sought by the applicant in this regard, as set out in the amended notice of motion, is not formulated as a weapon of defence, but as a weapon of attack, Both the prayers in this regard seek to introduce a new cause of action with regard to two different decisions based upon a different set of facts, These decisions function independently of the one taken on 23 May 2011 (to remove the applicant as a joint provisional liquidator of the Pamodzi group of companies),

[52] Taking into account all the above considerations, I am not convinced that a full and reasonable explanation has been given by the applicant for the extraordinary long delay in bringing review proceedings with regard to the aforesaid two decisions introduced for the first time in the amended notice of motion. However, a reasonable explanation (or the absence thereof) for the delay is not the only consideration in deciding whether the interests of justice require that condonation be granted. I shall also consider the prospects of success.

[54] When considering the prospects of success I have to consider whether the decision to enquire under section 381 constitutes administrative action as contended for by the applicant. In terms of section 1 of PAJA *"administrative action"* means (insofar it is relevant) any decision taken which adversely affects the rights of any person and which has a direct, external legal effect. Both these requirements, i.e. *"which adversely affects the rights"* and *"direct external legal effect"* have been explained as follows by Nugent JA in *Grey's Marine Hout Bay (Pty) Ltd v Minister of Public Works* 2005 (6) SA 313 (SCA) at par 23:

> "The qualification, particularly when seen in conjunction with the requirement that it must have a 'direct and external legal effect', was probably intended rather to convey that administrative action is action that has the capacity to affect legal rights, the two qualifications in tandem serving to emphasise that administrative action impacts directly and immediately on individuals. "

[55] According to the wording of section 381(1), (2) and (3), it appears that the purpose of the procedure set out therein is to enquire into and investigate matters in relation to a winding-up. The operative words indicating this are to *"enquire into the matter"* (subsection (1)), *"to answer any enquiry"* (subsection (2)) and *"to investigate"* (subsection (3)).

According to the wording of these subsections the overall purpose appears to be investigative and not that of a procedure which adversely affects the rights and impacts directly and immediately on individuals. I therefore have difficulty in seeing how the enquiry in question can be characterised as administrative action *(cf* **Nedbank Ltd v Master of the High Court, Witwatersrand Local Division** 2009 (3) SA 403 (W) par 96 and further with regard to section 417 of the Companies Act). However, in the event that I have misdirected myself in this regard, I shall now also consider whether, factually, an irregularity occurred.

[56] The alleged irregularity must be legally evaluated to determine whether it amounts to a ground of review under PAJA *(**Allpay Consolidated v Chief Executive Officer,* **SASSA** 2014 (1) SA 604 (CC) par 28). It would have to include a consideration of whether the irregularity or non-compliance was material or, put differently, egregious *(**SANRAL v Cape Town City*** 2017 (1) SA 468 (SCA) par 81). Having said that, I still bear in mind, when considering the application for condonation, that this requires a consideration of the merits, not a determination thereof.

[61] I do not agree with these submissions. The Master, in her letter dated 20 July 2011, clearly indicated what the nature of the proceedings was, i.e. that of an enquiry. According to this letter the purpose of the enquiry was to discuss the content of the Citizen article and the applicant's various responses dated 13, 15 and 19 July with which the Master was not satisfied. It is also clear from this letter, that the motivation for the enquiry was not about a complaint, but the applicant's responses which did not find favour with the Master. It related to the question whether or not the applicant (at that stage) had previous convictions for theft and/or fraud which, on the face of it, appear to be a serious matter. Why should the Master not be entitled to enquire about these allegations under circumstances where the applicant's responses thereto were unsatisfactory? Taking into account that at this stage the applicant's name was still appearing on the Master's panel of approved liquidators and trustees, I can see no reason why the Master should not be entitled to enquire about the suggestion that the applicant had previous convictions for theft and/or fraud. Having regard to these considerations, I am not convinced that, factually, an irregularity occurred as contended for by the applicant.

[62] It was also contended that section 381(1) cannot be used for something other than its intended purpose, because doing so would amount to using the powers under subsection (1) for an ulterior purpose as envisaged by section 6(2)(e)(ii) of PAJA. The intended purpose of subsection (1) appears not to be so tightly formulated as suggested by counsel for the applicant. The words "observing all the requirements imposed on him by any law or otherwise with respect to the performance of his duties" would also include directions of the Master or the Court (Henochsberg on the Companies Act, No 71 of 2008, Vo/2, Appendix 1, p 173, commentary on section 381). I can see no reason why a lawful request by the Master should not also be included. In this matter the Master requested the applicant on more than one occasion to indicate whether or not he had previous convictions for dishonesty. This was obviously of great concern to the Master. As pointed out by the Master, also of great concern was that the general public must have confidence in the process whereby the Master appoints liquidators and that the Master would not, in principle, appoint persons suspected of involvement in crime. Unfortunately the applicant failed to give a proper and direct answer to the Master's enquiry. On 18 July 2011 and in a last attempt to get a proper answer, the following question was posed to the applicant: "*Do you have previous convictions for theft and/or fraud? If yes, please provide the details of such convictions* ... ". To this the applicant replied as follows: "*I ... have no previous convictions that disqualify me from acting as a trustee or liquidator*". Thereafter, on 20 July 2011, the applicant was requested to attend another enquiry at the Master's office in terms of section 381(1) of the Companies Act.

[63] Having regard to these circumstances, I have no doubt that the Master was entitled to enquire about the applicant's previous convictions. A conviction of theft or fraud may have a bearing on the suitability of a person to act as a liquidator or to continue to act in that capacity, not only for the present, but also in future. It may also be relevant to the question whether or not a liquidator should remain on the Master's panel of approved liquidators and trustees. The various requests by the Master to obtain the necessary information in this regard should, in my view, be regarded as an attempt by the Master to exercise control over the applicant as a liquidator. The issue with regard to the applicant's previous convictions is directly linked to both his ability to faithfully performing his duties as well as his perceived ability to do so. Put differently, a dishonest man may not be trusted of performing his duties faithfully. Therefore, in my view, the reason for having conducted a formal enquiry in terms of section 381 was justified as the previous informal enquiry by means of correspondence proved to be unsuccessful.

[64] Taking into account the facts, all the above considerations and the onus of proof, I am not convinced that a reasonable prospect of success on the merits with regard to the decision of 20 July 2011 (to conduct an enquiry in terms of section 381(1) of the Companies Act) has been demonstrated. I shall now consider the merits of the decision of 5 September 2011 (to remove Motala from the Master's panel of persons suitable for appointment].

[69) This brings me back to the question whether the decision to remove the applicant's name from the Master's list, constitutes administrative action as contemplated in PAJA. In *Musenwa v Master of the North Gauteng High Court* 2010 JDR 1354 (GNP) Tuchten J also had to consider the question whether removing the applicant's name from the list was an administrative action. *He* dealt with this issue as follows (in paragraphs 10 and 11):

> *"The sole ground on which the interim relief* was *sought* was *that in removing names from the list, the Master performs an administrative act, thus engaging the Promotion of Administrative Justice Act,* 3 *of 2000, (PAJA') and that the Master had not heard him before taking the decision to remove him from the list.* ". *I do not agree that the compilation of the list constitutes administrative action. The list is not compiled in the process of implementing legislation but in the process of implementing the socio-political policy of the Minister. In these circumstances, it seems to me that the principle articulated by Chaskalson J in President of the Republic of South Africa & Others v South African Rugby Football Union & Others 2000* (1) *SA* 1 (CC) *par* 142 *is applicable".*

[71] The policy referred to by Tuchten J (as far as I could ascertain) is a policy determined by the Minister of Justice and Constitutional Development (and not the Master) in terms of, inter alia, section 158 of the Insolvency Act, No 24 of 1936 read with section 339 of the Companies Act. Although I was not addressed on the meaning and import of this policy, it appears that the last edition thereof was published in GR 77 of 7 February 2014 and was to come into operation on 31 March 2014. The constitutional validity of this policy was considered in South African Restructuring and Insolvency Practitioners Association v Minister of Justice and Constitutional Development and Others [2015] 1 All SA 589 (WCC) when the Court (par 232) made a declaration in terms of section 172(1)(a) of the Constitution that the policy is inconsistent with the Constitution and therefore invalid. This was confirmed on appeal in Minister of Justice v SA Restructuring & Insolvency Practitioners [2017) 1 All SA 331 (SCA). Notwithstanding this outcome, the Master's list or panel still exists and arises from policy determined by the Master (and not the Minister) as explained in the supplementary answering affidavit. However, it still remains a compilation according to policy. I therefore agree with Tuchten J that the compilation thereof does not constitute administrative action. Furthermore, I am also of the view that action taken by the Master in adding or removing a person's name, i.e. by restructuring the compilation of the list according to the current policy and discretion of the Master, is likewise not administrative

action as contemplated in PAJA. However, I need not have to make a determination or finding in this regard as I only have to consider the merits.

[76] From the above it appears that the applicant was given proper notice and also the opportunity to advance reasons why he should not be removed from the Master's Panel of Approved Liquidators and Trustees. He opted to not take advantage of the invitation. Furthermore, from all the correspondence it is clear that the applicant not only kept the Master in the dark about his previous convictions, but that he also told a blatant lie on 17 August 2011 (at the Master's Office) by stating that *"I don't have any previous convictions".* Taking into account all these considerations, I am not convinced that an irregularity has been committed by the Master as alleged. Therefore, in my view, there is no reasonable prospect of success on the merits with regard to the decision of 5 September 2011.

CONCLUSION

[77] I must now finally decide whether it will be in the interests of justice to grant condonation and to allow for an extension of time as envisaged by section 9 of PAJA. In this regard I take into account the excessive delay of more than three years after the decision of 20 July 2011 and 5 September 2011 had been taken. I also take into account the inadequate explanation given for this delay as well as the absence of reasonable prospects of success on the merits with regard to both these decisions. Furthermore, there is also a public interest element in the finality of decisions taken and the exercise of functions in connection therewith (Associated Institutions Pension Fund v van Zyl 2005 (2) SA 302 (SCA) par 46). Ultimately, the decision whether to condone a delay is based on whether the interests of justice so require. In my view that has not been demonstrated and therefore condonation for the late introduction of review proceedings with regard to these two decisions is refused. The result is that these two decisions, and the decision of 23 May 2011, remain valid and in force.

ORDER In the result I make the following order: The application is dismissed with costs, including the costs consequent upon the employment of two counsel. [Inter alia the applications reviewing and setting aside the decision of the Master on 23 May 2011 to remove the applicant as a joint provisional liquidator of the companies concerned; reviewing and setting aside the decision of the Master on 20 July 2011 to conduct an inquiry in terms of section 381 of the Companies Act and the entire proceedings conducted in terms of that decision; ordering the Master to reinstate the applicant to the approved panel of liquidators and trustees.

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Herselman and Another v Matsepe N.O. and Others

(4973/2014) [2017] ZAFSHC 209 (2 November 2017)

Attachment in terms of section 69 of the Insolvency Act 24 of 1936

Where assets were attached in terms of section 69(3) and (4) and kept in possession by the trustees an applicant for *mandament of spolie* did not have possession for the purpose of the *mandament*. (Spoliation is the wrongful deprivation of another's right of possession.)

