REPUBLIC OF SOUTH AFRICA

SOUTH GAUTENG HIGH COURT, JOHANNESBURG

CASE NO:2012/13077

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE : YES
(2) OF INTEREST TO OTHER JUDGES: YES
(3) REVISED

DATE 12/8/13 . **SIGNATURE**

In the matter between:

FIRSTRAND BANK LIMITED, WESTBANK DIVISION
Applicant

and

PMG MOTORS ALBERTON (PTY) LIMITED
(IN LIQUIDATION) First Respondent

PMG MOTORS KYALAMI (PTY) LIMITED
(IN LIQUIDATION) Second Respondent

PMG MOTORS WESTVILLE (PTY) LIMITED
(IN LIQUIDATION) Third Respondent

JUDGMENT

MAYAT J

[1] The applicant in this matter seeks the following relief against three affiliated companies (in liquidation):

i) A declaratory order confirming the cancellation of three agreements concluded between the applicant and each company concerned, prior to the liquidation of these companies, on the 23rd of January 2009; and

ii) Repayment of the amounts of R4 244 746-38, R9 126 987-12 and R3 993 171-89, mistakenly paid by the applicant to the joint liquidators of the said companies, pursuant to the cancellation of such agreements, together with accrued interest thereon.

[2] The agreements, which the applicant sought to cancel on the 23rd of January 2009, are so called floor plan agreements concluded between the applicant and each of the three companies concerned, prior to liquidation. Each of the said companies carried on business as motor vehicle dealers, prior to being liquidated on the 26th of January 2009.

[3] A preliminary issue in this context relates to the jurisdiction of this court in relation to all three respondents. In the event that this aspect is determined in favour of the applicant, the main legal issue in this matter relates to whether the provisions of section 84(2) of the Insolvency Act, 24 of 1936 ("the Act") apply to the circumstances of the present case.

RELEVANT FACTUAL MATRIX

[4] As already indicated, each of the respondents in this matter is a company in liquidation. The first respondent is PMG Motors Alberton (Pty) Limited (in liquidation), the second respondent is PMG Motors Kyalami (Pty) Limited (in liquidation) and the third respondent is PMG Motors (Westville) (Pty) Limited (in liquidation). The three companies concerned each traded as motor vehicle dealers, under different trade names prior to liquidation, and are referred to in this judgment as "PMG Alberton", "PMG Kyalami" and "PMG Westville" respectively. As the

names of the said three companies suggest, these companies were affiliated and/or related to each other prior to being wound-up, and were also affiliated to a fourth company, named PMG Motors Fourways Pty Limited ("PMG Fourways"), which is not a party to these proceedings. To the extent that it is relevant in this context, PMG Fourways has also apparently been liquidated.

[5] As also suggested by the names of the abovementioned four companies, three of the said companies carried on business in Gauteng, and one carried on business in KwaZulu-Natal ("KZN"), prior to liquidation. It is not in dispute on the basis of printouts on record annexed by the respondents from the Companies and Intellectual Property Registration Office ("CIPRO"), that the registered offices of all the companies concerned in this matter were located in KZN. It also appears from these printouts that all three companies were first incorporated in August 2005. As such, it is not in dispute that both the registered address as well as the principal place of business of PMG Westville does not fall within the area of jurisdiction of this court.

[6] It is also common cause that prior to liquidation, the applicant had entered into individual floor plan agreements with each of the three dealers in this matter as well as PMG Fourways. In terms of each of these agreements, the applicant agreed to sell goods, as defined, to the dealer concerned and/or to purchase goods from manufacturers or other suppliers and to re-sell the said goods to the dealer concerned, solely for the purposes of resale and leasing by the dealer concerned to their customers. It is not in dispute that "the goods" were defined in terms of each floor plan agreement as motor vehicles. It is also not in dispute in these proceedings that the said floor plan agreements constituted intalment sale agreements, as envisaged in the National Credit Act, 34 of 2005 ("the NCA").

[7] The terms of each floor plan agreement in this matter are common cause. It is accordingly not in dispute that in terms of clause 8 of each

agreement, ownership of the motor vehicles, which were financed by the applicant, did not pass to the dealer concerned and remained with the applicant, until full payment of the selling prices of the said motor vehicles were effected by the dealer concerned to the applicant in terms of the relevant invoice, together with stipulated interest thereon from time to time. It is further not in dispute that in terms of clause 11.1.13 of each floor plan agreement, under the heading "Breach of Agreement", the applicant was entitled at any time after the conclusion of each floor plan agreement to rate the dealer concerned to be a credit risk with regard to that dealer's obligations to the applicant. In these circumstances, the applicant was entitled in terms of clauses 11.1.15 and 11.1.16 of each floor plan agreement to terminate the said agreement immediately, inter alia if the applicant rated the dealer concerned a credit risk.

[8] A Manager in the applicant's Specialized Collections Retail Division, Raylene Meyer, states in the founding affidavit in the present proceedings that on the 23rd of January 2009, shortly before *ex parte* liquidation proceedings were instituted by all the abovestated four companies, identical letters were delivered by the applicant to PMG Alberton, PMG Kyalami and PMG Westville as part of an "orchestrated plan", which was put in place as a matter of urgency by the applicant. All the said letters, which were dated the 22nd of January 2009, were stated to be from the applicant's National Manager, Bernard Roux. It is indicated in this context that the said letters were delivered to PMG Alberton at 3 Voortrekker Road, Alberton, PMG Kyalami, at 63 Richards Avenue, Midrand and to PMG Westville at 1134 Jan Smuts Highway, Westville.

[9] It appears from copies of letters annexed to Meyer's founding affidavit that the applicant informed each of the dealers concerned as follows:

> "After careful consideration the Bank has decided to rate the above dealership to be a credit risk with regard to its obligations under the Floorplan Agreement. This is consequently a material breach of the Agreement pursuant to Clause ... thereof. We hereby give you notice that the Agreement

> is terminated with immediate effect and that we, without prejudice to any other rights we might have in law, including the right to claim damages, call for the immediate return of the vehicles together with all licensing documents/registration certificates and any other documents pertaining to the vehicles.
>
> Delivery of the vehicles and the relevant documents must be effected on receipt of this letter."

