

IN THE HIGH COURT OF SOUTH AFRICA
(TRANVAAL PROVINCIAL DIVISION)

Date : 2006-05-11

Case No : 11054/04

UNREPORTABLE

In the matter between:

**NATIONAL UNION OF METALWORKERS OF
SOUTH AFRICA**

First Applicant

A MAKGALEMELA AND 39 OTHERS

Second to Forty-
first Applicants

and

**THE MASTER OF THE HIGH COURT,
TRANVAAL PROVINCIAL DIVISION**

First Respondent

**MRS VILJOEN NO, ASSISTANT MASTER OF
THE HIGH COURT**

Second Respondent

**WILLEM VERHOEF NO as liquidator of
BVB PLANT HIRE CC (IN LIQUIDATION)**

Third Respondent

ANDRE'S INVESTMENTS (PTY) LTD

Fourth Respondent

**NORTHWEST SLAG & METAL
OUTSOURCING CC**

Fifth Respondent

HELENA ELIZABETH BOTHA

Sixth Respondent

JUDGMENT

SOUTHWOOD J

[1] The applicants seek an order in terms of the Promotion of

Administrative Justice Act 3 of 2003 ('PAJA') reviewing and setting aside the decision of the first respondent and/or the second respondent taken on 5 November 2003 to grant an extension of powers under the provisions of sections 386 and 387 of the Companies Act 61 of 1973 (as read with section 73 of the Insolvency Act 24 of 1936) for the third respondent to engage the services of attorneys and advocates in order to oppose any litigation against the insolvent estate of BVB Plant Hire CC (in liquidation) ('BVB') or to institute or conduct any litigation on behalf of BVB. In the notice of motion the applicants also seek an order declaring that the third respondent has no power or capacity to oppose any litigation on behalf of BVB or to pursue any relief on behalf of BVB in respect of the applicants' claims under case number J2343/98 in the Labour Court of South Africa, Johannesburg. At the hearing, the applicants' counsel conceded that the applicants are not entitled to the declaratory relief sought and asked only for an order reviewing and setting aside the Master's decision to extend the third respondent's power and the costs order in the notice of motion. The applicants seek an order that the costs of the application be paid jointly and severally by the third respondent *de bonis propriis*, the sixth respondent and any other respondents who oppose this application, such costs to include the costs consequent upon the employment of two counsel.

- [2] The first and second respondents do not oppose the application. They filed reports stating that they do not intend to oppose the application and that they abide the decision of the court. The second respondent attached to her report copies of the third respondent's application affidavit for the extension of his powers in terms of section 386 and 387 of the Companies Act, the annexures thereto and the second respondent's grant of the application. In her report the second respondent states that the reasons for the decision are those set out in

the application for the extension of powers.

- [3] The third respondent gave notice of his intention to oppose the application but did not file an answering affidavit or deliver a notice in terms of Rule 6(5)(d)(iii). The third respondent also did not file heads of argument. At the hearing, the third respondent was represented by counsel who only argued that the third respondent should not be ordered to pay the costs *de bonis propriis*.

- [4] The fourth, fifth and sixth respondents filed an answering affidavit in opposition to the relief sought and their counsel argued that the applicants are not entitled to the relief sought. The sixth respondent was Andre Botha, the managing member of BVB. On his death the executrix in his estate was substituted as the sixth respondent.

- [5] The applicants seek final relief on notice of motion and insofar as there may be disputes of fact the principles set out in ***Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd 1984 (3) SA 623 (A)*** at 632B – 633C are applicable. In the present case the material facts are all common cause and there are no disputes of fact which would prevent the court from granting final relief. The third respondent's application for the extension of his powers, the annexures thereto and the Master's decision are all before the court. The Master's reasons for granting the extension of powers are those set out in the application itself.

- [6] In order to understand the arguments it is essential to place the application and the decision to grant the extension of powers in their proper factual context. This will be summarised as briefly as possible.

- [7] Averring that they had been wrongfully dismissed by BVB on 10

January 1998 the applicants and 30 others (who are not parties to this application) referred the case to the Labour Court of South Africa at Johannesburg. The statement of case dated 12 July 1999 claimed an order in the following terms:

- (1) Declaring that the respondent's dismissal of the applicants on 10 January 1998 was an unfair labour practice;
- (2) Ordering the respondent to pay the applicants the equivalent of between 12 and 24 months remuneration calculated at the applicants' rate of remuneration at the date of their dismissal;
- (3) Ordering the respondent to reinstate each of the applicants, cited as second to further applicants, on the same terms and conditions of employment as that which governed them prior to their dismissal, retrospectively to the date of their dismissal; and
- (4) Costs of suit.