The trustees denied that the Applicants (owner of the farm and another who conducted a diary business with him) indeed incurred expenses in regards to the care of the sheep as alleged by the them. The trustees further contended that when the Sheriff executed the warrant which was issued in terms of section 69(3) and (4) of the Insolvency Act, such sheep were handed to the trustees' representative on 6 March 2014. The trustees therefore took possession and control over the sheep. According to the Respondents, the trustees exercised this position by appointing security guards and caretakers to take care of the sheep. The main contention of the Respondents in this regard was that since March 2014 when the Third Respondent attached the sheep, up until October 2014, when the sheep were removed by the Third Respondent, such sheep were solely under the care of the appointed security guards and employees of the representatives who acted on behalf of the trustees. The Respondents further contended that in view of the fact that the warrant authorised the Sheriff to attach and hand over the sheep to the trustees, the trustees were therefore also authorised to remove it from the farm. According to the Respondents, removal of the sheep was necessitated due to the fact that the trustees experienced difficulties in properly exercising control over the sheep because First Applicant not only intimidated the security guards and caretakers appointed by the trustees, but also disposed of some of the sheep without the consent and knowledge of the trustees. (Par [11])

It may be accepted that because of the animals being ill- treated at some stage, the Applicants did indeed in fact take care of such animals because of the condition they were in. However, in view of all the facts pertaining to the security guards which were appointed, being the representatives of the trustees, at all relevant times being from March 2014 up until the removal of such sheep from the farm, the trustees never lost control and possession of such sheep for the period March 2014 to October 2014. The fact that Applicants may have cared for such animals at some stage on the farm of the, did not provide them with the necessary undisturbed possession as contended by them. (Par [19])

Applicants approached the Court for a mandament of spolie order. In view of the prerequisite of possession referred to in **Santam Insurance Ltd v Devi** 1994 (3) SA 763 TPD], the Applicants never had possession of such sheep for purposes of a

mandament of spolie. In view thereof it is not necessary to consider the other grounds of appela. There is no reasonable prospect of success in regards to the appeal. The application should therefore fail. (Par [20])

Extracts

[8] During September 2014, the Applicants [owner of the farm and another who conducted a diary business with him] instituted action against the First and Second Respondents for expenses which the Applicant allegedly incurred in regards to the management and feeding of the sheep, when the care of the sheep was, as alleged by the Applicants, taken over by the Applicants. During August 2014, the First and Second Respondents were further informed by the Applicants of Applicants' lien over such sheep until the amount as claimed by the Applicants in regards to such expenses, was paid and settled by the First and Second Respondents in their capacities as trustees of the insolvent estate.

[11] It is to be mentioned that the Respondents denied the fact that the Applicants indeed incurred expenses in regards to the care of the sheep as alleged by the Applicants. The Respondents further contended that when Third Respondent (Sheriff) executed the warrant which was issued in terms of Section 69(3) and (4) of the Insolvency Act, such sheep were handed to the trustees' representative on 6 March 2014. The trustees therefore took possession and control over the sheep. According to the Respondents, the trustees exercised this position *de facto* by appointing security guards and caretakers to take care of the sheep. The main contention of the Respondents in this regard was that since March 2014 when the Third Respondent attached the sheep, up until October 2014, when the sheep were removed by the Third Respondent, such sheep were solely under the care of the appointed security guards and employees of the representatives who acted on behalf of the trustees. The Respondents further contended that in view of the fact that the warrant authorised the Sheriff to attach and hand over the sheep to the trustees, the trustees were therefore also authorised to remove it from the farm. According to the Respondents, removal of the sheep was necessitated due to the fact that the trustees experienced difficulties in properly exercising control over the sheep because First Applicant not only intimidated the security guards and caretakers appointed by the trustees, but also disposed of some of the sheep without the consent and knowledge of the trustees.

[15] According to Respondents, the Third Respondent executed the warrant on 6 March 2014 and *inter alia* attached 1 700 sheep at the farm Sandfontein. After such attachment of the sheep, the Sheriff handed it to the representative of the trustees'. At that stage Chari Thompson from C & D Thompson Auctioneers was appointed to take care of the sheep on behalf of the trustees. In reply, the Applicants state that they were never informed that Mr. Thompson was appointed to take care of the sheep at that stage. What is important is that according to the Applicants themselves, the Mr. Thompson referred to did in fact hire some security guards sitting at the entrance gate of the farm to monitor the people on the farm apparently from removing the sheep or other assets.

[19] It may be accepted that because of the animals being ill- treated at some stage, the Applicants did indeed in fact take care of such animals because of the condition they were in. However, in view of all the facts pertaining to the security guards which were appointed by Mr. Thomson, being the representatives of the First and Second Respondents, at all relevant times being from March 2014 up until the removal of such sheep from the farm, First and Second Respondents never lost control and possession of such sheep for the period March 2014 to October 2014. The fact that Applicants may have cared for such

animals at some stage on the farm of the First Applicant, did not provide Applicants with the necessary undisturbed possession as contended by the Applicants.

[20] Applicants approached the Court for a mandament of spolie order. In view of the prerequisite of possession referred to in **Santam Insurance Ltd v Devi** *(supra)* [**Santam Insurance Ltd v Devi 1994 (3) SA 763** TPD], the Applicants never had possession of such sheep for purposes of a mandament of spolie. In view thereof it is not necessary to consider the other grounds of appeal as raised by the Applicants. Therefore there is no reasonable prospect of success in regards to appeal. The application should therefore fail.

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Dykes van Heerden Incorporated and another v Bekker NO and others

[2017] JOL 37189 (GSJ)

Enquiry in terms of sections 417 and 418 of the Companies Act 61 of 1973

A person who has failed to establish himself as a creditor is not entitled to attend and to interrogate any witness appearing at an enquiry in terms of section 417 and section 418.

The first applicant has set out the allegations of its claim in paragraphs 12 to 14 of the affidavit. The question that arises is whether the allegations are sufficient to plead a cause of action. The court is of the view that the first applicant has failed to set out a cause of action and has failed to provide the essential evidence to support its claim in law. It is alleged that the first applicant was appointed as conveyancer of the company. No essential details have been given about the date of appointment whether it was oral or in writing. No details about who represented the parties and where the transaction was concluded. The court agrees with the respondents' submission that this date is important to consider the question of prescription. The court states that the Master or a trustee or liquidator in an insolvent estate cannot accept a claim if the claim has prescribed. ***[Comment: See Breda NO v The Master of the High Court, Kimberley (20537/2014) [2015] ZASCA 166 (26 November 2015) par [23] for the view that a presiding officer should not refuse to admit a claim because the claim has on the face of it prescribed.]*** (Par [14])

The liquidators have explained the answering affidavit why the claims made by the second applicant cannot be accepted. They have stated that the properties referred

to in the agreements were not owned by the company and that the company could therefore not have entered into agreements in respect of those properties and could not have been the seller in respect of those properties. Further that no funds were paid to the company by the second applicant. (Par [20])

Since the claims were dismissed by the Master and the second applicant has instituted an action in this Court which action is being defended by the respondents, it is inappropriate for the Court to deal with the same issue in motion proceedings. Even if it could be appropriate for this Court to deal with this matter, the applicant has failed to establish itself as a creditor of the company without *prima facie* proof of payment to the company and a resolution of the problem that the properties involved were not the company's properties. The mere fact that second applicant instituted action against the respondents cannot be, by itself, *prima facie* proof that it is a creditor. It must supply *prima facie* evidence to establish that it is a creditor which it has failed to do. (Par [21])

The first applicant has alluded in its founding affidavit that it can still call for a special creditors' meeting to deal with their claims. They therefore have alternative remedies available to it which includes a review application. (Par [22])

Extracts

[1] The first and second applicant brought an urgent application for an order declaring that they are creditors for purposes of sections 417 and 418 of the Companies Act 71 of 2008 (the Act) and as such they are entitled to attend and to interrogate any witness appearing at the enquiry in terms of section 417 and section 418 read with item 9 of chapter 5 of the Act (the enquiry) before the first respondent. Further that the first respondent be ordered to allow them to participate in the enquiry and for the respondents to make available to them a transcript of the entire record of the proceedings at the enquiry. They sought in the alternative an order that the enquiry be suspended pending the final determination of a review application to be instituted within 21 days of the order, reviewing and setting aside the ruling of the first respondent not to allow them to participate in the enquiry.

[12] Since the respondents have denied that the applicants are creditors of the company, the applicants must show that they are creditors of the company. The applicants are also required to make out its case in its founding papers.

[14] The first applicant has set out the allegations of its claim in paragraphs 12 to 14 of the affidavit. The question that arises is whether the allegations are sufficient to plead a cause of action. In my view, the first applicant has failed to set out a cause of action and has failed to provide the essential evidence to support its claim in law. It is alleged that the first applicant was appointed as conveyancer of the company. No essential details have been given about the date of appointment whether it was oral or in writing. No details about who represented

the parties and where the transaction was concluded. I agree with the respondents' submission that this date is important to consider the question of prescription. The Master or a trustee / liquidator in an insolvent estate cannot accept a claim if the claim has prescribed.

[17] The claim documents, annexed as "JVH1" and "JVH2" are inadequate in supplying the necessary details to establish a claim against the company. Annexure "JVH1" merely suggest at 21 that the claim is in respect of "professional services rendered". No invoices were supplied. It is not explained when and in respect of which services were rendered. It is not explained how the amount claimed have been calculated. "JVH2" similarly lacks the necessary details.

[18] The applicant has failed to make out its case in its founding papers. It has failed to allege the necessary averments and to provide the necessary evidence in order to claim a fee from the company. It is not possible to claim on the basis of fees / wasted costs. On the face of it, the wasted costs relate to damages and not a fee. The allegations made on behalf of the first applicant amount to an equivocation, rendering the allegations as vague and embarrassing.

[20] The second to fifth respondents have explained in paragraphs 18.1 to 18.5 and 21.2 to 21.3 of the answering affidavit why the claims made by the second applicant cannot be accepted. They have stated that the properties referred to in the agreements were not owned by the company and that the company could therefore not have entered into agreements in respect of those properties and could not have been the seller in respect of those properties. Further that no funds were paid to the company by the second applicant.

[21] Since the claims were dismissed by the Master and the second applicant has instituted an action in this Court which action is being defended by the respondents, it is inappropriate for this Court to deal with the same issue in motion proceedings. Even if it could be appropriate for this Court to deal with this matter, the applicant has failed to establish itself as a creditor of the company without *prima facie* proof of payment to the company and a resolution of the problem that the properties involved were not the company's properties. The mere fact that second applicant instituted action against the respondents cannot be, by itself, *prima facie* proof that it is a creditor. It must supply *prima facie* evidence to establish that it is a creditor which it has failed to do.

[22] The first applicant has alluded in its founding affidavit that it can still call for a special creditors' meeting to deal with their claims. They therefore have alternative remedies available to it which includes a review application.

[23] The application stands to be dismissed with costs.

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Oro Africa (Pty) Limited v Currin

[2017] JOL 39170 (WCC)

No paragraph numbering in this report

Locus standi in terms of section 9 of the Insolvency Act 24 of 1936 -Liquidated claim of not less than R100

A claim is not a liquidated claim where its existence depends on the fulfillment of a condition, but it is a liquidated claim where the condition relates only to the date for payment which is not due as at the date of the hearing of the application for sequestration.

> Section 9(1) of the Insolvency Act 24 of 1936 provides that:
>
> "A creditor (or his agent) who has a liquidated claim for not less than £50 (R100) or two or more creditors (or their agent) who in the aggregate have liquidated claims for not less than £100 (R200) against a debtor who has committed an act of insolvency who is insolvent may petition the Court for the sequestration of the estate of the debtor."
>
> Section 9(2) provides that:
>
> "A liquidated claim which is accrued but which is not yet due on the date of the hearing of the petition shall be reckoned as a liquidated claim for the purposes of subsection (1)."

In this connection Meskin *The Law of Insolvency* at 2.1 writes:

> "A liquidated claim in this context is a claim for an amount which is fixed either by agreement or by an order of the Court or otherwise. The mere fact that the claim is disputed does not render it un-liquidated if nevertheless it is capable of easy and speedy proof. Thus, a claim for damages whether arising in contract or delict which is yet to be quantified by a judgment or agreement ordinarily is an un-liquidated claim but a claim for damages may be a liquidated claim, e.g., a claim for damages in an amount equal to an amount stolen where such latter amount is established."