[10] In these circumstances, despite the incorrect references in the said letters to clause numbers in the floor plan agreements, it appeared from the said letters that the applicant sought to cancel each floor plan agreement between the applicant and the dealer concerned on the basis that the said dealer constituted a credit risk with respect to its obligations to the applicant, as provided in the said agreements. As already indicated in this regard, the applicant was entitled to cancel the floor plan agreements for the reason stated in the said letters, in accordance with clause 11 of the said agreements. The applicant also demanded the immediate return of vehicles from each dealer, as provided in the floor plan agreements.

[11] It appeared from copies of a letter, addressed at the time to PMG Alberton, which were on record, that the said copies were apparently signed by someone other than Roux. It also appeared from copies of a letter on record, which was addressed at the time to PMG Kyalami, that the said letter and copies thereof were apparently accepted by someone at PMG Kyalami, on the 23rd of January 2009. This person had apparently signified his acceptance of the letter by signing a copy of the said letter, dating the said copy "23/1/09", and also stamping the said copy with a stamp of PMG Kyalami, incorporating its address in Midrand.

[12] In relation to PMG Westville, the applicant asserts that a letter of cancellation, also dated the 22nd of January 2009, as well as copies of the said letter were delivered by hand on the 23rd of January 2009 to the premises of PMG Westville. It is indicated in this regard by the applicant that copies of the said letter were also delivered in triplicate

for each director of PMG Westville. It is further indicated in the founding papers and confirmed in reply by the applicant that a certain Warren Penery had accepted the said letter and copies thereof on the 23rd of January 2009 at the premises of PMG Westville. Three copies of the said letter, signed by Roux are annexed to the founding affidavit. A further three copies of the said letter, signed by both Roux and another unidentified person, are also annexed to the founding affidavit. The date "2009-01-23" is inserted in manuscript, near the signature of the unidentified person on the latter three copies. Thus, it appears that the unidentified person had apparently signified his or her acceptance of the said letter by signing a copy or copies of the said letter on record, and dating the said copy or copies "2009-01-23".

[13] To the extent that it is relevant in this context, Meyer further states in the founding affidavit that the applicant failed to deliver a letter to PMG Fourways. As such, she avers that the applicant's failure to deliver a letter to PMG Fourways resulted in certain legal consequences in terms of the Act, and PMG Fourways is accordingly not a party to the present proceedings.

[14] Meyer further asserts that each dealer concerned accepted the cancellation of the relevant floor plan agreement and allowed the applicant's motor vehicles to be removed from the premises of each such dealer, pursuant to such cancellation. Meyer also states in her affidavit, (confirmed by affidavits from the relevant employees of the applicant), that at the time the relevant letters were delivered on the 23rd of January 2009 to each of the three dealers involved, the applicant's motor vehicles were voluntarily handed back to the applicant and the applicant subsequently took control of the said motor vehicles.

[15] In response to assertions by the respondents relating to the date of removal of vehicles by the applicant from each dealer's premises, the applicant clarifies in reply that certain vehicles were removed by the

applicant after the 23rd of January 2009, when the applicable floor plan agreements had already been cancelled and the dealers concerned had already been requested to deliver the vehicles and the "relevant documentation" on receipt of the letters of cancellation. However, the applicant also avers in reply that given the date of cancellation of the floor plan agreements on the 23rd of January 2009, the date of removal of the vehicles pursuant to such cancellation is not relevant to these proceedings. It is accordingly emphasized in this context that the respondents had all voluntarily given up possession of the applicant's motor vehicles in their possession, when the applicant had validly cancelled the applicable floor plan agreements and requested delivery of the said vehicles.

[16] It is not in dispute that the applicant subsequently made arrangements to remove the vehicles, which were owned by the applicant, from the premises of all the dealers concerned by the 26th of January 2009 and sold the said vehicles. The applicant indicates in this regard, and it is not in dispute, that the proceeds of the sale of the said vehicles were then mistakenly paid by the applicant to the respondents in this matter. Against this background, it is not in dispute that the applicants paid each of the respondents the amounts claimed in the applicant's notice of motion. It is also not in dispute that the applicant demanded repayment of the said amounts from each of the respondents, and each of the respondents have failed to pay the respective amounts claimed, or any part thereof.

[17] As already indicated, each dealer was subsequently liquidated, apparently on the basis of *ex parte* applications in each case in the KZN Provincial Division of the High Court, Pietermaritzburg. It appears from the relevant orders annexed to the founding affidavit that provisional winding-up orders in relation to all three dealers, were granted on Tuesday, the 27th of January 2009. Thereafter, the provisional orders were confirmed on the 9th of March 2009. It is accordingly not in dispute in these proceedings that by operation of

law, the liquidation of each respondent in this matter commenced from Monday the 26th of January 2009, when liquidation proceedings were instituted.[1] Thus, the liquidation in each case effectively commenced on the Monday, which followed Friday the 23rd of January 2009, when the applicant asserts that letters of cancellation, referred to above, were delivered.

[18] As regards delivery of a letter of cancellation to PMG Westville, a certain Hans Jurie Louw, who describes himself as the Dealer Principal at PMG Westville during January 2009, states in an affidavit opposing the present application as follows :

> "
> 8.
> The letters of cancellation in question were never delivered on 23 January 2009.
> 9.
> I specifically recall that it was on Monday, 26th January 2009 that I first became aware that there was a liquidation in progress.
> 10.
> A representative, whose name I cannot recall, of Wesbank arrived at the dealership and advised that the Third Respondent, was in liquidation and that he required the return of the motor vehicles.
> 11.
> Not being experienced or knowledgeable about liquidation procedures, I sought to telephone the various directors of PMG Motors but was unable to contact them on their cell phones.
> 12.
> I thereafter phoned ...., the dealer principal at the Second Respondent[and]....the dealer principal of the First Respondent.
> 13.
> The other three dealer principals all advised me that they had also just been informed of the liquidation and advised me that the Applicant was at their premises making arrangements for the return of various motor vehicles which were on the floor plans."

Thus, Louw suggests that a letter of cancellation on record was not served on PMG Westville on the 23rd of January 2009.