[8] In their Statement of Case the applicants pertinently alleged that the second and further applicants (at that stage 70 in all) were employed by the respondent until their dismissal on 10 January 1998. In its Statement of Case dated July 1999 BVB admitted this allegation. On 16 October 1999 the applicants and the respondent held a pre-trial conference at which BVB's legal representatives did not indicate that BVB wished to withdraw the admission that the 70 applicants had been in its employ.

[9] In the mean time, on 6 October 1999 BVB filed an application in the Pretoria High Court seeking an order placing the close corporation

under liquidation. On 12 October 1999 the court granted a provisional winding-up order with return day on 16 November 1999. On the return day the court granted a final order. The applicants were unaware of these proceedings until 24 January 2000 when the applicants' attorney received a letter from BVB's then attorney informing the applicants of the liquidation. The letter also advised the applicants that the third respondent had been appointed as liquidator.

[10] During December 2000 the applicants (and the other 30 employees) launched an application for the joinder of the fourth, fifth and sixth respondents (then Andre Botha) as respondents in the proceedings in the Labour Court. The basis of the joinder application was that Botha had abused the corporate identity of BVB and the fourth and fifth respondents, treating them as his *alter ego*, and that the corporate veil between him and these corporations should be pierced. The notice of motion made provision for Botha and the fourth and fifth respondents to oppose the joinder application. Apart from the joinder of Botha and the fourth and fifth respondents the applicants sought orders

- (1) that the applicants be given leave to deliver a notice of intention to amend their statement of case within two months of the order for joinder;
- (2) that Botha and the fourth and fifth respondents file their responses to the applicants' statement of case as amended, within 10 days after the applicants amended their statement of case;
- (3) that BVB file its amended statement of case in response to the applicants' statement of case as amended within the same period.

BVB and Botha and the fourth and fifth respondents did not oppose the application for joinder and on 19 August 2001 the orders sought were granted. Pursuant to that order the applicants effected far-reaching amendments to their statement of claim to bring Botha and the fourth and fifth respondents within the ambit of their claim. The applicants claimed orders

- (1) Declaring that BVB's dismissal of the second and further applicants on 10 January 1998 was unfair;
- (2) Ordering BVB, Botha and the fourth and fifth respondents, jointly and severally, to pay to each of the second to further applicants compensation calculated at the rate of his or her monthly remuneration at the date of dismissal and, subject to what the court may determine, the equivalent to between 12 and 24 months remuneration;
- (3) Ordering Botha and the fourth and fifth respondents to reinstate each of the second and further applicants, retrospectively to the date of dismissal, on the same terms and conditions of employment as that which governed the position immediately prior to their dismissal from the employ of the first respondent;
- (4) Ordering BVB, Botha, and the fourth and fifth respondents, jointly and severally, to pay the applicants' costs of suit.

After the applicants amended their statement of claim the respondents

failed to plead to the amended statement.

[11] On 24 April 2002 the applicants obtained judgment by default against the respondents on the amended statement of claim. In terms of the judgment orders were granted –

- (1) Declaring that the dismissal of the second and further applicants on 10 January 1998 was procedurally and substantively unfair;
- (2) That Andre Botha reinstate each of the second and further applicants whose names appear on the schedule annexed to the notice of motion marked 'A' (the applicants being referred to as 'the specified applicants') retrospectively to 10 January 1998 on the same terms and conditions of employment as those which governed the position immediately prior to their dismissal from the employ of the first respondent;
- (3) Declaring that in respect of the 49 month period from 10 January 1998 to 28 February 2002 Andre Botha together with the fourth and fifth respondents, jointly and severally, are liable to pay each of the specified applicants, respectively his or her monthly remuneration in the sum set out in annexure 'A' hereto;
- (4) That Andre Botha, and the fourth and fifth respondents, jointly and severally, pay the applicants' costs of suit, such costs to include the costs of the application for joinder dated December 2000; and

- (5) That the case for the applicants other than the specified applicants be postponed *sine die*.