In this context, a claim is not a liquidated claim where its existence depends on the fulfilment of the condition but it is a liquidated claim where the condition relates only to the date for payment which is not due as at the date of the hearing of the application for sequestration. A claim is not liquidated however where the reason for why the payment thereof is not due is where the creditor has agreed to withhold proceedings against the debtor, pending the fulfilment of a condition and this condition remains unfulfilled.

Respondent admits, save for the defences raised in terms of the National Credit Act 34 of 2005 (NCA), that he owes applicant money. His defence is that the money is not yet due but this point cannot be raised to dispute the applicant's *locus standi* by virtue of section 9(2). As the court stated in *Nedbank Ltd v Fuls and another* [2012] ZAWCHC 196 (12 November 2012):

> "Most significantly, the first respondent never disputes that he owes the applicant a substantial sum of money. For the applicant have *locus standi* as a creditor, that amount need not be due."

In this connection Mr *Irish* referred to *Pan American World Airways Incorporated v SA Fire and Accident Insurance Company Limited* 1965 (3) SA 150 (A) at 175C:

> "When dealing with the problem of an implied term the first enquiry is, of course, whether, regard being had to the expressed terms of the Agreement, there is any room for importing the alleged implied term" (the existence of the tacit term is determined by the bystander test; see also Christie *The Law of Contract in South Africa* (6 ed) at 174–176).

The difficulty for respondent is that he has failed to provide evidence required to establish a tacit term. There is no basis by which he discharged the *onus* which rested upon him. Further, the tacit term alleged would contradict the express terms that the loan would be repayable on demand. In short, the passage from the respondent's affidavit, is riddled with contradiction and most certainly cannot justify the various versions which were set out therein. A tacit term cannot be established on this version.

In another analogous area of law, the Income Tax Act 58 of 1962, as amended, and, in particular section 103(1) of that Act (the old tax avoidance section), the concept of arm's length was interrogated very carefully by courts in a number of cases. In particular in *Hicklin v CIR* 1980 (1) SA 481 (A) at 495A Trollip JA, in dealing with the concept of "dealing at arm's length" for the purposes of this section said:

> "It connotes that each party is independent of the other and in so dealing will strive to get the utmost possible advantage out of the transaction itself."

If this Court follows the *Hicklin* test, which, presents a correct interpretation of the concept of arm's length as set out in the NCA, then notwithstanding the fact that it can be pointed out that a couple of other loans may well not have been arm's length, does not on its own detract from a conclusion that the loan which respondent, on his version, contends was made between himself and the applicant was not concluded arm's length.

According to *National Credit Regulator v Opperman and others* 2013 (2) BCLR 170

(CC) section 89(5)(c) [deleted by Act 19 of 2014] of the NCA is invalid and the provision thus has no effect on the claim against the capital of the debt.

It is not possible for respondent to plead the very point that Mr *Tredoux* attempted to raise in an attempt to stave off the obvious, namely, that the respondent has been enriched. There is no basis on these papers to show how the enrichment has been diminished. Accordingly on the clear application of the available law, there is an enrichment claim which is sufficient to justify the basis of applicant's case.

Section 8(a) of the Insolvency Act provides:

> "A debtor commits an act of insolvency (a) if he leaves the Republic or being out of the Republic remains absent therefrom, or departs from his dwelling or otherwise absents himself, with intent by so doing to evade or delay the payment of his debts."

Meskin in *The Law of Insolvency* says at 2-65 in regard to this section:

> "The essence of each of these acts of insolvency is that by the particular conduct the debtor has intended to evade or delay the payment of his debts. The test in relation to the debtor's intention is a subjective one but such intention is established by a process of inferential reasoning and is not dependent on the mere *ipse dixit* of the debtor. Thus while his leaving the Republic or leaving his dwelling gives rise to an inference that such intention was present, it is insufficient in itself to justify a conclusion, even *prima facie* that an act of insolvency has been established since there may be other explanations for such conduct. But the other circumstances of a particular case e.g. that the debtor owes numerous creditors substantial amounts and has departed without any prior reference to them or any attempt to provide for satisfaction of their claims, may justify an inference that the debtor acted with the requisite intent. In determining whether the requisite intention existed, the Court 'must weigh up all the relevant factors, facts and circumstances in order to determine what, on the balance of probabilities, was the dominant operative or effectual intention in substance and truth of the debtor'."

It is not strictly necessary to make a finding in this regard because of the finding in respect of factual insolvency.

Meskin [par 5.31.3] states:

> "In this context as in those of section 29, 30 of the Insolvency Act, the issue as to whether the insolvent's liabilities exceeded his assets at any particular date must be determined on a balance of probabilities. Such a determination entails *inter alia* fixing at least the probable [market] value i.e. temporary value of each of the assets at such date ... . For the

> purpose of proving [the] insolvent's liabilities at the relevant date, reliance may be placed on the accepted proof of debt which are admissible as *prima facie* proof of the liabilities as at the date of sequestration and as such affording some evidence for the amount of the liabilities at the former date. Reliance may be placed also on the insolvent's books and records which are admissible insofar as they afford *prima facie* evidence of his liabilities. In evaluating evidence in this context one may not presume that an insolvent's financial position at the one date was unchanged at another. It is submitted that in this context as in those sections of 29, 30 of the Insolvency Act the liabilities envisaged are exclusively actual and contingent liabilities (i.e. a liability which by reason of existing *vinculaum* [*sic*] *juris* between the creditor and the debtor may become an enforceable liability on the happening of some future event). Hence liability under a suretyship would qualify as an actual liability in this context."

The amount of the loan which is correct is most likely the one adopted with Investec, namely, a value of the loan in terms of its prospects of recovery today, not in a year and a half time on speculative figures. Manifestly there is no basis by which Company Worx can repay the loan today nor tomorrow. Its value for the purposes of insolvency can never be R4,9 million. It must be vastly less.

This therefore means that if the loan is reduced drastically, it is clear that respondent is factually insolvent. It means that, as Mr *Irish* has described the position of respondent, he is in a hopelessly insolvent state.

As a result, it must follow that the only question is whether there is an advantage to creditors. On the basis of the figures offered by applicant there would be a dividend of something around 27c in the rand. Given the mendacity which has been shown in this case, even on respondent's own version, there is an obvious and pressing need for an independent enquiry into respondent's estate which can be done by trustees who would be empowered to so do.

In the result therefore, all of the defences must be rejected. The provisional order is made final.

Extracts

Locus standi

Section 9(1) of the Insolvency Act 24 of 1936 provides that:

> "A creditor (or his agent) who has a liquidated claim for not less than £50 (R100) or two or more creditors (or their agent) who in the aggregate have liquidated claims for not less than £100 (R200) against a debtor who has committed an act of insolvency who is insolvent may petition the Court for the sequestration of the estate of the debtor."

Section 9(2) provides that:

> "A liquidated claim which is accrued but which is not yet due on the date of the hearing of the petition shall be reckoned as a liquidated claim for the purposes of subsection (1)."

As shall become apparent later, this provision is of significance to the disposition of this case. In this connection Meskin *The Law of Insolvency* at 2.1 writes:

> "A liquidated claim in this context is a claim for an amount which is fixed either by agreement or by an order of the Court or otherwise. The mere fact that the claim is disputed does not render it un-liquidated if nevertheless it is capable of easy and speedy proof. Thus, a claim for damages whether arising in contract or delict which is yet to be quantified by a judgment or agreement ordinarily is an un-liquidated claim but a claim for damages may be a liquidated claim, e.g., a claim for damages in an amount equal to an amount stolen where such latter amount is established."

In this context, a claim is not a liquidated claim where its existence depends on the fulfilment of the condition but it is a liquidated claim where the condition relates only to the date for payment which is not due as at the date of the hearing of the application for sequestration. A claim is not liquidated however where the reason for why the payment thereof is not due is where the creditor has agreed to withhold proceedings against the debtor, pending the fulfilment of a condition and this condition remains unfulfilled.

Respondent admits, save for the defences raised in terms of the NCA [National Credit Act 34 of 2005], that he owes applicant money. His defence is that the money is not yet due but this point cannot be raised to dispute the applicant's *locus standi* by virtue of section 9(2). As the court stated in *Nedbank Ltd v Fuls and another* [2012] ZAWCHC 196 (12 November 2012):

> "Most significantly, the first respondent never disputes that he owes the applicant a substantial sum of money. For the applicant have *locus standi* as a creditor, that amount need not be due."

I should add that this particular issue was hardly pressed by Mr *Tredoux*, who appeared on behalf of the respondent.

Mr *Irish* sought to interrogate the basis of respondent's version concerning the terms of the loan by firstly contending that the respondent had not appreciated the difference between a tacit and an implied term of an agreement. A tacit term of a contract would, of course, in terms of trite law be established by reference to the intention of the parties as opposed to an implied term in which case the intention of the parties would not be relevant (see *Alfred*

McAlpine and Son (*Pty*) *Limited v Transvaal Provincial Administration* 1974 (3) SA 506 (A) at 531; Van der Merwe et al *Contract*: *General Principles* (4 ed) at 241 and the cases collected at footnote 216).

As Mr *Irish* noted, there was no basis on which an implied term has been alleged or established on these papers. If respondent's contention was that a tacit term existed, then, in order to decide whether this was so, it was important to examine the express terms of the contract.

In this connection Mr *Irish* referred to *Pan American World Airways Incorporated v SA Fire and Accident Insurance Company Limited* 1965 (3) SA 150 (A) at 175C:

> "When dealing with the problem of an implied term the first enquiry is, of course, whether, regard being had to the expressed terms of the Agreement, there is any room for importing the alleged implied term" (the existence of the tacit term is determined by the bystander test; see also Christie *The Law of Contract in South Africa* (6 ed) at 174–176).

Courts have generally been slow to infer a tacit term for, as stated, in *City of Cape Town* (*CMC Administration*) *v Bourbon-Leftley and another NNO* 2006 (3) SA 488 (SCA) at 494I–495B [also reported at [2005] JOL 15493 (SCA) – Ed]:

> "It follows that a term cannot be inferred because it would, on the application of the well-known 'officious bystander' test, have been unreasonable of one of the parties not to agree to it upon the bystander's suggestion. Nor can it be inferred because it would be convenient and might therefore very well have been incorporated in the contract if the parties had thought about it at the time. A proposed tacit term can only be imported into a contract if the court is satisfied that the parties would *necessarily* have agreed upon such a term if it had been suggested to them at the time . . . If the inference is that the response by one of the parties to the bystander's question might have been that he would first like to discuss and consider the suggested term, the importation of the term would not be justified."

Manifestly the *onus* of proving the terms of the agreement from which it relies rests on the respondent who has alleged the existence of such a term.

The difficulty for respondent is that he has failed to provide evidence required to establish a tacit term. There is no basis by which he discharged the *onus* which rested upon him. Further, the tacit term alleged would contradict the express terms that the loan would be repayable on demand. In short, the passage from the respondent's affidavit, which I have cited, is riddled with contradiction and most certainly cannot justify the various versions which were set out therein. A tacit term cannot be established on this version.

Furthermore, the replying affidavit of Mr Gary Nathan demonstrates very clearly that the importation of a term would never have been tacitly agreed to between the parties.

Significantly in an another analogous area of law, namely the Income Tax Act 58 of 1962, as amended, and, in particular section 103(1) of that Act (the old tax avoidance section), the concept of arm's length was interrogated very carefully by courts in a number of cases. In particular in *Hicklin v CIR* 1980 (1) SA 481 (A) at 495A Trollip JA, in dealing with the concept of "dealing at arm's length" for the purposes of this section said:

> "It connotes that each party is independent of the other and in so dealing will strive to get the utmost possible advantage out of the transaction itself."

If this Court follows the *Hicklin* test which, in my view, presents a correct interpretation of the concept of arm's length, as set out in the NCA, then notwithstanding the fact that it can be pointed that a couple of other loans may well not have been arm's length, does not on its own detract from a conclusion that the loan which respondent, on his version, contends was made between himself and the applicant was not concluded arm's length.