[19] In response to the allegations by Louw, a Risk Manager named Alec Labuschagne employed by the applicant confirms in replying papers that in January 2009, he was employed by the applicant, with the title of Manager: Stocks Audit. He also confirms the contents of the applicant's founding papers in so far as they relate to him and explains further that he was instructed on the 22nd of January 2009 to travel to

---

[1] In terms of section 348 of the Companies Act 61 of 1973 winding-up is retrospectively deemed to commence at the time

Durban to assist with the return of vehicles to the applicant from PMG Westville. He accordingly states that on the morning of Friday the 23rd of January 2009, he drove to the PMG Westville dealership, where he met Penery. He indicates that other employees of the applicant were also present. He also indicates that Penery was given a voluminous envelope containing the applicant's letters of cancellation in triplicate for each director of PMG Westville. Labuschagne specifically states in this respect that Penery in turn handed these letters directly to Louw, who had then signed copies of the said letters in his (Labuschagne's) presence.

[20] As already indicated, it is common cause that the liquidation orders relating to the companies in this matter were subsequently granted by the KZN High Court, Pietermaritzburg. It is also common cause that pursuant to such orders, letters of authority were issued to joint liquidators in each case by the Master of the KZN High Court, Pietermaritzburg. It is not in dispute in this regard that the joint liquidators appointed in relation to PMG Alberton were Zeenath Kajee, Enver Mohamed Motala, Ranjith Choonilall, Themba Zwelithili Zulu and Marco Pierre Voller; the joint liquidators appointed in relation to PMG Kyalami were Zeenath Kajee, Enver Mohamed Motala, Krishna Ruben Vengadesan, Nadasen Moodley, Aubrey Bongani Zenzele Ngcobo, and Mduduzi Christopher Nkomo; and the joint liquidators appointed in respect of PMG Westville were Zeenath Kajee, Enver Mohamed Motala, Krishna Ruben Vengadesan, Xolani Maqhawe Basil Zondo, and Johnine Winsome Elsie Hope. It is further not in dispute that two of the said joint liquidators, namely, Zeenath Kajee and Enver Mohamed Motala, who are common to all the liquidations in this matter, are both based in Houghton, Johannesburg.

[21] Unless the context indicates otherwise in this judgment, a reference to "the joint liquidators" in this judgment shall mean the joint liquidators of PMG Alberton, PMG Kyalami and PMG Westville, individually and collectively. As already indicated, apart from Kajee and Motala, the

remaining joint liquidators are based either in Durban or Pietermaritzburg.

[22] One of the joint liquidators of the second and third respondents (but not of the first respondent), the abovestated Vengadesan has filed a "replying affidavit" on behalf of all three respondents, in his capacity as the duly authorized representative of all three respondents in the present proceedings. This is so despite the fact that Kajee from Westrust (Pty) Ltd ("Westrust"), in Houghton, Johannesburg and Motala, from SBT Trust (Pty) Ltd, also in Houghton, Johannesburg are the only two joint liquidators, who have been appointed as the joint liquidators of all three respondents. Be that as it may, Vengadesan states in his affidavit that subsequent to the liquidations in each case in this matter, the first and second respondents did not trade, nor continue the respective businesses of the first and second respondents. It is accordingly averred by Vengadesan that the first and second respondents no longer have their principal places of business within the area of jurisdiction of this court.

[23] It appears from correspondence on record that the first and final liquidation and distribution accounts in respect of the three respondents have been drawn on the basis that the proceeds of the sale of the motor vehicles sold by the applicant form part of the liquidated assets of the respondents. Thus, it appears from correspondence incorporated in the founding papers that the attorneys of record of the applicant subsequently addressed letters to Westrust and the relevant joint liquidators in each case in November 2010, objecting to the fact that the joint liquidators had apparently assumed that the applicant's assets formed part of the liquidated assets of the respondents.

[24] By way of response, the respondents conveyed to the applicant's attorneys that although the applicant's claim against each respondent is secured, such claim is subject to a 10% fee by the joint liquidators. The applicant avers in these circumstances that after the relevant floor

plan agreements were cancelled, and prior to the commencement of liquidation proceedings in each case, the joint liquidators were not entitled to deduct 10% of the proceeds mistakenly paid to them.

[25] It may be mentioned that notwithstanding the apparent concession by the joint liquidators pertaining to 90% of the amount of the applicant's "secured claim", this portion of the applicant's claim has, to date, not been tendered by the respondents to the applicant. The joint liquidators have apparently simply refused to repay the applicant the monies mistakenly paid by the applicant to the joint liquidators.

[26] Against this background, the respondents contended on the basis of Louw's affidavit that there were material disputes of facts on the papers relating to the date of delivery of the cancellation letters by the applicant, as well as the date of subsequent collection of motor vehicles by the applicant. Vengadesan states in this context that apart from Louw, the joint liquidators were unable to obtain confirmatory affidavits from the other dealer principals involved in this matter, and have indeed been unsuccessful in contacting these dealer principals.

JURISDICTION

[27] Against this background, the respondents contended that this court had no territorial jurisdiction over the respondents in this matter. It was emphasized in this context that the liquidation orders of the companies in this matter were granted by the KZN High Court, in Pietermaritzburg. It was also emphasized that pursuant to such orders, letters of authority were issued to the joint liquidators in each case by the Master of the KZN High Court, also in Pietermaritzburg. Thus, the respondents contended that only the KZN High Court, in Pietermaritzburg (and possibly, the KZN High Court, Durban) are effectively connected to the respondents in this matter for jurisdictional purposes.

[28] The respondents' counsel further contended that his submissions in this regard were fortified by the fact that the registered offices of all

three companies in this matter were in KZN. It was accordingly contended that this court had no territorial jurisdiction over the respondents in this matter. The respondents' counsel also relied upon the judgment of Binns-Ward J in the recent case of *Sibakhulu Construction (Pty) Ltd v Wedgewood Village Golf Country Estate*, 2013 (1) 191 (WCC) to support his submissions in this regard. This judgment was premised upon the fact that section 23(3) of the Companies Act, 71 of 2008 ("the 2008 Act"), unlike the repealed section 12(1) of the Companies Act 61 of 1973 ("the 1973 Act"), required the registered office of a company to be in the same as its principal office.