[12] On 15 July 2002 the third respondent, Botha and the fourth and fifth respondents launched an application for the rescission of the judgment by default granted on 24 April 2002. The third and other respondents also sought orders

- (1) that the third respondent's late delivery of his response already filed of record to the applicants' statement of claim dated 12 July 1999 be condoned;
- (2) that Botha and the fourth and fifth respondents, within 10 days after the grant of the order rescinding the judgment by default, deliver their responses to the applicants' statement of claim in the main application as amended, in terms of Rule 6(3), and that the third respondent, within the same period, deliver notice of intention to amend consequently its response already filed of record.

The applicants opposed this application.

[13] On 6 November 2002 the Labour Court heard the rescission application. After argument the parties agreed on the order to be made. The order reads as follows –

'Having read the papers filed of record and having heard the parties' representatives, it is ordered by consent:

- (1) Paragraph 1 of the order of Mr Justice Ngcamu dated 24 April 2002 ('the earlier order') is hereby

rescinded.

- (2) Paragraphs 2, 3, 4 and 6 of the earlier order are hereby:
 - 2.1 suspended; and
 - 2.2 declared to be of no force and effect, until such time as a final judgment has been granted against the first applicant in the terms set out in paragraph 1 of the earlier order.
- (3) The second, third and fourth applicants shall pay:
 - 3.1 the costs of the joinder application on 21 June 2001, reserved on that date;
 - 3.2 the costs of this application, jointly and severally.
- (4) Should no final judgment against the applicant as contemplated in paragraph 2 hereof - be granted, both the earlier order in its entirety and this order save for paragraph 3 hereof, shall *ipso facto* lapse.'

[14] The effect of this order was that the declaratory order made against BVB (that the dismissal of the applicants on 10 January 1998 was procedurally and substantially unfair) was rescinded; that the orders made against Botha and the fourth and fifth respondents were suspended until a final judgment was granted against BVB (Le. that the dismissal on 10 January 1998 was procedurally and substantially unfair) and that if a final judgment was not granted against BVB both the judgment by default and the agreed order of 6 November 2002,

with the exception of the costs order in paragraph 3, will lapse. The liability of Botha and the fourth and fifth respondents was therefore dependent on the grant of a final order against the third respondent that the dismissal of the applicants on 10 January 1998 was procedurally and substantively unfair.

[15] It must be noted that when the rescission application was launched, argued and settled, the third respondent had no power in terms of section 386(4)(a) of the Companies Act to bring or defend in the name and on behalf of the close corporation any action or other legal proceedings of a civil nature. When he deposed to the founding affidavit, Botha stated that he was duly authorised to depose to the founding affidavit on behalf of the third respondent and that he had been advised by the third respondent that other than being a party to the proceedings the third respondent did not wish to incur any costs in the matter and that he abides the decision of the court. The third respondent was therefore a party to the proceedings when he had no power to be.

[16] On 15 May 2003 the third respondent, Botha and the fourth and fifth respondents launched a further application in which they sought orders in the following terms:

- (1) that the third respondent's late delivery of his response already filed of record to the applicants' statement of claim dated 12 July 1999 ('the earlier response') be condoned;
- (2) that the third respondent be granted leave to deliver the notice of intention to amend the earlier response within 2 months of the date of granting the order;

- (3) that Botha and the fourth and fifth respondents shall within 2 months of the date of granting of the order deliver their responses to the applicants' statement of case filed of record by the applicants on 5 September 2001;
- (4) that the third respondent be granted leave to withdraw the admission made in the earlier response that the second and further respondents were employees of BVB.

Once again, despite not having the power to bring this application in terms of section 386(4)(a) of the Companies Act, the third respondent was a party to the application and the notice of motion sought three orders in respect of the third respondent and BVB. Once again Botha, as deponent to the founding affidavit, stated that he was duly authorised by the third respondent to depose to the affidavit on behalf of the third respondent; that the third respondent had advised him that other than being a party to the application the third respondent did not wish to incur any costs in the matter and abides the decision of the court. The third respondent confirmed these statements in a confirmatory supporting affidavit.

- [17] By then, the third respondent had prepared a first and final liquidation account for BVB which he confirmed under oath on 5 September 2002. The account reflects that no claims were proved; that the assets of the close corporation realised R31 179; that that sum was exhausted by administration costs and accordingly there were no funds available. There was therefore no reason for the third respondent to be a party to the application and seek any relief.