I should, add that even if the agreement breaches the NCA, on its own this would not be a sufficient defence to a claim. In *National Credit Regulator v Opperman and others* 2013 (2) BCLR 170 (CC)[also reported at [2013] JOL 29746 (CC) – Ed] the Constitutional Court stated at paragraph [55]:

> "The most plausible meaning of section 89(5)(c) is the one the High Court gave it. The interpretation reflects what common sense tells one the aim of the provision is, in view of the NCA as a whole: consumers have to be protected against uncontrolled credit providers and therefore credit providers are required to register; credit providers who do not register in contravention of the NCA face severe consequences; courts must declare the agreement void and order *either* that all rights perceived to follow from the agreement (including the right to restitution) are cancelled *or* forfeited to the State. In practice it may well always be forfeited to the State."

The court in *Opperman* held that section 89(5)(c) of the NCA would result in an arbitrary deprivation of property in breach of section 25(1) of the Constitution of the Republic of South Africa, 1996 ("the Constitution"). Accordingly, at paragraph [78], in dealing with the consequences of this finding the court said:

> "As the High Court pointed out, a credit provider's objective is to make money by way of interest. A credit provider who enters into an unlawful agreement is not legally entitled to the interest. Forgoing the interest is another means to achieve the aims of the NCA that is less restrictive than the means employed by section 89(5)(c)."

The effect of this decision is that section 89(5)(c) of the NCA is invalid and the provision thus has no effect on the claim against the capital of the debt.

An applicant may also have an enrichment claim against the respondent in respect of the capital amount advanced, which in this case is R4 386 562,31, notwithstanding that the defences in so far as the NCA might succeed.

In this case respondent did not plead any such extinction. This argument appears to come as a desperate and last attempt to stave off the averments regarding enrichment. The very basis of respondent's defence to insolvency is predicated on the argument of a loan owing by Company Worx which exceeds the so-called amount of money owing to applicant. Hence it is not possible for respondent to plead the very point that Mr *Tredoux* attempted to raise in an attempt to stave off the obvious, namely, that the respondent has been enriched. There is no basis on these papers to show how the enrichment has been diminished. Accordingly on the clear application of the available law, there is an enrichment claim which is sufficient to justify the basis of applicant's case.

Act of insolvency

This brings me to the question of the act of insolvency. Section 8(a) of the Insolvency Act provides:

> "A debtor commits an act of insolvency (a) if he leaves the Republic or being out of the Republic remains absent therefrom, or departs from his dwelling or otherwise absents himself, with intent by so doing to evade or delay the payment of his debts."

Meskin in *The Law of Insolvency* says at 2-65 in regard to this section:

> "The essence of each of these acts of insolvency is that by the particular conduct the debtor has intended to evade or delay the payment of his debts. The test in relation to the debtor's intention is a subjective one but such intention is established by a process of inferential reasoning and is not dependent on the mere *ipse dixit* of the debtor. Thus while his leaving the Republic or leaving his dwelling gives rise to an inference that such intention was present, it is insufficient in itself to justify a conclusion, even *prima facie* that an act of insolvency has been established since there may be other explanations for such conduct. But the other circumstances of a particular case e.g. that the debtor owes numerous creditors substantial amounts and has departed without any prior reference to them or any attempt to provide for satisfaction of their claims, may justify an inference that the debtor acted with the requisite intent. In determining whether the requisite intention existed, the Court 'must weigh up all the relevant factors, facts and circumstances in order to determine what, on the balance of probabilities, was the dominant operative or effectual intention in substance and truth of the debtor'."

Mr *Irish* submitted that respondent had left the country in order to avoid repaying the applicant and hence in order to avoid his obligations as he wanted to prevent a criminal prosecution. He only returned to South Africa once he was assured by his attorneys that he would not be arrested. In this connection, Mr *Irish* referred to a letter generated by Liddell Weeber and Van der Merwe Incorporated of 14 July 2015 to respondent

Mr *Irish* submitted that respondent had left the country in order to avoid repaying the applicant and hence in order to avoid his obligations as he wanted to prevent a criminal prosecution. He only returned to South Africa once he was assured by his attorneys that he would not be arrested. In this connection, Mr *Irish* referred to a letter generated by Liddell Weeber and Van der Merwe Incorporated of 14 July 2015 to respondent which, *inter alia*, reads thus: ...

This e-mail has to be read together with the balance of respondent's own version. Regrettably respondent has not been candid with this Court. It is clear that, notwithstanding respondent's version, he must, on any basis, have left South Africa on the morning of 26 June 2015. At best for him, he would then have taken a flight from Cape Town at either 6am, or at the latest at 7am, in order to catch the flight from Johannesburg to Malawi on that date. There was absolutely no basis by which he was going to, could have, wanted to or was willing to attend a meeting at 2pm in applicant's offices on that day. Hence his version is a blatant lie. It is regrettable that the respondent, as unfortunately has been the case on more than one occasion in his papers, has not been candid with this Court. After all, he is a chartered accountant who should maintain the highest standards of probity which is regrettably manifestly not the case.

Respondent left South Africa in circumstances where he represented to the Nathans, to whom he owed a considerable sum of money, that he would present himself at their offices. The irresistible inference is that the e-mails sent, particularly the one at 6:30am, was a subterfuge and contained a commitment that could never be implemented. Regarding the idea that the respondent had a return ticket, as Mr *Irish* correctly submitted, a return ticket to South Africa is a necessity because it is not possible for a foreigner to obtain the necessary visa to enter Malawi without a return ticket. This attempt at justification can thus be discounted. However, it is not strictly necessary for me to make a finding in this regard because I can make the necessary finding in respect of factual insolvency.

Respondent claims to have cash which is held by the applicant of R1,2 million. This is the most puzzling averment, namely, that the applicant holds R1,2 million of respondent's cash.

On what basis this claim is made, I do not know. No explanation is provided, no justification is given and this amount cannot be taken into account. The inclusion of the respondent's pension fund is manifestly incorrect because in terms of section 23(7) of the Insolvency Act 24 of 1936, any pension fund is excluded from the insolvent estate.

Certain of the properties were already sold. For example, the Muizenberg property was sold not at the low value of R1,85 million but for R1,65 million. Whatever the reason, the fact is that R1,65 million was obtained. These figures significantly reduce the respondent's assets. Crucially the question then arises; what is the true value of the Company Worx loan?

Without this asset respondent's estate is manifestly insolvent.

In respect of these sections Meskin [par 5.31.3] states:

> "In this context as in those of section 29, 30 of the Insolvency Act, the issue as to whether the insolvent's liabilities exceeded his assets at any particular date must be determined on a balance of probabilities. Such a determination entails *inter alia* fixing at least the probable [market] value i.e. temporary value of each of the assets at such date ... . For the purpose of proving [the] insolvent's liabilities at the relevant date, reliance may be placed on the accepted proof of debt which are admissible as *prima facie* proof of the liabilities as at the date of sequestration and as such affording some evidence for the amount of the liabilities at the former date. Reliance may be placed also on the insolvent's books and records which are admissible insofar as they afford *prima facie* evidence of his liabilities. In evaluating evidence in this context one may not presume that an insolvent's financial position at the one date was unchanged at another. It is submitted that in this context as in those sections of 29, 30 of the Insolvency Act the liabilities envisaged are exclusively actual and contingent liabilities (i.e. a liability which by reason of existing *vinculaum* [*sic*] *juris* between the creditor and the debtor may become an enforceable liability on the happening of some future event). Hence liability under a suretyship would qualify as an actual liability in this context."

That one which is correct is most likely the one he adopted with Investec, namely, a value of the loan in terms of its prospects of recovery today, not in a year and a half time on speculative figures. Manifestly there is no basis by which Company Worx can repay the loan today nor tomorrow. Its value for the purposes of insolvency can never be R4,9 million. It must be vastly less.

This therefore means that if the loan is reduced drastically, it is clear that respondent is factually insolvent. According to the figures/assets which will be recoverable, the amount of assets will be R1 235 736. This is the probable financial picture as at December 2016. It means that, as Mr *Irish* has described the position of respondent, he is in a hopelessly insolvent state.

As a result, it must follow that the only question is whether there is an advantage to creditors. On the basis of the figures offered by applicant there would be a dividend of something around 27c in the rand. Given the mendacity which has been shown in this case, even on respondent's own version, there is an obvious and pressing need for an independent enquiry into respondent's estate which can be done by trustees who would be empowered to so do.

In the result therefore, all of the defences must be rejected. The provisional order is made final.

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Mulaudzi v Old Mutual Life Assurance Co (South Africa) Ltd and Others

2017 (6) SA 90 (SCA)

Insolvent entitled to intervene in matters where trustees abide decisions.

Save for a narrow point, the trustees formally stated that they would abide the decision of the court in both matters. In the result, the insolvents were entitled to take steps which, if successful, would enhance the value of the estate, whether by increasing the assets in the estate in the second appeal or reducing the liabilities in the estate in the first appeal. The insolvents were thus entitled to intervene in both matters.

When is recusal of judge required?

On 2 December 2016 both the NDPP and Old Mutual duly gave notice to the Master of the High Court (the Master) in terms of s 75(1) of the Insolvency Act 24 of 1936 (the Insolvency Act) of their intention to proceed with the second appeal. On 20 February 2017, the Master appointed Christopher Peter van Zyl, Selby Musawenkosi Ntsibande and Oscar Jabulani Sithole as the co-trustees of the joint estate of the Mulaudzis. (Par [11])

In terms of s 20(1) of the Insolvency Act, the effect of the sequestration of the estate of an insolvent shall be to divest the insolvent of his estate and to vest it in the Master until a trustee has been appointed, and, upon the appointment of a trustee, to vest the estate in the trustee. One of the consequences of this is that 'the person to deal with that estate, to administer it, to sue in respect of it, and to defend actions concerning it, is the trustee, and not the insolvent'. *(Mears v Rissik, Mackenzie NO and Mears' Trustee* 1905 TS 303 at 305. For this reason alone, the trustees are necessary parties in both matters. And, as the trustees correctly point out, their appointment remains valid until set aside by the Master or the court hearing the review application. Until then, the trustees must continue to perform their duties in terms of the Insolvency Act. It follows that the review application has no bearing on

these matters. The trustees remain trustees until such time as a court removes them from office. In such event, the Master retains control of the estate and may appoint new trustees. (Par [16])

Save for a narrow point sought to be advanced in the second appeal, the trustees formally stated that they would abide the decision of this court in both matters. In the result, the Mulaudzis were entitled to take steps which, if successful, would enhance the value of the estate, whether by increasing the assets in the estate in the second appeal or reducing the liabilities in the estate in the first appeal. The Mulaudzis were thus entitled to intervene in both matters. (Par [20])

Joinder is required, only if the party has a direct and substantial interest which may be affected prejudicially by the judgment of the court in the proceedings concerned. (See *Judicial Service Commission and Another v Cape Bar Council and Another* 2013 (1) SA 170 (SCA) 2012 (11) para 12, where Brand JA stated: 'It has by now become settled law that the joinder of a party is only required as a matter of necessity — as opposed to a matter of convenience — if that party has a direct and substantial interest which may be affected prejudicially by the judgment of the court in the proceedings concerned . . . .)] Nedbank does not have any such interest in either matter. When Nedbank claimed repayment of the proceeds of the policy from Old Mutual, which the latter had previously paid to Mr Mulaudzi, Old Mutual paid Nedbank in full. Nedbank therefore has no interest in the outcome of either matter before us. Such other asserted legal disputes as may exist between Mr Mulaudzi (as a client) and Nedbank (as his banker) bear no connection to the matters before the court. It is plain that Mr Mulaudzi's application for the joinder of Nedbank as a party to both matters before this court had to fail. (Par [23])