[29] Counsel for the respondents also indicated in this context that there was nothing to suggest that the joint liquidators in this matter had obtained the authority of the Master of the High Court in KZN to carry on business in Gauteng, nor was there any suggestion that the joint liquidators intended to do so.

[30] In terms of section 19(1)(a) of the Supreme Court Act 59 of 1959 ("the SC Act"), all divisions of the High Court have jurisdiction over all persons "residing or being in" their area of jurisdiction. As the SC Act does not define the notion of "residence", in our law "residence" in relation to both natural and juristic persons has hitherto always been defined on the basis of the common law and/or the applicable statute. [2] On this basis, it has always been accepted that "residence" in the area of jurisdiction of a court is a sufficient connecting factor for jurisdictional purposes for both natural persons as well as juristic persons.

[31] As regards the notion of a "residence" of a juristic person, it was previously provided in terms of section 12(1) of the 1973 Act that a

---

[2] In dealing with the notion of "residence" of natural persons, Forsyth *Private International Law*, second edition at 164-5 it is stated as follows:

> "In s 19(1)(a) of the Supreme Court Act, it is provided that the various Divisions of the Supreme Court shall have jurisdiction over "all persons residing or being in" their areas of jurisdiction; but the term "residing" is not defined in the Act. Instead it must be defined in terms of the common law. As we have seen, s 19(1)(a) has been interpreted to mean little more than that Divisions of the Court are limited to their territorial jurisdiction accordingly to the principles to be found in the common law. In particular, the Courts have refused to equate "residing" in s 19 with "being", ie they have not considered their jurisdiction to be dependant *either* on mere physical presence *or* in residence. A strict distinction is drawn between these two concepts."

court had territorial jurisdiction in respect of any company, in the event that the registered office of such company, **or** (my emphasis) its "main place of business" was located within the area of jurisdiction of such court. Section 12(1) of the 1973 Act was subsequently repealed by the 2008 Act. To the extent that it is relevant in this context, section 1 of the 1973 Act, also defines the words "place of business" as

> "any place where the company transacts or holds itself out as transacting business and includes a share transfer or share registration office."

[32] Against this background, it was well established prior to the enactment of the 2008 Act that the registered office of a company and its main place of business could be located in different jurisdictions. On this basis, Hoexter JA accepted in the case of *Bisonboard Ltd v Braun Woodworking Machinery* 1991(1) SA 482 (AD) that a company can have a place of central control, which is located in a different place to its registered office.[3] Thus, it was held in the circumstances of that case that a court in the area where a company's registered office is located has jurisdiction, even though the said company's place of central control is located in an area outside of the court's jurisdiction.

[33] In terms of section 23(3) of the 2008 Act, a company's registered address can only be located at an office maintained by the said company, and not the office of a third party. As such, the company's registered office must be located at its only office or, if it has more than one office, then the registered office must be located at the place of its principal office. The transitional provisions in terms of schedule 5 of the 2008 Act do not deal with pre-existing companies in terms of the 1973 Act. However, it may be mentioned in this context that Rule 4(1)(a)(v) of the Uniform Rules of Court relating to service of proceedings against a company still permits service on an employee of the company at its registered address or its principal place of business, as contemplated

---

[3] Page 503D-E. In the circumstances of that case, Hoexter JA dealt with the notional concept of an incorporated company's residence for jurisdictional purposes, from a historical perspective, where the registered office and the principal place of business of that corporation are located in different places

in section 12(1) of the 1973 Act. Be that as it may, as already indicated, in the recent case of *Sibakhulu, supra,* Binns-Ward J considered the amendments in the statutory framework in this regard in the context of a court's jurisdiction in relation to a winding-up application. Specifically, in the matter before the court in that case, there was an application for winding-up a company in a division of the High Court and another application to place the same company under supervision for the purposes of business rescue in terms of section of 131(1) of the 2008 Act in another division of the High Court. It is well known in this regard that business rescue proceedings relating to financially distressed companies were not contemplated in terms of the 1973 Act, and accordingly constitutes an innovation introduced by the 2008 Act.

[34] Binns-Ward J concluded in relation to the facts before him that as section 12(1) of the 1973 Act had been repealed, and there was no equivalent provision in the 2008 Act, jurisdiction in respect of matters arising from the 2008 Act, fell to be determined on common law grounds, unless the 2008 Act reflected a different intention. The court considered it relevant in this context that the stated objectives of 2008 Act included providing for the efficient rescue of financially distressed companies. [4] The court also considered the unprecedented prescription in section 23(3) of the 2008 Act to be relevant in the circumstances. The learned Judge accordingly found that for the purposes of jurisdiction, at least in relation to matters involving applications for a change of status of a company, a local company resided only at its registered office (which is the same as its principal office in terms of the 2008 Act.).[5] Therefore, the court held that the only High Court having territorial jurisdiction in respect of an application for winding-up a company or placing a company under supervision for business rescue purposes, is the court where the registered office of the said company is located.[6]

---

[4] in terms of section 7(k) of the 2008 Act
[5] at paragraph 25
[6] at paragraph 24

[35] As regards companies in liquidation, section 9 of schedule 5 of the 2008 Act makes provision for the continued application of chapter XIV of the 1973 Act in relation to the winding-up of companies. The said chapter incorporates inter alia provisions relating to the appointment of liquidators, the powers of liquidators as well as the duties of liquidators. In terms of section 367 of this chapter, it is provided that pursuant to the grant of a winding-up order by the court, the Master of the High Court is compelled to appoint a liquidator or liquidators for the purposes of conducting proceedings in the winding-up. It is accepted in this context that upon the grant of a winding-up order, including a provisional winding-up order, the directors of the company cease to be such functionally, officially and nominally.[7]

[36] The general powers of liquidators in terms of section 386(1) of the 1973 Act include the power to summon a general meeting of creditors. It is also provided in section 386(3) of the 1973 Act that:

> "The liquidator of a company-
> (a) in a winding-up by the Court, with the authority granted by meetings of creditors and members or contributories or on the directions of the Master given under section 387;
> (b) in a creditors' voluntary winding-up, with the authority granted by a meeting of creditors; and
> (c) in a members' voluntary winding-up, with the authority granted by a meeting of members,
>
> shall have the powers mentioned in subsection (4).