[18] On 9 June 2003 the applicants' attorney addressed a letter to the third respondent referring to the history of the litigation, pointing out that the third respondent opposed the relief sought by the applicants without good reason and that the rescission application and the opposition to the main application were of no benefit to BVB or its creditors. The applicant's attorney called on the third respondent to withdraw the application launched on 15 May 2003 and consent to an order in the main proceedings. The third respondent did not respond formally to this request and the applicants filed an answering affidavit in which they set out the history of the main proceedings and the third respondent's role in it and averred that the application was an irregular proceeding. The applicants also stated that an order for costs *de bonis propriis* would be sought against the third respondent. The third respondent then filed a further affidavit independently of Botha and the fourth and fifth respondents. In this affidavit the third respondent alleged that from the date of his appointment he had made it clear to all interested parties that he, in his capacity as liquidator of BVB, was not going to participate in the litigation and that Botha and the fourth and fifth respondents should take whatever action they saw fit; that he, as liquidator of BVB, did not have the power to institute proceedings on behalf of the close corporation - he had not been authorised by creditors (none had proved claims) and the Companies Act did not confer such power on him; that he never authorised any person, attorney or counsel, to bring proceedings on behalf of the close corporation; that he had fulfilled all his obligations as liquidator and had no interest in any of the parties before court or the outcome of the litigation between them. He stated that a judgment against the close corporation in liquidation would be worthless.

[19] Because of the third respondent's stance in this affidavit the applicants

decided to launch an application for a declaratory order that the dismissal of the applicants by BVB was procedurally and substantively unfair. The applicants launched this application on 16 October 2003 for hearing on 6 November 2003 when the application launched by Botha and the fourth and fifth respondents on 15 May 2003 was set down for hearing. The notice of motion and the founding affidavit state clearly and unambiguously that the applicants seek only a declaratory order that the dismissal of the applicants by BVB on 10 January 1998 was procedurally and substantively unfair. In addition the notice of motion states that no costs order would be sought unless a respondent opposed the application.

[20] The third, fourth, fifth and sixth respondents did not file answering affidavits. On 6 November 2003, at court, the third respondent appeared, represented by an attorney and counsel, and handed to the applicants' legal representatives the third respondent's answering affidavit. The other respondents also appeared and handed to the applicants' legal representatives their answering affidavits. This resulted in the postponement of the applications.

[21] In his answering affidavit the third respondent states that his powers under section 386 and 387 of the Companies Act have been extended by the Master and he has the power to oppose the applicants' application.

[22] The third respondent's application to the Master for the extension of his powers and the Master's decision are not in dispute. It will be remembered that the Master's reasons are those given by the third respondent in his application. The third respondent's application reads as follows –

'Ek, WILLEM VERHOEF, verklaar hiermee onder eed dat die volgende feite korrek en waar is ten aansien van my aansoek om uitbreiding van magte in terme van artikel 386 en 387 van die Maatskappywet ten einde regsaksie teen die BK in likwidasië teen te staan.

1. Aqtergrond

Bovermelde boedel is soos per aanhangsel op 16 November 1999 per hofbevel gelikwideer en is ons aangestel as likwidateurs deur u.

2. Eiendomsbeskrwing

Die BK in likwidasië het minimale roerende bates gehad wat in die normale verloop van sake verkoop is. Die opbrengs was van so 'n aard dat ons ons statute refooi sal moet verminder na betaling van administrasiekostes.

U sal opmerk dat ons Likwidasië en Distribusierekening reeds ingedien is en weens omstandighede buite ons beheer wil ons u graag versoek om nie gemelde Rekening te bekragtig nie om redes wat hieronder sal blyk.