Insofar as the contention that De Vos J was bound by the reasoning and conclusions of Hlophe JP is concerned, De Vos J held, quite correctly, that they constitute the opinion of another court which is neither relevant nor admissible in the proceedings before him. The rule to this effect enunciated in *Hollington v F Hewthorn & Co Ltd* [1943] KB 587 (CA) has been adopted by this court in *Hassim (also known as Essack) v Incorporated Law Society of Natal* 1977 (2) SA 757 (A)at 764E – 765G) and the Constitutional Court in *Prophet v National Director of Public Prosecutions* 2007 (6) SA 169 (CC) para 42. In any event, as appears from the judgment of De

Vos J, the learned judge did have regard to the judgment of Hlophe JP but considered it to be unpersuasive. (Par [40])

Here, the apprehension of bias is not limited to the fact of the relationship between Hlophe JP and the attorney. The apprehension is strengthened by the following additional considerations: Hlophe JP was not one of the duty judges, but allocated the matter to himself. He then proceeded to dismiss Old Mutual's application for leave to intervene on the turn, in circumstances where he had not afforded himself sufficient time to read and properly consider the papers before coming into court. He thereafter proceeded to discharge the rule nisi granted in favour of the NDPP, also on the turn, in circumstances where he had not had the opportunity of first reading the replying affidavit, which was filed shortly before the hearing. When he subsequently gave reasons for his order, he did not refer to the material evidence in the NDPP's replying affidavit, which pertinently contradicted Mr Mulaudzi's defence. (Par [60])

What is more, in a matter that was neither easy nor clear, those reasons, when they were eventually delivered, only ran to some six pages. That fortifies the view, so it was submitted, that Hlophe JP, whether consciously or subconsciously, was partial to Mr Mulaudzi's cause. It is so that where the offending conduct sustains the inference that the presiding judge was not open-minded, impartial or fair during the hearing, this court will intervene and grant appropriate relief, including declaring the proceedings invalid without considering the merits. [*S v Tyebela* 1989 (2) SA 22 (A) at 30C.] Here, however, it was submitted that an examination of the reasons furnished fortifies the inference that the learned Judge President was prejudiced against Old Mutual and the NDPP and prejudged the case against them. It is accordingly necessary to consider those reasons to determine whether this submission is well grounded. (Par [61])

The learned Judge President could only have reached the conclusion that there were no reasonable prospects of a successful prosecution in the matter if he disbelieved the evidence of the NDPP. But, the evidence showed that Mr Mulaudzi was not entitled to the proceeds of the policy because of the outright cession he had entered into with Nedbank. The indisputable effect of the cession was that Mr Mulaudzi had lost all of his rights under the policy, which were transferred to Nedbank. Nothing

remained vested in him. Thus, on the test in *National Director of Public Prosecutions v Rautenbach and Others* 2005 (4) SA 603 (SCA) there was no basis on which Hlophe JP could properly make a finding that Mr Mulaudzi was entitled to the investment. In any event, as held in *Rautenbach*, the court was 'not called upon to decide upon the veracity of the evidence. It need ask only whether there is evidence that might reasonably support a conviction and a consequent confiscation order . . . and whether that evidence might reasonably be believed.' (Par [64])

It is so that some of the individual factors raised would not, in and of themselves, be a sufficient indication that the NDPP and Old Mutual did not have a fair hearing. Taken cumulatively though, there is no doubt that their complaint that they reasonably apprehended that the Judge President did not bring an open and impartial mind to bear on the adjudication of the matter, is justified. It follows that the order of the Western Cape High Court, per Hlophe JP, of 18 September 2014 refusing Old Mutual leave to intervene and discharging the provisional POCA (Prevantion of Organised Crime Act 121 of 1998) restraint order made by Weinkove AJ on 28 August 2014, falls to be set aside. And, as the proceedings before Hlophe JP amount to a nullity, the matter must be remitted to the High Court (differently constituted) to enable it to properly adjudicate the matter. (See s 19*(c)* or *(d)* of the Superior Courts Act 10 of 2013, which provides:

> "The Supreme Court of Appeal or a Division exercising appeal jurisdiction may, in addition to any power as may specifically be provided for in any other law—
>
> *(c)* remit the case to the court of first instance, or to the court whose decision is the subject of the appeal, for further hearing, with such instructions as regards the taking of further evidence or otherwise as the Supreme Court of Appeal or the Division deems necessary; or
>
> *(d)* confirm, amend or set aside the decision which is the subject of the appeal and render any decision which the circumstances may require.'

The second distinguishing feature between *Rautenbach* and this case is that the proceedings before Hlophe JP amount to a nullity. In that respect, the High Court cannot be said to have acted at all. This court's order setting aside the order of Hlophe JP will accordingly operate ex tunc, ie the restraint order will be revived with effect from 18 September 2014. In the circumstances, sections 35(1), (3) and (4) of POCA, read with the decision of this court in *Bester and Another NNO v National Director of Public Prosecutions; National Director of Public Prosecutions v Kleinhans and Other* 2013 (1) SACR 83 (SCA) (a

case dealing with the comparable provisions of section 36 of POCA relating to the liquidation of corporate entities), have the effect that assets which are under the control of the curator bonis by virtue of a restraint order on the date of the sequestration of a person's estate are excluded from the insolvent estate. In this case the provisional restraint order was made on 28 August 2014, a date before the sequestration application was issued on 28 April 2015 and the Mulaudzis' estate was provisionally sequestrated on 2 December 2015. As a result, the Mulaudzis' insolvent estate will be subject to the restraint order. (Par [72])

Extracts

[2] On 9 August 2012 Mr Mulaudzi informed Nedbank in writing that he wanted to cancel the cession and to have his investment documents returned. Nedbank declined to cancel the cession. On 2 June 2014 Mr Mulaudzi submitted a disinvestment application form to Old Mutual in respect of the policy in terms of which he sought payment of the full disinvestment value of the policy. On 6 June 2014 Old Mutual paid the full maturity value of the policy, namely R48 163 098,55, into an Absa Bank Ltd (Absa) account nominated by Mr Mulaudzi. Old Mutual did so in the mistaken belief that Mr Mulaudzi was still the owner of the policy. On 28 July 2014 Nedbank sought payment of the proceeds of the policy from Old Mutual on the basis of the cession concluded on 24 March 2011 between it and Mr Mulaudzi. Old Mutual then realised that it had effected payment to Mr Mulaudzi in error. On 8 August 2014, Old Mutual paid Nedbank the full maturity value of the policy as it was obliged to in terms of the cession. Old Mutual thereafter sought repayment from Mr Mulaudzi, who refused.

[10] It subsequently emerged that the joint estate of the Mulaudzis was provisionally sequestrated on 2 December 2015 and finally sequestrated on 27 May 2016. After an application for leave to appeal that order was dismissed by the High Court; a petition to this court met the same fate on 9 November 2016. An application to the Constitutional Court was also dismissed on 30 January 2017. On 3 March 2017 a further application to the President of this court for a reconsideration of the dismissal of Mr Mulaudzi's petition also failed.

[11] On 2 December 2016 both the NDPP and Old Mutual duly gave notice to the Master of the High Court (the Master) in terms of s 75(1) of the Insolvency Act 24 of 1936 (the Insolvency Act) of their intention to proceed with the second appeal. On 20 February 2017, the Master appointed Christopher Peter van Zyl, Selby Musawenkosi Ntsibande and Oscar Jabulani Sithole as the co-trustees of the joint estate of the Mulaudzis.

[16] In terms of s 20(1) of the Insolvency Act, the effect of the sequestration of the estate of an insolvent shall be to divest the insolvent of his estate and to vest it in the Master until a trustee has been appointed, and, upon the appointment of a trustee, to vest the estate in the trustee. [*Aboo v FirstRand Bank Ltd* [2005] ZASCA 25 (29 March 2005) para 12.] One of the consequences of this is that 'the person to deal with that estate, to administer it, to sue in respect of it, and to defend actions concerning it, is the trustee, and not the insolvent'. [*Mears v Rissik, Mackenzie NO and Mears' Trustee* 1905 TS 303 at 305.] For this reason alone, the trustees are therefore necessary parties in both matters. And, as the trustees correctly point out, their appointment remains valid until set aside by the Master or the court hearing the review application. Until then, the trustees must continue to perform their duties in terms of the Insolvency Act. It follows that the review application has no bearing on these matters. The trustees remain trustees until such time as a court removes them from office. In such event, the Master retains control of the estate and may appoint new trustees.

[20] Save for a narrow point (to which I shall latterly turn) sought to be advanced in the second appeal, the trustees formally stated that they would abide the decision of this court in both matters. In the result, the Mulaudzis were entitled to take steps which, if successful, would enhance the value of the estate, whether by increasing the assets in the estate in the second appeal or reducing the liabilities in the estate in the first appeal. The Mulaudzis were thus entitled to intervene in both matters. [See inter alia *Blumenthal and Another v Thomson NO and Another* 1994 (2) SA 118 (A) ([1993] ZASCA 190) at 121I; *Ferreira v Ntshingila* 1990 (4) SA 271 (A) ([1989] ZASCA 149) at 281J – 282A; *Moraliswani v Mamili* supra n15 at 10F; *Rennie v Kamby Farms* supra n14 at 131H – 132A; *P E Bosman Transport Works Committee and Others v Piet Bosman Transport (Pty) Ltd* 1980 (4) SA 794 (A) at 799; *Mbutuma v Xhosa Development Corporation Ltd* 1978 (1) SA 681 (A) at 687A.]

[23] Joinder is required, only if the party has a direct and substantial interest which may be affected prejudicially by the judgment of the court in the proceedings concerned. [See *Judicial Service Commission and Another v Cape Bar Council and Another* 2013 (1) SA 170 (SCA) (2012 (11) BCLR 1239; [2012] ZASCA 115) para 12, where Brand JA stated: 'It has by now become settled law that the joinder of a party is only required as a matter of necessity — as opposed to a matter of convenience — if that party has a direct and substantial interest which may be affected prejudicially by the judgment of the court in the proceedings concerned . . . .'] Nedbank does not have any such interest in either matter. When Nedbank claimed repayment of the proceeds of the policy from Old Mutual, which the latter had previously paid to Mr Mulaudzi, Old Mutual paid Nedbank in full. Nedbank therefore has no interest in the outcome of either matter before us. Such other asserted legal disputes as may exist between Mr Mulaudzi (as a client) Nedbank (as his banker) bear no connection to the matters before us. It is thus plain that Mr Mulaudzi's application for the joinder of Nedbank as a party to both matters before this court had to fail.

[35] In my view, the circumstances of the present case are such that we may well have been entitled to refuse the application for condonation irrespective of the prospects of success. This court has often said that in cases of flagrant breaches of the rules, especially where there is no acceptable explanation therefor, the indulgence of condonation may be refused whatever the merits of the appeal. [*National Director of Public Prosecutions v Rautenbach and Others* 2005 (4) SA 603 (SCA) paras 25 – 27.] Here, the delay is so unreasonable and the explanation offered so unacceptable and wanting that we may well have been justified in adopting that course. However, and not without some hesitation, I shall nonetheless briefly touch on Mr Mulaudzi's prospects of success.

[40] Insofar as the contention that De Vos J was bound by the reasoning and conclusions of Hlophe JP is concerned, De Vos J held, quite correctly, that they constitute the opinion of another court which is neither relevant nor admissible in the proceedings before him. The rule to this effect enunciated in *Hollington v Hewthorn & Co Ltd* [*Hollington v F Hewthorn & Co Ltd* [1943] KB 587 (CA) ([1943] 2 All ER 35)] has been adopted by this court in *Hassim v Law Society* [*Hassim (also known as Essack) v Incorporated Law Society of Natal* 1977 (2) SA 757 (A) at 764E – 765G] and the Constitutional Court in *Prophet v NDPP*. [*Prophet v National Director of Public Prosecutions* 2007 (6) SA 169 (CC) (2006 (2) SACR 525; 2007 (2) BCLR 140; [2006] ZACC 17) para 42.] In any event, as appears from the following passage of the judgment of De Vos J, the learned judge did have regard to the judgment of Hlophe JP but considered it to be unpersuasive: ...