[37] The specific powers of liquidators, as stipulated in subsection 386(4) of the 1973 Act, include inter alia, the power:

> "(a) to bring and defend in the name and on behalf of the company any action or other legal proceedings of a civil nature, ...: Provided that immediately upon the appointment of a liquidator and in the absence of the authority referred to in subsection (3), the Master may authorize, upon such terms as he thinks fit, any urgent legal proceedings for the recovery of outstanding accounts;
> (b) .... ;
> (c) ... ;
> (d) ... ;
> (e) ... ; [and]
> (f) to carry on or to discontinue any part of the business of the company in so far as may be necessary for the beneficial winding-up thereof: Provided that, if he considers it necessary, the liquidator may carry on or discontinue any part of the business of the company concerned

[7] See for example, *Attorney-General v Blumenthal* 1961(4) SA 313 (T) 314-315

> before he obtained the leave of the Court or the authority referred to in subsection (3) [by a meeting of creditors or members]...

[38] Even though section 386(4) of the 1973 Act provides inter alia for the abovestated powers as well as additional powers of liquidators, chapter XIV of the 1973 Act does not specifically provide for territorial jurisdiction in relation to the exercise of such powers by liquidators. Moreover, even though it is accepted on the basis of the provisions of the Act read together with both the 1973 Act and the 2008 Act, that the court where a company "resides" prior to liquidation, must necessarily have jurisdiction in relation to winding-up applications, both the 1973 Act as well as the 2008 Act appear to be silent on the area of jurisdiction of a court in relation to proceedings after liquidation, where such proceedings do not relate to the winding-up of a company *per se*.

[39] As already indicated, the 1973 Act specifically provides that legal proceedings in terms of section 386(4), must be instituted by or against a liquidator. Hugo J noted in this regard in the case of *Shepstone & Wylie and Others v Geyser NO* 1998 (1) SA 354 (N) at 359G, that in practice actions involving companies in liquidation are instituted in the name of the liquidator with the letters "NO" (*nomine officio*), or the company concerned is cited to be "in liquidation", as in the present case. Subsequently, Epstein AJ in the case of *Fey NO v Lala Exporters* 2011 (6) SA 181 (WLD) held that where a liquidator acts in terms of section 386(4)(a) of the 1973 Act, legal proceedings must be instituted in the name of the company in which the assets vests and cannot be brought in the name of the liquidator.[8] Be that as it may, both these matters did not relate to jurisdiction in relation to the powers, which are vested in liquidators.

---

[8] The Judge in this matter disagreed with the judgment of Msimeki AJ in the case of *Airborne Express CC and Another v Van den Heever NO and Others* (WLD Case No 05/18568) where the court held at paragraphs 12 and 13 of the judgment that it was unnecessary and pedantic to draw a distinction between cases where a liquidator acts in the interests of a company in liquidation and where a liquidator acts in his capacity as liquidator *nomino officio*. The Court accordingly indicated that the distinction in this regard was a question of form over substance.

[40] As regards the consequences of liquidation, Kirk-Cohen J stated in the case of *De Villiers and Others NNO v Electronic Media Network (Pty) Ltd* 1991 (2) SA 180 (W) at 184C-H[9] as follows:

> "Upon liquidation a company does not cease to exist nor do its assets vest in the liquidators - they remain vested in the company. In *Letsitele Stores (Pty) Ltd v Roets and Others* 1958 (2) SA 224 (T) Williamson J said the following at 227A-C:
>
> "I think the effect of a liquidation is adequately and properly set out at 343 of Pyemont's *Company Law of South Africa* 6th ed, where it is stated as follows:
>
> 'Immediately upon the winding-up order becoming operative the control of the company's affairs passes out of the hands of the directors and, upon the appointment of a liquidator, into those of a liquidator; but the company's corporate identity remains and its property remains vested in the corporation. The essential difference, however, is that the business is henceforth carried on not for the benefit of the members of the corporation but with a view only to its winding-up and the distribution of its assets among the creditors in satisfaction of their debts and, when these are satisfied, for the division of any balance among contributories. The assets are therefore held upon a trust in which the creditors are interested, and they can apply to the Court to have their rights enforced.'
>
> That may be very different from the effect of a sequestration order in the case of an individual. Under a sequestration order the individual is divested of his assets and they become vested first in the Master and then in the trustee. That is not the effect of a liquidation order... "

[41] Against this background, it is my view that in the absence of any provisions in the 2008 Act and chapter XIV of the 1973 Act, jurisdiction in respect of proceedings against the liquidators fall to be determined on common law grounds. Hypothetically in such cases, on the basis of the provisions of section 386(4)(a), a liquidator is empowered inter alia to institute legal proceedings, outside the area of jurisdiction of the court, which granted the winding-up order. Presumably, in such a case, the defendant or respondent could hypothetically lodge a counterclaim against a liquidator in these proceedings outside the area of jurisdiction of the court, which granted the winding-up order. Furthermore, it can hardly be disputed that assets and/or property and/or an office of a company, in liquidation, can hypothetically fall outside the area of jurisdiction of the court, which granted a winding-up order. Moreover,

---

[9] Quoted with approval by Epstein AJ in the case of *Fey, supra* at 187A-I

as in the present case, the Master of the High Court can hypothetically appoint a liquidator or joint liquidators, outside the area of jurisdiction of the court, which granted a winding-up order. In the latter eventuality, the place of central control (for the benefit of creditors) may or may not be outside the area of jurisdiction of the court granting the winding-up order; or one or more joint liquidators may administer part of the winding-up of a company outside the other joint liquidators' place of central control for the purposes of liquidation.