3. Redes vir aansoek om uitbreiding van magte

3.1 Ons doen op hierdie stadium aansoek vir uitbreiding van magte ten einde betrokke te kan raak in litigasië.

- 3.2 Aangesien geen eise bewys is op die tweede vergadering van skuldeisers te maak van die dienste van prokureurs en advocate ten einde regsadvies in te win nie.
- 3.3 Daar word tans aansoek gedoen vir verstek vonnis teen die insolvente boedel ten bedrae van ongeveer R2.5 miljoen asook die herindiensneming van ongeveer 70 werknemers.
- 3.4 Alhoewel sodanige vonnis nie die papier werd sou wees waarop dit geskryf sou word nie, aangesien die boedel nie oor enige fondse beskik nie, en om logiese rede ook nie 70 werknemers weer in diens kan neem nie, sal dit wel tot gevolg hê dat ander partye wat voorheen gevoeg is tot gemelde regsaksie gemelde bedrag sal moet betaal en gemelde werknemers in diens moet neem.
- 3.5 Ek het geen twyfel dat laasgemelde gevoegde partye derhalwe wel 'n belang het in die uitspraak/vonnis wat verleen mag word nie.
- 3.6 Kennisgewing van aansoek om verstek vonnis teen die BK in likwidasië te neem op 6 November 2003 is op my kantore gedien en het ek die ander partye in kennis gestel van laasgemelde aansoek teen die BK in likwidasië.
- 3.7 Ek het vervolgens spesifieke instruksies vanaf die besturende lid, synde mnr. André Botha ontvang

om laasgemelde aansoek teen te staan.

- 3.8 U sal merk uit die inhoud van bladsy 2 van die relevante skrywe hierby aangeheg, gemerk aanhangsel 'A', dat die boedel en die Likwidateur gevrywaar word van enige moontlike regskostes, hetsy kostes aangegaan deur die boedel of Likwidateur of kostebevele teen die boedel of Likwidateur verleen.
- 3.9 U sal ook merk dat die skrywe my moontlik verantwoordelik kan hou vir skade indien ek nie sou voortgaan om die aansoek te opponeer nie.
- 3.10 Dit blyk derhalwe dat ek moontlik 'n persoonlike risiko mag loop indien ek nie sou voortgaan met opponering nie aangesien die skrywer van aanhangsel 'A' in alle waarskynlikheid sou wou poog om op 'n latere stadium te bewys dat ek my statutêre pligte versuim het.
- 3.11 In die lig van die feit dat die boedel en die Likwidateur gevrywaar word van enige kostes deur 'n belanghebbende party, glo ek dat daar geen goeie rede vir my bestaan om sy versoek te weier nie.

4. Spesifieke inhoud van uitbreiding van magte

U word dus hiermee versoek om my magte uit te brei in terme van artikel 386 en artikel 387 van die

Maatskappywet, saamgelees met artikel 73 van die Insolvensiewet No 24 van 1936 (soos gewysig) ten einde die dienste te bekom van prokureurs en advokate, ten einde enige regsaksie teen die insolvente boedel te bestry of alternatiewelik enige regsaksie namens die boedel in te stel of te loots.'

Annexure 'A' reads as follows:

'NUMSA MESO EN 69 ANDER - BVB PLANT HIRE BK (IN LIKWIDASIE)

Bovermelde aangeleentheid het betrekking. Soos u reeds daarvan kennis dra, is daar hangende litigasie spesifiek met betrekking tot BVB Plant Hire CC (in likwidasie) in terme waarvan u aangestel was as Likwidadeur. As vorige lid van die betrokke Beslote Korporasie draek persoonlik kennis van die feite tot hierdie litigasie. Die saak het te make met die afdanking van sekere werknemers voor likwidasie, welke afdanking nie onregmatig was soos beweer deur NUMSA. Indien die aansoek soos gebring deur NUMSA. ongeopponeer toegestaan word, kan dit lei tot vonnis teen die BK (in likwidasie) asook verdere Respondente wat gevoeg was tot die geding.

Die bestaande aansoek is op die rol geplaas vir Donderdag 6 November 2003 en dit is in hierdie verband 'n saak van uiterste dringendheid dat u magtiging hierin bekom om die saak te opponeer en verdediging aan te teken voor die saak aangehoor word op gemelde datum.

Dit is in hierdie verband ook van kardinale belang dat u in u hoedanigheid as Likwidadeur:

1. Magtiging bekom in terme van artikel 386 en 387 van die Maatskappyewet; asook
2. Magtiging in terme van artikel 73 van die Insolvensiewet

in terme waarvan u magte verkry om prokureurs aan te stel, verdediging aan te teken en eise teen te staan ten behoeve van BVB Plant Hire BK (in likwidasie).

As belanghebbende party tot die dispuut, vrywaar die skrywer hiervan die insolvente boedel en die Likwidadeur van enige regsonkoste aangegaan sowel as enige kostebevele toegestaan teen die boedel of die Likwidadeur voortspruitend uit u toetrede tot die bovermelde geding.