[60] Here, the apprehension of bias is not limited to the fact of the relationship between Hlophe JP and the attorney. The apprehension is strengthened by the following additional considerations: Hlophe JP was not one of the duty judges, but allocated the matter to himself. He then proceeded to dismiss Old Mutual's application for leave to intervene on the turn, in circumstances where he had not afforded himself sufficient time to read and properly

consider the papers before coming into court. He thereafter proceeded to discharge the rule nisi granted in favour of the NDPP, also on the turn, in circumstances where he had not had the opportunity of first reading the replying affidavit, which was filed shortly before the hearing. When he subsequently gave reasons for his order, he did not refer to the material evidence in the NDPP's replying affidavit, which pertinently contradicted Mr Mulaudzi's defence.

[61] What is more, in a matter that was neither easy nor clear, those reasons, when they were eventually delivered, only ran to some six pages. That fortifies the view, so it was submitted, that Hlophe JP, whether consciously or subconsciously, was partial to Mr Mulaudzi's cause. It is so that where the offending conduct sustains the inference that the presiding judge was not open-minded, impartial or fair during the hearing, this court will intervene and grant appropriate relief, including declaring the proceedings invalid without considering the merits. [*S v Tyebela* 1989 (2) SA 22 (A) at 30C.] Here, however, it was submitted that an examination of the reasons furnished fortifies the inference that the learned Judge President was prejudiced against Old Mutual and the NDPP and prejudged the case against them. It is accordingly necessary to consider those reasons to determine whether this submission is well grounded.

[64] The learned Judge President could only have reached the conclusion that there were no reasonable prospects of a successful prosecution in the matter if he disbelieved the evidence of the NDPP. But, the evidence showed that Mr Mulaudzi was not entitled to the proceeds of the policy because of the outright cession he had entered into with Nedbank. The indisputable effect of the cession was that Mr Mulaudzi had lost all of his rights under the policy, which were transferred to Nedbank. Nothing remained vested in him. Thus, on the test in *Rautenbach* there was no basis on which Hlophe JP could properly make a finding that Mr Mulaudzi was entitled to the investment. In any event, as held in *Rautenbach*, the court was 'not called upon to decide upon the veracity of the evidence. It need ask only whether there is evidence that might reasonably support a conviction and a consequent confiscation order . . . and whether that evidence might reasonably be believed.'

[68] It is so that some of the individual factors raised would not, in and of themselves, be a sufficient indication that the NDPP and Old Mutual did not have a fair hearing. Taken cumulatively though, I have no doubt that their complaint that they reasonably apprehended that the Judge President did not bring an open and impartial mind to bear on the adjudication of the matter, is justified. It follows that the order of the Western Cape High Court, per Hlophe JP, of 18 September 2014 refusing Old Mutual leave to intervene and discharging the provisional POCA restraint order made by Weinkove AJ on 28 August 2014, falls to be set aside. And, as the proceedings before Hlophe JP amount to a nullity, the matter must be remitted to the High Court (differently constituted) to enable it to properly adjudicate the matter. [See s 19*(c)* or *(d)* of the Superior Courts Act 10 of 2013, which provides: "The Supreme Court of Appeal or a Division exercising appeal jurisdiction may, in addition to any power as may specifically be provided for in any other law— *(c* remit the case to the court of first instance, or to the court whose decision is the subject of the appeal, for further hearing, with such instructions as regards the taking of further evidence or otherwise as the Supreme Court of Appeal or the Division deems necessary; or *(d)* confirm, amend or set aside the decision which is the subject of the appeal and render any decision which the circumstances may require.']

[72] The second distinguishing feature between *Rautenbach* and this case is that the proceedings before Hlophe JP amount to a nullity. In that respect, the High Court cannot be said to have acted at all. This court's order setting aside the order of Hlophe JP will accordingly operate ex tunc, ie the restraint order will be revived with effect from 18 September 2014. [*General Accident Versekeringsmaatskappy Suid-Afrika Bpk v Bailey*

NO 1988 (4) SA 353 (A) at 358H – 359A; and *MV Snow Delta: Discount Tonnage Ltd v Serva Ship Ltd* 1998 (3) SA 636 (C) at 643G – 644A (cf *MV Snow Delta: Serva Ship Ltd v Discount Tonnage Ltd* 2000 (4) SA 746 (SCA) para 7 (at 7521).] In the circumstances, ss 35(1), (3) and (4) of POCA, read with the decision of this court in *Bester v NDPP* [*Bester and Another NNO v National Director of Public Prosecutions; National Director of Public Prosecutions v Kleinhans and Other* 2013 (1) SACR 83 (SCA) ([2012] 2 All SA 453)] (a case dealing with the comparable provisions of s 36 of POCA relating to the liquidation of corporate entities), have the effect that assets which are under the control of the curator bonis by virtue of a restraint order on the date of the sequestration of a person's estate are excluded from the insolvent estate. In this case the provisional restraint order was made on 28 August 2014, a date before the sequestration application was issued on 28 April 2015 and the Mulaudzis' estate was provisionally sequestrated on 2 December 2015. As a result, the Mulaudzis' insolvent estate will be subject to the restraint order.

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Minister of Environmental Affairs v Recycling and Economic Development Initiative of South Africa NPC; Minister of Environmental Affairs v Kusaga Taka Consulting (Pty) Limited

[2017] JOL 39217 (WCC)

Application for winding up of solvent company by a Cabinet Minister.

In terms of section 157(1) of the Companies Act 71 of 2008 the Minister may apply for the winding up of a solvent company in terms of section 81(1) on the ground of just an equitable if it is in the public interest to do so.

Section 157(1) of the Companies Act 71 of 2008 provides as follows:

> **157. Extended standing to apply for remedies**
>
> (1) When, in terms of this Act, an application can be made to, or a matter can be brought before, a court, the Companies Tribunal, the Panel or the Commission, the right to make the application or bring the matter may be exercised by a person-
>
> (a) directly contemplated in the particular provision of this Act;
>
> (b) acting on behalf of a person contemplated in paragraph (a), who cannot act in their own name;
>
> (c) acting as a member of, or in the interest of, a group or class of affected persons, or an association acting in the interest of its members; or
>
> (d) acting in the public interest, with leave of the court.

Redisa and KT submit that there is a textual reason why section 157 does not apply. That is because section 79 (2) of the Companies Act expressly confines the

procedures for the winding-up of solvent companies "*whether voluntary or by court order"* to Part G of Chapter 2 (i.e. sections 79 to 83). Redisa submitted that even if section 157 (1)(d) were to have applied to applications for winding-up as envisaged in section 79 and 81 of the Companies Act, there would be a reason why section 157 should not have been relied upon by the Minister. The simple reason is that it would not be in the public interest to wind up a solvent company at the instance of a third party and against the wishes of the company itself. (Par [59])

The Minister's contention that the money collected by Redisa, that ended up in the pockets of the directors of Redisa through KT, is public funds is correct. (Par [164])

It is clear that section 81 of the Companies Act does not directly grant the Minister the necessary standing to bring an application for the winding-up of a solvent company. The category or categories of persons or entities that can bring such an application is restricted in terms of this section. These are either: the company itself; its directors and shareholders; a business rescue practitioner; a creditor where the company's business rescue proceedings have ended in the manner as contemplated in section 132 (2) of the Act; or the Commission or Panel under the conditions and circumstances as set out in section 81. (Par [166])

The court disagrees with the submissions that section 157(1)(d), due to the fact that it is listed under Chapter 7 of the Companies Act which deals with remedies and enforcement, do not extend to other applications that may be brought in terms of the Companies Act, more especially to applications under section 81 (1) of the Act. The court also disagrees that because section 157(1) forms part of Chapter 7 it should be restricted to alternative procedures for addressing complaints or securing rights contained in section 156.

On a plain reading of section 156, it does not only deal with alternative procedures for addressing complaints or dispute resolution or securing rights. And while it makes provision for alternative procedures for addressing complaints or securing rights to a person referred to in section 157, it also grants such a person the right to apply for appropriate relief to the division of the High Court that has the jurisdiction over the matter. See in this regard section 156 (c). (Par [170])

Section 157 (1) is clear where it states, "*when, in terms of this Act, an application can be made to, or a matter can be brought before, a court … the right to make the application … may be exercised by a person." (Emphasis added)* (Par [171])

If regard is to be had to the words in section 157 (1) which states "*when in terms of this Act application can be made to a court",* it would be absurd and nonsensical to exclude an application which can be made in terms of section 81(1) of the Act. There is no other provision in the Act or rule of interpretation which would exclude an application in terms of section 81(1) that can be found in the words "*when an application in terms of this Act"* can be made before a court. The provisions of section 156 do not exclude such an interpretation. The words of section 157 do not restrict the remedies available to the applicants contemplated in section 157(1)(a)-(d) to only those remedies in terms Chapter 7. The introductory phrase does not read "*when in terms of this **Chapter**, an application can be made to a court"*, but reads "*when in terms of this **Act,** an application can be made."* (Par [172])

If an interpretation is given to section 157 (1), to exclude persons other than those mentioned in section 81(1) and not include persons as mentioned in subsections (a)-(d), it would defeat the purpose of Chapter 7 which grants certain remedies and enforcement of rights to people other than those mentioned in any other provision of the Act, in particular those mentioned in section 81(1) of the Act. (Par [173])

The title of section 157, clearly intends to extend locus standi to the categories of people referred to in subsection 1(a) to (d), which makes provision as stated in the title "*Extended standing to apply for remedies".* This is an indication of a clear intention to extend *locus standi* to bring applications or bring matters before a court in instances where such a person or persons mentioned in subsections (a)-(d), explicitly in terms of other provisions of the Act, do not have such standing. This provision gives effect to one of the stated goals of the Act which is to promote compliance with the Bill of Rights in the sphere of company law. It accords with section 39(2) of the Constitution which in turn resembles section 38:

> "Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights. The persons who may approach a court are– (a) anyone acting in their own interest; (b) anyone acting on

> behalf of another person who cannot act in their own name; (c) anyone acting as a member of, or in the interest of, a group or class of persons; (d) anyone acting in the public interest; and (e) an association acting in the interest of its members." (Par [174])

After having found that those persons or categories of persons as mentioned in section 157(1)(a) - (d), may bring an application, or matter before a court, the question that still needs to be answered is whether the Minister in terms of the provisions of section 157(1)(d) could bring this application for the winding-up of Redisa and KT in the "*public interests"*. CF Swanepoel ("Swanepoel") in an article titled **The judicial application of the "interests" requirement for standing in constitutional cases: "A radical and deliberate departure from the common law"** [2014 *De Jure* 63] discusses albeit in a constitutional context the requirements of public interests. The learned author after having referred to various cases discusses what a court would consider in determining what entails the broader public interests in the application of section 38. (Par [178]

These principles would also find application in the determination of what the public interests would be in terms of section 157 (1)(d) of the Companies Act. It would appear that the broader public interests, as identified by Swanepoel which would find application in this case could include, amongst others "*the need to obtain legal certainty for the proper administration of justice*; *an interest in ensuring that public power is exercised in accordance with constitutional and legal prescripts; and the need for the rule of law to be upheld"* [Swanepoel above at 83], especially if regard is to be had to the other purposes of the Act which is to promote compliance with the Bill of Rights, as provided for in the Constitution and in the application of company law. (Par [179])

The Redisa Plan, which the Minister adopted, can be regarded as "*a reasonable legislative and other measures to prevent pollution and ecological degradation*" which clearly gives effect to this constitutional obligation placed upon the Minister and the Department. In this regard it is a function of the Minister to execute and protect the environmental rights of South Africans, which had been delegated to Redisa. In doing so she was acting in the broader public interest. Redisa exercised a function in terms of Chapter 3 (section 24) of the Constitution as well as a broader public function in terms section 239 thereof. In this regard, the Minister apart from

the public interest therefore has as the responsible Minister a direct interest in the litigation. But given the allegations of impropriety made against Redisa an organ of state the interests of justice or the public interests, compels the court to scrutinise the action even where the Minister's standing is questionable. (Par [182])

The court agrees with the Minister that no justifiable explanation had been given for the depletion and disappearance of the reserves they had repeatedly confirmed they had available to be able to continue with the implementation and administration of the Redisa Plan for several months after the change in the funding model would be effected. It is clearthat somehow without proper explanation, the reserves had dissipated or the previous information given was not correct. (Par [195])

In respect of both the application against Redisa as well as KT, the Minister has made out a sufficient case why this application should be brought ex parte. It is also clear if one should have regard to the totality of the evidence, especially the underhand and secretive manner in which the directors, some of whom are also shareholders in KT and the associated companies as shown above, had conducted themselves, that urgent and drastic action on the part of the Minister and the Department had to be taken after they had been made aware of the conduct directors of Redisa and the manner in which funds had been spirited towards KT. (Par [199])

In balancing the interest of the shareholder as against that of the government on any basis of justice and equity there was no comparison between the competing interests, and the interests of the government in this respect and consequently those of the public had to take precedence over the interests of the second respondent who really had no financial interest in the matter. As a substantial issue the court took into consideration that the company was in effect a state company and due weight had to be given to the wishes of the members of the government who were charged with administering and being responsible for the company. (Par [212].