[42] It may be mentioned in this respect that the respondents' counsel suggested that it was necessary for the joint liquidators to obtain the authority of the Master of the High Court, Pietermaritzburg, to carry on business in Gauteng in relation to PMG Alberton and PMG Kyalami, as envisaged in section 386(3) of the 1973 Act. However, in terms of the proviso to section 386(4)(f), the joint liquidators are, of course, empowered in certain circumstances to continue or discontinue carrying on business in Gauteng, without the authority envisaged in section 386(3). Moreover, in terms of section 386(3), the said power to carry on or discontinue business in Gauteng can be exercised by the joint liquidators, not with the authority of the Master of the High Court, as suggested by the respondents' counsel, but with the authority granted by meetings with creditors and members or contributories as stipulated in subsection 386(3)(a),[10] or, if such authority is not granted, on the direction of the Master, in terms of section 387 or, if such direction is not given, with the leave of the Court under section 386(5) read with section 387(3).[11]

[43] More pertinently in the circumstances of the present case, the joint liquidators are empowered in terms of section 386(4)(a) to institute legal proceedings in this court against parties "residing" in this court's area of jurisdiction and/or causes of action arising in this court's area of jurisdiction. Moreover, if the *dicta* of Kirk-Cohen J, *supra,* are applied,

---

[10] *Griffin and Others v The Master and Others* 2006(1) SA 187 (SCA) at 190 D-G
[11] *Griffin, supra*

the assets and/or premises of PMG Alberton and PMG Kyalami in Gauteng in essence remain vested in these corporations, and control of these assets and/or premises passes from the directors of these corporations to the joint liquidators, for the benefit of the creditors of these companies, in liquidation. It is my view in these circumstances that the notional residence of joint liquidators can take the form of dual residency, as Hoexter JA found in relation to companies in the *Bisonboard* case, *supra*, both in the area where one or more joint liquidators are "registered" and the area of central control of the joint liquidators. [12] This is particularly so as it is my view that the principles underlying companies having more than one "residence" within the framework of the 1973 Act can potentially still apply in relation to joint liquidators if central control and/or joint administration of the liquidated company for the benefit of creditors is conducted by more than one joint liquidator from more than one jurisdiction.[13]

[44] In these circumstances, it is significant that the findings by Binns-Ward J in the *Sibakhulu* case were specifically limited to potential difficulties, which could arise if proceedings relating to the status of companies in winding-up applications and business rescue proceedings are instituted in different jurisdictions. These potential difficulties do not apply to the present case. This is particularly so as the new provisions of the 2008 Act relating to the registered office of a company being at the same location as the principal office of a company, obviously do not apply once a company is liquidated. However, as already indicated, the joint liquidators still have the power in terms of the 1973 Act to institute proceedings in this court's area of jurisdiction and/or to carry on any part of a business, or to "discontinue" any part of the business

---

[12] at page 495 D-496F. This view was also supported by Eloff J in the *Dairy Board v John T Rennie & Co (Pty) Ltd* 1976(3) SA 768 (W) case, where the learned judge opined if a company's principal place of business is situated elsewhere than its registered office, then the company might in law also "reside" at the latter place. Thus, both these Judges did not agree with Innes J in the case of *T W Beckett & Co Ltd v H Kroomer Ltd*, 1912 AD 324 where it was indicated that if the analogy of a natural person was to be followed, then a corporation could only reside at one place at a time.

[13] See similarly section 19(3) of the SC Act, which provides that the provisions of section 19(1) relating to residence must not be construed to limit in any way, the existing powers of jurisdiction at the commencement of the SC Act, nor is such division deprived of any jurisdiction, which it could lawfully exercise at the commencement of the SC Act

conducted by PMG Alberton and PMG Kyalami in Gauteng terms of section 386(4) of the 1973 Act.

[45] It is also relevant in my view that two of three affiliated respondents in this matter, had principal places of business as envisaged in the 1973 Act in Gauteng. Moreover, if one takes into account PMG Fourways, three of four affiliated companies in this matter had principal places of business in Gauteng. As such, it is not in dispute on the papers that the place of business and/or the places of central control of PMG Alberton and PMG Kyalami were both Gauteng. Furthermore, if it is assumed on the basis of the provisions of section 23(3) of the 2008 Act that a company incorporated prior to the 2008 Act is compelled to take steps to have its registered office and its principal office in the same location, and if it is further assumed that PMG Alberton and PMG Kyalami had not been liquidated, then both these companies would have been compelled to change their registered offices from KZN to Gauteng, where their principal offices were located. In addition, it is my view that as section 23(3) of the 2008 Act does not have any bearing in relation to the appointment of liquidators, fairness dictates that there is a legal presumption in these circumstances that the new principles underlying the said section do not apply retrospectively to liquidators of companies, which were already incorporated prior to the 2008 Act coming into effect.[14]

[46] As already indicated, it is also my view that in the absence of anything to the contrary in both the 1973 Act as well as the 2008 Act, the conceptual notion of "residence" of joint liquidators with administrative offices in different areas of jurisdictions, is analogous to a company having a registered office and a principal place of business in different locations in terms of the 1973 statutory framework. In the final analysis, it is my view that this court has jurisdiction in relation to all three

---

[14] It is well established that there is a general presumption in South African law on the basis of elementary considerations of fairness that legislation is not intended to operate with retrospective effect. See for example the judgment of Mokgoro J in the case of *President of the Republic of South Africa and Another v Hugo* 1997 (4) SA 1 (CC) at paragraph 102

respondents, to the extent that Gauteng constitutes a "seat", from which two joint liquidators administer the affairs of each respondent. As such, this "seat" constitutes a "residence" for jurisdictional purposes, irrespective of whether Johannesburg, or Pietermaritzburg or Durban constitutes the place of central control of the joint liquidators.[15]

[47] In view of my findings above, it is not necessary for me to consider the third respondent separately. However, I take cognizance of the fact that the registered office as well as the principal place of business of the third respondent in this matter, were both located in KZN. Thus, this respondent had no connection to this court, prior to liquidation, apart from its relationship to the other companies in Gauteng. Be that as it may, I am also of the view that there was considerable merit in the applicant's counsel's reliance upon the doctrine of *causa continentia* in the present circumstances.[16] Therefore, in addition to my findings set out above, it is my view that considerations of convenience, justice and good sense, in any event, justify an unnecessary multiplication of proceedings in relation the same subject matter in these proceedings. Specifically, as two of three respondents are effectively connected to the jurisdiction of this court, justice and convenience dictates that the extra-jurisdictional respondent (which is related to the above two respondents) should fall within the purview of this court's jurisdiction in respect of the same subject matter. Therefore, as with the case of *Permanent Secretary, Department of Welfare v Nguxuza* 2001(4) SA 1184 (SCA), (admittedly a class action relating to Constitutionally-entrenched rights), there was nothing to suggest that the applicant in this matter was engaged in impermissible "forum-shopping".[17] As such, there is good cause for cohesion of proceedings on the basis of the peculiar facts and circumstances of the present case.