Uit hoofde van voormelde, versoek ek, en word u instruksies hiermee gegee, dat u onverwyld voortgaan met die stappe soos hierbo uiteengesit, by versuim waarvan ek self sowel as enige ander party wat gevoeg was tot hierdie aansoek, u moontlik sal verantwoordelik hou vir enige kostes of skade weens versuim aan u kant.

Ek verneem dringend van u met betrekking tot die bovermelde.'

The letter is signed by Andre Botha as 'Besturende Lid'.

The Master's decision reads as follows:

'U aansoek om uitbreiding van magte in terme van artikel 386 en 387 van die Maatskappywet word hiermee goedgekeur soos vervat en gedefinieer in per paragraaf 4 van gemelde aansoek.'

[23] The applicants contend that the decision of the Master (the second respondent) to extend the powers of the third respondent was 'administrative action' as defined in section 1 of PAJA and that it should be reviewed and set aside in terms of section 6. The applicants rely on the following grounds under section 6(2) –

(1) para (d) - that the decision was materially influenced by an error of law;

(2) para (e)(iii) - that the decision was taken because irrelevant considerations were taken into account or relevant considerations were not considered;

(3) para (h) - that the decision was so unreasonable that no reasonable person could have exercised the power to grant such authority to the liquidator.

[24] These grounds do not correspond exactly with those in paragraph 12 of the founding affidavit but the respondents' counsel, correctly, does not object to the applicants relying on these grounds. The application for the extension of powers is before the court together with the Master's decision and the Master's reasons for the decision are those put forward by the third respondent in his application for extension of the powers. All the relevant facts have been canvassed and there can be no prejudice to the respondents if the applicants rely on grounds not stipulated in the founding affidavit - see **Bato Star Fishing (Pty)**

Ltd v Minister of Environmental Affairs and Others 2004 (4) SA 490 (CC) paras 25-27 and **Van Rensburg v Van Rensburg en Andere 1963 (1) SA 505 (A)** at 509H-510B.

- [25] The respondents' counsel also does not contend that the applicants do not have standing to review the decision in terms of PAJA, that the decision does not adversely affect the rights of any person or that the decision does not have a direct, external effect. He contends that the sole issue for determination is whether the Master's exercise of the powers in terms of section 387 of the Companies Act is so unreasonable that no reasonable person could have exercised that power as the Master did (Le. whether subsection 6(2)(h) of PAJA applies). He argues that it cannot be found that the Master acted in this way.
- [26] Section 391 of the Companies Act provides that the general duties of a liquidator in a winding-up are forthwith to recover and reduce into possession all assets and property of the company, movable and immovable, and to apply them in satisfaction of the costs of the winding-up and the claims of creditors and to distribute the balance among those who are entitled thereto. In **Ex parte Klopper NO: In re Sogervim SA (Pty) Ltd 1971 (3) SA 791 (T)** at 795E the court commented that the liquidator stands in a fiduciary relationship to the company and in **Concorde Leasing Cooperation (Rhodesia) Ltd v Pringle-Wood NO 1975 (4) SA 231 (R)** at 235A the court observed that the liquidator owes a duty to the company to see that its assets are realised and its liabilities minimised to the best possible advantage of the company. He also owes a duty to the creditors to see that they suffer the least loss and receive the most advantageous dividend. It follows that the liquidator must at all times act in pursuit of these objectives and no others.

- [27] Consistent with these powers and duties, section 386(1) of the Companies Act confers on the liquidator limited powers to perform certain acts to recover funds and other property, to prove claims against debtors of the company and to effect payment of the company's debts and to call meetings of creditors to give the liquidator authority to perform acts necessary for the liquidation of the company. A liquidator may be given additional powers in terms of section 386(4), one of which is the power to bring or defend legal proceedings of a civil nature, either by means of meetings of creditors, members or contributories, or on the directions of the Master under section 387 of the Companies Act.
- [28] If no meeting of creditors is held and the liquidator requests the Master to grant such powers to him, the Master is required to consider properly the facts before him and to determine whether or not it is appropriate that the powers requested be given to the liquidator. As already pointed out the powers can only be granted for the purpose of achieving the objectives of the winding-up process and in the fulfilment of the liquidator's duties and clearly not for the purpose of assisting third parties to achieve objects unrelated to these objectives.
- [29] As appears from the application the third respondent did not seek an extension of his powers for the purpose of liquidating the close corporation. It was not necessary to litigate to recover assets or the payment of debts and it was not necessary to oppose the litigation against BVB. The third respondent pointed out that all BVB's assets had been sold and that the proceeds were not sufficient to pay the expenses of the liquidation. According to the third respondent the judgment sought against BVB would be worthless. The third respondent sought the extension of his powers to enable him to litigate