There is sufficient grounds in terms of the provisions of section 81(1)(c)(ii) or section 81(1)(d)(iii) of the Companies Act where the Minister, in substitution of those persons or entities as mentioned in these two sections, has made out a case that it is just and equitable to wind up Redisa. (Par [216])

There is also sufficient grounds in terms of the provisions of section 81 (1)(c)(ii) or section 81(1)(d)(iii) of the Companies Act, where the Minister, in substitution of those persons or entities as mentioned in these two sections, has made out a case that it is just and equitable to wind up KT.(Par [218])

In the result therefore the court makes the following order:

(a) In respect of case number 9675/2017:

I) That the Respondent is placed in final liquidation.

II) That the liquidator of the Respondent be directed to distribute the entire net value of the Respondent to the Waste Management Bureau, a juristic person established in terms of **section 34A** of the **National Environmental Management: Waste Act 59 of 2008**, in terms of section 30(3)(b)(iii)(bb) of the Income Tax Act 58 of 1962, read with clause 8.5.2 and/or 8.5.3 of the Memorandum of Incorporation of the Respondent.

III) That the cost of the application, which cost shall include the cost of two counsel, shall be the cost in the winding-up liquidation of the Respondent.

(b) In respect of case number 10123/17:

I) That the Respondent is placed in final liquidation.

II) That the liquidator of the Respondent be directed to distribute the entire net value of the Respondent to the Waste Management Bureau, a juristic person established in terms of **section 34A** of the **National Environmental Management: Waste Act 59 of 2008** and in terms of section 30(3)(b)(iii)(bb) of the Income Tax Act 58 of 1962. Alternatively, to the liquidator of Recycling and Economic Development Initiative of South Africa NPC (registration number 210/022733/08) as appointed by the Master of the High Court, Cape Town under Master's reference C 361/2017.

III) That the cost of the application, which cost shall include the cost of two counsel, shall be the cost in the winding-up liquidation of the Respondent.

Extracts

[59] Redisa and KT further submit that there is a textual reason why section 157 does not apply. And that is because **section 79** (2) of the **Companies Act expressly** confines the procedures for the winding-up of solvent companies "*whether voluntary or by court order"* to Part G of Chapter 2 (i.e. **sections 79** to **83**). Redisa submitted that even if **section 157** (1)(d) were to have applied to applications for winding-up as envisaged in **section 79** and **81** of the **Companies Act, there** would be a reason why **section 157**should not have been relied upon by the Minister. The simple reason is that it would not be in the public interest to wind up a solvent company at the instance of a third party and against the wishes of the company itself.

[60] The Minister's contention, namely that they are dealing with public funds which were collected by Redisa before 1 February 2017, is wrong. Redisa contends that the funds are administered at the behest of the producers (as defined in the Redisa Plan) and are not paid into the National Revenue Fund. If a producer does not subscribe to the Redisa Plan, it has to subscribe to an integrated waste management plan prepared in terms of the Waste Act. This fee is not spent, in accordance with the new legislation, by Redisa in a predetermined ratio. It is as little public funds as are the fees collected by a private school from parents of students attending the school. This contention cannot be relied upon as a just and equitable ground, on the basis that Redisa deals with public funds. According to Redisa, this is still the position even after the intervention of Act 13 of 2016. Once monies collected by the National Revenue Fund from the producers are paid to Redisa, this position may change but as yet no such payments have been made.

[61] The Respondents' further submitted that even if section 157 (1)(d) were to apply, the Minister was required to have applied for this court's leave to do so before launching her application. KT, in particular argued, that even if the Minister properly obtained leave under section 157 (1)(d), she failed to demonstrate why KT a solvent private company should be wound up in the "*public interest"*. KT further argued that courts are circumspect in granting standing on the ground of public interest. In this regard, the Constitutional Court [Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others 1996 (1) SA 984 (CC) para 234] has held that an applicant is required to demonstrate that he or she is genuinely acting in the public interest, and that in determining whether to grant standing on this basis regards must be had to: (i) whether the applicant has another reasonable and effective remedy; (ii) the nature of the relief sought; and (iii) the range of persons who may be affected by the order and the opportunity they had to present evidence or argument.

[62] Furthermore, it is argued that the Minister's application is defective for at least the following reasons. Firstly, the Minister has a variety of other reasonable and effective remedies at her disposal. After she approved the Redisa Plan, in terms of which Redisa was authorised to conclude the management contract with KT, she could have exercise her right to initiate a review of the amendment of the plan. She did not exercise that right. It was also open to her to challenge the conclusion of the management contract on public law grounds, if as she contends that Redisa is a public body. Either in terms of the **Promotion of**

Administrative Justice Act 2 of 2000 or on the basis of the principle of legality. Secondly, the Minister seeks the liquidation of a privately owned, solvent company, contrary to the wishes of its shareholders and directors. She does this by way of a final order, whereby she wants the liquidators of KT to transfer the entire net value to the Waste Management Bureau or the liquidators of Redisa. She does not seek to achieve the ordinary consequence of the liquidation of a solvent company (namely the payment of creditors and the distribution of the surplus to shareholders). She seeks to effectively expropriated (for no consideration), the company's assets by transferring them to an entity under her control.

[63] Lastly, neither persons with a direct interest in KT (its shareholders and directors), nor affected persons in the waste industry (including those who pay a levy under the Redisa Plan) were given notice of the Minister's application, let alone afforded the opportunity to make submissions.

101] Redisa in addition submitted that a court in coming to a conclusion as to what is just and equitable, has to balance the interests of the individuals affected with the interests of good governance and the administration of justice. It further entails a judgment on the facts and the exercise of judicial discretion.

[102] It submitted that subject to the comments made by the court in *Rand Air* [*Rand Air (Pty) Ltd v Ray Bester Investments (Pty) Ltd 1985 (2) SA 345 (W)*], section 81(1)(d) of the Companies Act is not confined to cases analogous to the grounds mentioned in other parts of the section. The submission further is that there is no general rule as to the nature of the circumstances that have to be present, or a fixed category of circumstances which provide the basis for just and equitable winding-up. The ordinary categories identified would include the following:

1. the disappearance of the company's substratum;

2. illegality of the objects of the company and fraud in connection therewith;

3. a deadlock in the management of the company's affairs;

4. grounds analogous to those for the dissolution of a partnership; and

5. oppression.

Determination of the facts which underpins this application

[113] Apart from the points raised in limine by the Respondents' which are disputes of a legal nature, most of the facts raised in the Minister's founding papers upon which the applications was based are vehemently disputed by the Respondents in their answering papers. In coming to a conclusion as to the real and true facts of this case, the court should also have regard to the Minister's replying affidavit and further evidence which the court admitted on behalf of the Minister, together with the rebutting affidavits that was presented into evidence by Erdmann on behalf of Redisa and Crozier on behalf of KT.

[164] The Minister's contention therefore that the money collected by Redisa, that ended up in the pockets of the directors of Redisa through KT, is public funds is therefore correct.

[165] The question to consider now was whether the Minister had the necessary locus standi to bring the application for the liquidation of these two entities. Ordinarily the winding-up a solvent company by an order of court is provided for in **section 81**

[166] It is clear that **section 81** of the **Companies Act does** not directly grant the Minister the necessary standing to bring an application for the winding-up of a solvent company. The category or categories of persons or entities that can bring such an application is restricted in terms of this section. These are either: the company itself; its directors and shareholders; a business rescue practitioner; a creditor where the company's business rescue proceedings have ended in the manner as contemplated in section 132 (2) of the Act; or the Commission or Panel under the conditions and circumstances as set out in section 81.

[169] I do not agree with the submissions of the Respondents that section 157 (1)(d), due to the fact that it is listed under Chapter 7 of the **Companies Act which** deals with remedies and enforcement, do not extend to other applications that may be brought in terms of the **Companies Act, more** especially to applications under section 81 (1) of the Act. I also do not agree that because section 157 (1) forms part of Chapter 7 it should be restricted to alternative procedures for addressing complaints or securing rights contained in section 156.

[170] I also do not agree that it does not provide the basis to extend the categories of persons authorised to apply for the winding-up of a solvent company under Part G of Chapter 2. On a plain reading of section 156, it does not only deal with alternative procedures for addressing complaints or dispute resolution or securing rights. And whilst it makes provision for alternative procedures for addressing complaints or securing rights to a person referred to in section 157, it also grants such a person the right to apply for appropriate relief to the division of the High Court that has the jurisdiction over the matter. See in this regard section 156 (c).

[171] In my view section 157 (1) is clear where it states, "*when, in terms of this Act, an application can be made to, or a matter can be brought before, a court … the right to make the application … may be exercised by a person." (Emphasis added)*

[172] If regard is to be had to the words in section 157 (1) which states "*when in terms of this Act application can be made to a court",* it would be absurd and nonsensical to exclude an application which can be made in terms of section 81(1) of the Act. There is no other provision in the Act or rule of interpretation which would exclude an application in terms of section 81(1) that can be found in the words "*when an application in terms of this Act"* can be made before a court. I also do not understand the provisions of section 156 to exclude such an interpretation. I agree with Mr Muller that the words of section 157 do not restrict the remedies available to the applicants contemplated in section 157 (1) (a)-(d) to only those remedies in terms Chapter 7. I agree with the submission that the introductory phrase "*when in terms of this **Chapter**, an application can be made to a court"*, that instead, the phrase reads "*when in terms of this **Act,** an application can be made."*

[173] What would then be the purpose of section 157, if such an interpretation on a clear and plain understanding of the words of a section cannot be given to it? The section permits the categories of persons to make an application to a court when the circumstances as set out in subsections (a) to (d) are present or is justified. If an interpretation is given to section 157 (1), to exclude persons other than those mentioned in section 81 (1) and not include persons as mentioned in subsections (a)-(d), it would defeat the purpose of Chapter 7 which grants certain remedies and enforcement of rights to people other than those mentioned in any other provision of the Act. And in particular those mentioned in section 81 (1) of the Act.