---

[15] In the *Bisonboard* case, *supra* Hoexter JA, 500 I- 501D, referred to section 4 of English Civil Jurisdiction and Judgments Act 1982, which stipulated that a corporation had its "seat" in a particular part of the United Kingdom, on the basis that it has a registered office in that part, or its central management and control is exercised in that part or it has a place of business in that part

[16] See for example the case of *Roberts Construction Co. Ltd v Willcox Bros. (Pty) Ltd* 1962 (4) 327 (AA), where the Appellate Division applied the common law doctrine of *continentia causae*, where one court has jurisdiction over a part of a cause of action, which arose across two jurisdictional areas on the basis of considerations of convenience, justice and good sense.

[17] at paragraph 25 per Cameron JA

DATE OF DELIVERY OF LETTERS OF CANCELLATION AND VALIDITY OF CANCELLATION

[48] Having found that this court has jurisdiction in relation to all three respondents in this matter, it is necessary to determine whether the applicant validly cancelled the relevant floor plan agreements in each case on the 23rd of January 2009. It is common cause in this regard that the applicant was empowered in terms of each floor plan agreement to cancel the said agreement in the event that the applicant considered the relevant contracting party to be a credit risk.

[49] As regards the dispute on the papers relating to the incorrect clause numbers reflected on the copies of the letters of cancellation on record, it is my view that notwithstanding the said incorrect clause numbers, the contents of the said letters of cancellation unequivocally correlated with the provisions of the floor plan agreements relating to the power of the applicant to terminate the said agreements, in the event that the applicant considered the dealers concerned to be a credit risk. Thus, the references to the clause numbers in the letters of cancellation were obviously typographical errors. More importantly, it is my view that the said letters clearly and unequivocally conveyed to the dealers concerned that the floor plan agreements had been cancelled, as provided in the said agreements.[18] It is well established in this regard that in the absence of an agreement to the contrary, a party such as the applicant, who exercises his right to cancel an agreement, must convey his decision in this respect to the other contracting party in unequivocal terms.[19]

[50] The respondents' reliance on the *dicta* Hugo J in the High Court, Pietermaritzburg in the case of *Imperial Bank Limited v Levinia Ramsaroop (in her capacity as liquidator of Dezzo Trading 213 (Pty) Limited & Others* (case number 1893/2006) are in my view also

---

[18] See *Ntsobi v Berlin Mission Society* 1924 TPD 378 and *Ponnisamy and Another v Versailles Estates (Pty)* Ltd 1973 (1) SA 372 (A) 385G

[19] *Swart v Vosloo* 1965(1) SA 100 (AD) at page 105F-G

misdirected. In that case, unlike the present case, the instalment sale agreement between the parties, envisaged three formal steps for cancellation namely, a demand for immediate performance, a refusal of the said demand and eventual cancellation. The court found that the applicant in that case had proved at best only one of three contractual requirements. In the present case, the applicant's case is premised upon a clear and unequivocal cancellation of the instalment sale agreement in each case merely on the basis that the applicant considered the contracting parties to be a credit risk. No formal steps were envisaged in the floor plan agreements as a pre-requisite to cancellation of the said agreements.

[51] Whilst the respondents also aver that there are material disputes of fact on the papers, it appears that there is nothing to gainsay the evidence in the founding papers relating to delivery of cancellation letters to PMG Alberton and PMG Kyalami on the 23rd of January 2009. Thus, even though Vengadesan states in this regard that the joint liquidators were unable to obtain confirmatory affidavits relating to PMG Alberton and PMG Kyalami, it appears to me that it is not really in dispute on the papers that the letters of cancellation on record from the applicant to these dealers were delivered by hand on the 23rd of January 2009. This is particularly so as the copies of letters on record in relation to these two dealers reflect signatures signifying acceptance of the said letters, and in the case of PMG Kyalami, the said signature is also dated the 23rd of January 2009. Thus, I have no difficulty in finding that the letters of cancellation delivered by the applicant to PMG Alberton and PMG Westville on the 23rd of January 2009, validly cancelled the floor plan agreements with these parties on that date.

[52] As regards PMG Westville, Louw alleges that he did not receive letters of cancellation on the 23rd of January 2009. His bald denials in this regard do not address the evidence on record incorporated in the founding papers pertaining to delivery. It also appears that despite Louw's denials, he makes no positive averments in response to the

applicant's assertions in the founding papers relating to Penery taking delivery of letters of cancellation on the 23rd of November 2009. He also does not explain the signature and date on copies of the said letters of cancellation on record, which form part of the founding papers.

[53] Louw accordingly merely states in this respect that the other dealer principals advised him at an unspecified date that the applicant was also present at their premises and was making arrangements to remove various motor vehicles from their premises. As already indicated, he further states that he only first became aware of liquidation proceedings on Monday the 26th of January 2009, and suggests that the applicant only removed vehicles from the premises of PMG Westville on that date.

[54] Even though Louw does not stipulate the date on which he spoke to the other dealers, and even though he denies having received letters of cancellation from the applicant on Friday, the 23rd of January 2009, it is significant that he does not appear to dispute (and cannot in fact dispute) the fact that the other two dealers in this matter could only have spoken to him after they had received letters of cancellation from the applicant on the 23rd of January 2009.

[55] In these circumstances, on the basis of the facts not disputed by Louw, and the tenable facts admitted by him, it appears to me that it is more probable than not, that when Louw spoke to the other dealers, he himself had received letters of cancellation from the applicant, as an integral part of the applicant's undisputed "orchestrated plan", which was executed on the 23rd of January 2009. This is particularly so as Louw simply makes no positive assertion in his affidavit in response to the applicant's tenable assertion that Penery had accepted the applicant's letter of cancellation and copies thereof, on behalf of PMG Westville, on the 23rd of January 2009, nor does Louw tender any explanation in his affidavit pertaining to the signature, apparently on

behalf of PMG Westville, dated the 23rd of January 2009, on copies of the letter of cancellation on record.