for the benefit of third parties, particularly Andre Botha, who would become liable to pay the applicants and employ them if an order was granted against BVB. The statement that Botha undertook to indemnify the third respondent and BVB against any costs orders made against them was in itself worthless. There was no information to show that the indemnity had any value.

[30] The second respondent states that her reasons for granting the third respondent's application were those set out in the application itself.

[31] In order to decide whether the second respondent's decision to extend the third respondent's powers to include the power to bring or defend in the name of the close corporation any action or legal proceedings of a civil nature is reviewable an objective assessment of the facts must be made – see ***Trinity Broadcasting (Ciskei) v Independent Communications Authority of South Africa* 2004 (3) SA 346 (SCA)** para 20. For purposes of section 6(2)(h) the decision will be reviewable if it is one that a reasonable decision-maker would not reach - ***Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs* 2004 (4) SA 490 (CC)** para 44. If the second respondent's decision, on the basis of all the relevant factors, was not one that a reasonable decision-maker could have reached, it is reviewable and must be set aside.

[32] The decision was clearly taken on the strength of irrelevant considerations and relevant considerations were not considered. The irrelevant considerations were the effect that the litigation would have on third parties. The relevant considerations were that no benefit of any kind would accrue to the close corporation in liquidation. In the light of the information set out in the application a reasonable decision maker would not have reached the conclusion that the third

respondent's powers should be extended. The decision is therefore reviewable.

Costs

[33] Counsel for the third respondent submitted that it would not be fair to order the third respondent to pay the costs of the application *de bonis propriis*. He made no attempt to justify the third respondent's conduct in joining in the various applications and his fear of being held liable to any of the other respondents. The third respondent has brought two applications without the power in terms of section 386(4)(a) of the Companies Act. He has through-out made common cause with the other respondents, particularly Andre Botha and his estate, in bringing these applications. He has surrendered his independence to these respondents and allowed them to dictate to him what position he should take. The application for the extension of his powers was the ultimate step consistent with this. This was done despite a lengthy letter from the applicants' attorney setting out the history of the matter and the third respondent's role in it. She spelled out for the third respondent exactly why he should not oppose the application. The third respondent filed a notice of intention to oppose the application and did not file an affidavit to explain his conduct or rebut the inference that he has made common cause with the respondents. The third respondent did not file heads of argument timeously to concede the application and set out his position *vis-a-vis* the applicants. In these circumstances the conclusion is inescapable that the third respondent has acted recklessly without due regard for his duties as a liquidator. The respondent will therefore be ordered to pay the costs *de bonis propriis* with the other respondents.

[34] Order

The following order is made:

- (1) The decision of the second respondent taken on 5 November 2003 to grant an extension of powers under the provisions of section 386 and 387 of the Companies Act, 61 of 1973 (as read with section 73 of the Insolvency Act, 24 of 1936) for the third respondent to engage the services of attorneys and advocates in order to oppose any litigation against the insolvent estate of BVB Plant Hire CC (in liquidation) or to institute or conduct any litigation on behalf of BVB is reviewed and set aside;
- (2) The third respondent, *de bonis propriis*, and the fourth, fifth and sixth respondents are ordered to pay the costs of this application jointly and severally, the costs to include the costs consequent upon the employment of two counsel.

**B.R. SOUTHWOOD
JUDGE OF THE HIGH COURT**

CASE NO: 11054/2004

HEARD ON: 20 April 2006

FOR THE 1ST TO 41ST APPLICANTS: ADV. P.J. VAN BLERK SC
ADV. B.M. SLON

INSTRUCTED BY: Cheadle Thompson & Haysom Inc

FOR THE THIRD RESPONDENT: ADV. P. NEL

INSTRUCTED BY: Smart Attorneys

FOR THE 4TH, 5TH and
6TH RESPONDENTS: ADV. H VAN R WOUDSTRA SC

INSTRUCTED BY: Louw Pienaar Attorneys

DATE OF JUDGMENT: 11 May 2006