[174] The title of section 157, clearly intends to extend locus standi to the categories of people referred to in subsection 1 (a) to (d), which makes provision as stated in the title "*Extended standing to apply for remedies",* this is an indication of a clear intention to extend locus standi to bring applications or bring matters before a court in instances where such a person or persons mentioned in subsections (a)-(d), explicitly in terms of other provisions of

the Act, do not have such standing. I am also in agreement with Mr Muller that this provision gives effect to one of the stated goals of the Act which is to promote compliance with the Bill of Rights in the sphere of company law. Which accords with section 39 (2) [Section 39 (2): "When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights."] of the Constitution which influenced the formulation of section 157, which in turn resemble section 38 [Section 38: "Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights. The persons who may approach a court are– (a) anyone acting in their own interest; (b) anyone acting on behalf of another person who cannot act in their own name; (c) anyone acting as a member of, or in the interest of, a group or class of persons; (d) anyone acting in the public interest; and (e) an association acting in the interest of its members."] of the Constitution.

[178] After having found that those persons or categories of persons as mentioned in section 157 (1)(a) - (d), may bring an application, or matter before a court, the question that still needs to be answered is whether the Minister in terms of the provisions of section 157 (1)(d) could bring this application for the winding-up of Redisa and KT in the "*public interests"*. CF Swanepoel ("Swanepoel") in an article titled **The judicial application of the "interests" requirement for standing in constitutional cases: "A radical and deliberate departure from the common law" [**2014 *De Jure* 63] discusses albeit in a constitutional context the requirements of public interests. The learned author after having referred to various cases discusses what a court would consider in determining what entails the broader public interests in the application of section 38.

[179] In my view these principles would also find application in the determination of what the public interests would be in terms of **section 157** (1)(d) of the **Companies Act. It** would appear that the broader public interests, as identified by Swanepoel which would find application in this case could include "*the need to obtain legal certainty for the proper administration of justice*; *an interest in ensuring that public power is exercised in accordance with constitutional and legal prescripts; and the need for the rule of law to be upheld",* [Swanepoel above at 83]. amongst others*.* Especially if regard is to be had to the other purposes of the Act which is to promote compliance with the Bill of Rights, as provided for in the Constitution and in the application of company law.

[180] The further purposes of the Act relevant to this case is set out in section 7 (h), (i) and (j), which respectively provide for the formation, operation and accountability of non-profit companies in a manner designed to promote, support and enhance the capacity of such companies to perform their functions; balance the rights and obligations of shareholders and directors within companies; and encourage the efficient and responsible management of companies.

[181] If regard is to be had to these requirements, in my view, the Minister has established that she has the necessary locus standi to have brought these applications in the public interests in terms of the provisions of section 157 (1)(d). The Minister as a member of the executive took an oath to uphold the Constitution, which includes the values of openness, accountability and transparency, which underpins the Constitution. She and the Department of Environmental Affairs also has a responsibility to ensure in terms of section 24 of the Constitution that everyone has the right to an environment that is not harmful to the health or well-being, and to have the environment protected for the benefit of present and future generations, through reasonable legislative and other measures that prevent pollution and ecological degradation, promote conservation and secure ecologically sustainable development and use of natural resources or promoting justifiable economic and social development.

[182] The Redisa Plan, which she adopted, can be regarded as "*a reasonable legislative and other measures to prevent pollution and ecological degradation*" which clearly gives effect to this constitutional obligation placed upon the Minister and the Department. In this regard it is a function of the Minister to execute and protect the environmental rights of South Africans, which had been delegated to Redisa. In doing so she was acting in the broader public interest. Redisa exercised a function in terms of Chapter 3 (section 24) of the Constitution as well as a broader public function in terms section 239 thereof. In this regard, the Minister apart from the public interest therefore has as the responsible Minister a direct interest in the litigation. But given the allegations of impropriety made against Redisa an organ of state, as will be shown hereunder, the interests of justice or the public interests, compels this court to scrutinise the action even where the Minister's standing is questionable.

[195] I am in agreement with the Minister given these facts, it is clear on the objective evidence that no justifiable explanation had been given for the depletion and disappearance of the reserves they had repeatedly confirmed they had available to be able to continue with the implementation and administration of the Redisa Plan for several months after the change in the funding model would be effected. It is clear, therefore, that somehow without proper explanation, the reserves had dissipated or the previous information given was not correct.

Ex parte

[198] Courts are loath to grant orders against a party on an ex parte basis. It would usually discourage litigation by stealth or ambush unless there are compelling reasons to do so. In only a limited number of situations, matters can be brought ex parte. One of those would be where immediate relief is sought even though temporary nature because of imminent harm that would ensure should the relief not be granted. [Van Loggerenberg Erasmus: Superior Court Practice (Vol 2) 2nd edition Service 4, 2017 D1-60.]

[199] In my view in respect of both the application against Redisa as well as KT, the Minister has made out a sufficient case why this application should be brought ex parte. It is also clear if one should have regard to the totality of the evidence, especially the underhand and secretive manner in which the directors, some of whom are also shareholders in KT and the associated companies as shown above, had conducted themselves, it is clear that urgent and drastic action on the part of the Minister and the Department had to be taken after they had been made aware of the conduct of Erdmann and the other directors of Redisa and the manner in which funds had been spirited towards KT.

[200] As said earlier, the fees that were collected were public funds, which were misappropriated and diverted through KT for the benefit of Erdmann, Davidson, Crozier and Kirk. This was done secretively and in a manner which the Minister and the Department would not have been aware of.

Just and Equitable

[201] The question now to consider is whether it would be just and equitable, in respect of both Respondents to grant a final order for liquidation.

[202] In both applications, the Minister after having been granted standing in terms of section (1) (d) relies on the provisions of section 81 (1)(c)(ii) and or **section 81** (1)(d)(iii) of the **Companies Act. Those** categories of persons therefore as referred to in these subsections of **section 81** will have to be substituted by the Minister as the person or entity who brought the application. If the application should proceed in terms of the provisions of **section 81** (1)(c)(ii) such an application would be on the grounds that the Minister (being

substituted as one or more of the company's creditors) have applied to the court for an order to wind up the company on the grounds that it is otherwise just and equitable to do so. In this regard, the Minister is therefore regarded as a creditor.

[203] If the application should proceed in terms of the provisions of **section 81** (1)(d)(iii), then such an application would be brought on the grounds of the Minister (being substituted as the company itself or one or more of its directors or one or more of its shareholders) having applied to the court for an order to wind up the company on the grounds that it is otherwise just and equitable to do so. The courts have in the past dealt with the just and equitable ground for winding-up of a company in terms of the provisions of these two subsections.

[204] In terms of **section 81** (1)(c)(ii), the Minister (as the substitute for a creditor), cannot obtain an order on this ground merely because in a winding-up there will be the ordinary advantages thereof, such as having a liquidator control and investigate the company's affairs. Courts have always referred to five categories of circumstances which have to be present to determine whether it is just and equitable to liquidate a solvent company. These were as set out in **Rand Air**, as stated above in paragraph 101. It is trite that these categories do not constitute any kind of numerus clauses and it was left open to the courts to devise other categories in future.

[205] But as pointed out by **Henochsberg** [P Delport & Q Vorster Henochsberg on the Companies Act 71 of 2008 [May 2017 – SI 14] p 326] it is nevertheless useful and instructive to list them in this fashion so as to illustrate the kind of thing which can be complained of under this heading. And that the courts have for a number of decades not deemed it necessary to devise further categories. The learned authors further state that it is indeed difficult to think of anything else, which could possibly fall into this genus of category. A court would be hesitant to wind up a solvent company where a creditor, or in this case the Minister, does not establish a ground falling within one of these categories.

[210] The court found that in considering whether to grant a final winding-up order on the grounds that it is just and equitable to do so, it had to be satisfied that the applicant had established this on a balance of probabilities and had to exercise a judicial discretion based on the broad principles of law, justice and equity. It further found that taking the applicant's case in its totality, there was powerful and uncontroverted facts that the government of both South Africa and Bophuthatswana, that previously subsidised the company, decided not to do so and the workforce had been discharged, that it was inconceivable that the company could discharge the vast and numerous projects to which it had committed itself without the injection of finance from its former sources.

[211] The court had to consider, and balance the justice and equity of the competing interests of the applicant, on the one hand, who was the managing director of a large state-controlled organisation, and supported by the Minister of Finance and other functionaries, who were in favour of the final liquidation for a variety of reasons. These reasons included the fact that the substratum of the company had disappeared, as well as for reasons of mismanagement and lack of confidence in the management of the company. While on the other hand, the interests of the second respondent, who was opposed to the granting of the final order. It was also a fact that the second respondent's membership of the company derived from his employment in a government funded institution and not in his own right and he had no financial interest or stake in the company, such as was held by the government.

[212] In balancing his interests as against that of the government on any basis of justice and equity there was no comparison between the competing interests, and the interests of the government in this respect and consequently those of the public had to take precedence

over the interests of the second respondent who really had no financial interest in the matter. As a substantial issue the court took into consideration that the company was in effect a state company and due weight had to be given to the wishes of the members of the government who were charged with administering and being responsible for the company.

[216] In my view, therefore, there is sufficient grounds in terms of the provisions of section 81 (1)(c)(ii) or section 81 (1)(d)(iii) of the Companies Act where the Minister, in substitution of those persons or entities as mentioned in these two sections, has made out a case that it is just and equitable to wind up Redisa.

[217] As regarding the question whether it would be just and equitable to wind up KT, the court will consider the following facts:

a) That KT's own existence as a company depends on Redisa and the implementation of the Redisa Plan. And as stated earlier, KT cannot independently exist without Redisa. Redisa and the Redisa Plan is a substratum of KT.

b) It is also totally dependent on its funding or financial well-being on Redisa.

c) Should Redisa's funding, therefore, be discontinued from the Department or National Treasury, KT's lifeblood and existence will be cut off, it will therefore be difficult to function independently as a company. There is no evidence that it will be able to exist without the funding it receives from Redisa.

d) KT as a private entity through its CEO, Crozier, had been implicit in using KT as a vehicle through which money had been misappropriated to Erdmann, Davidson and Kirk, through the shareholders of KT, NYI and Avranet in direct contravention of Schedule 1, Part 3 of the Companies Act as well as the MOI of Redisa.

e) The Minister and the Department given the manner in which KT had been used as a vehicle to enrich Redisa's directors would clearly be opposed to it receiving any funding through Redisa.

These are clearly some of the grounds referred to in **Rand Air**, which among others would be the disappearance of the company's substratum, the illegality of some of its conduct in relation to the role it serves to enrich Redisa's directors and the breach of trust between it and the Minister.

[218] In my view, therefore, there is also sufficient grounds in terms of the provisions of section 81 (1)(c)(ii) or section 81 (1)(d)(iii) of the Companies Act, where the Minister, in substitution of those persons or entities as mentioned in these two sections, has made out a case that it is just and equitable to wind up KT.

[219] In the result therefore I make the following order:

(a) In respect of case number 9675/2017:

I) That the Respondent is placed in final liquidation.

II) That the liquidator of the Respondent be directed to distribute the entire net value of the Respondent to the Waste Management Bureau, a juristic person established in terms of **section 34A** of the **National Environmental**

Management: Waste Act 59 of 2008, in terms of section 30(3)(b)(iii)(bb) of the Income Tax Act 58 of 1962, read with clause 8.5.2 and/or 8.5.3 of the Memorandum of Incorporation of the Respondent.

III) That the cost of the application, which cost shall include the cost of two counsel, shall be the cost in the winding-up liquidation of the Respondent.

(b) In respect of case number 10123/17:

I) That the Respondent is placed in final liquidation.

II) That the liquidator of the Respondent be directed to distribute the entire net value of the Respondent to the Waste Management Bureau, a juristic person established in terms of **section 34A** of the **National Environmental Management: Waste Act 59 of 2008** and in terms of section 30(3)(b)(iii)(bb) of the Income Tax Act 58 of 1962. Alternatively, to the liquidator of Recycling and Economic Development Initiative of South Africa NPC (registration number 210/022733/08) as appointed by the Master of the High Court, Cape Town under Master's reference C 361/2017.

III) That the cost of the application, which cost shall include the cost of two counsel, shall be the cost in the winding-up liquidation of the Respondent.