[56] Louw's denials in this regard are accordingly untenable, and it is more probable than not that letters of cancellation were delivered to all three dealers in this matter on 23rd of January 2009 (and incidentally not to PMG Fourways) as part of an "orchestrated plan" which was put in place by the applicant on that day. Thus, even though the applicant effectively admits that this plan was not executed in relation to PMG Fourways, which is not a party to these proceedings, it is overwhelmingly probable that the said plan "came together" in relation to the three respondents in this matter. This is particularly so as Louw cannot dispute delivery of the letters of cancellation to PMG Alberton and PMG Kyalami on the 23rd of January 2009. Moreover, further plausible assertions by Labuschagne in reply, reinforce the probabilities relating to delivery to PMG Westville, as part of the applicant's orchestrated plan.

[57] Louw's further assertion to the effect that an unidentified representative from the applicant had informed him on the 26th of January 2009 that the third respondent was in liquidation was, in my view, also improbable in the circumstances. This is so by virtue of the fact that the final order for liquidation was only granted in March 2009. As already indicated in this regard, the commencement of liquidation from the 26th of January 2009, only became retrospectively effective when the said final order was granted in March 2009. Therefore, as at the 26th of January 2009, no one, let alone a representative of the applicant, could have been aware that PMG Westville had been liquidated.

[58] Taking all the above facts and circumstances into account, the suggestions by Louw (and the lack of positive averments by him) relating to the date of delivery of cancellation letters in this matter are so improbable and untenable that they can be rejected merely on the

papers.[20] There were accordingly no genuine disputes of fact relating to the date of delivery of letters of cancellation to the directors of PMG Westville.

[59] Therefore, it has been established on the papers before me that all the letters of cancellation to the three dealers involved in this matter were sent by the applicant prior to the commencement of liquidation on the 26th of January 2009. Each floor plan agreement was accordingly validly cancelled by the applicant, prior to the commencement of liquidation in each case on the 26th of January 2009. Thus, the applicant remained the owner of the motor vehicles subsequently removed by the applicant, without the encumbrance of any instalment sale agreement, and is entitled to all proceeds from the sale of the said vehicles.

[60] As regards the averred dispute of fact pertaining to the date of collection of motor vehicles by the applicant from PMG Westville, I agree with the applicant's counsel that Louw's suggestions pertaining to the subsequent date of collection of motor vehicles by the applicant from PMG Westville on the 26th of January 2009 is not relevant to these proceedings, as the relevant floor plan agreements were all effectively cancelled on the 23rd of January 2009. In any event, to the extent that the applicant appears to admit that arrangements for the collection of certain motor vehicles were made by the applicant on Monday, the 26th of January 2009, pursuant to cancellation of the floor plan agreements, it is my view that as at the 26th of January 2009, the undisputed collection of vehicles by the applicant at that stage could only have been based upon the applicant's cancellation of the applicable floor plan agreement with PMG Westville, as provided for in clause 11 of the said agreement, and not upon the liquidation of this company, as suggested by Louw. Moreover, it is not in dispute that the

---

[20] In accordance with the well known principles set out in the case of *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984(3) SA 623 (AD)

applicant requested delivery of the relevant vehicles on the 23rd of January 2009.

THE APPLICABILITY OF SECTIONS 83 AND 84(2) OF THE INSOLVENCY ACT

[61] Against the background set out above, I accept that after the letters of cancellation were delivered by the applicant on the 23rd of January 2009 in each case, arrangements were made to remove the motor vehicles, owned by the applicant, from the premises of each of the dealers involved in this matter. As already indicated, it is not in dispute that the applicant subsequently sold the said vehicles. It is further common cause that the proceeds of the said sales are currently being held by the joint liquidators, and that notwithstanding demand, the joint liquidators have refused to pay the said proceeds to the applicant.

[62] In these circumstances, as already indicated, the further issue in this matter relates to the applicability of section of 84(2) of the Act to the present matter. Section 84 of the Act provides as follows:

> "**Special provisions in case of goods delivered to a debtor in terms of an instalment agreement** (1) If any property was delivered to a person (hereinafter referred to as the debtor) under a transaction that is an instalment sale agreement contemplated in paragraphs (a), (b) and (c)(i) of the definition of "instalment agreement" set out in section 1 of the National Credit Act, 2005, such a transaction shall be regarded on the sequestration of the debtor's estate as creating in favour of the other party to the transaction (hereinafter referred to as the creditor) a hypothec over that property whereby the amount still due to him under the transaction is secured. The trustee of the debtor's estate shall, if required by the creditor, deliver the property to him, and thereupon the creditor shall be deemed to be holding the property as security for his claim and the provisions of section 83 shall apply.
>
> (2) If the debtor returned the property to the creditor within a period of one month prior to the sequestration of the debtor's estate, the trustee may demand that the creditor deliver to him that property or the value thereof at the date when it was so returned to the creditor, subject to payment to the creditor by the trustee or to deduction from the value thereof (as the case may be) of the difference between the total amount payable under the said transaction and the total amount actually paid thereunder. If the property is delivered to the trustee the provisions of subsection (1) apply."

Section 83 of the Act, in turn, relates to the realization of securities for claims by a creditor of a sequestrated estate, specifically in relation to movable property.

[63] Therefore, whilst subsection 84(1) determines the consequences pertaining to a sequestrated debtor, who has taken delivery of goods, which are the subject matter of an instalment sale transaction, subsection 84(2) determines the consequences pertaining to the sequestrated debtor, who has given up possession of property to a creditor, 30 days prior to sequestration. The dispute in the present proceedings is whether the provisions of subsection 84(2) contemplates an extant instalment sale agreement, or whether the said subsection is applicable in all instances when property is returned to a creditor within one month prior to the debtor's sequestration, irrespective of whether the applicable instalment sale agreement has been cancelled.

[64] The applicant's counsel contended that as with subsection 84(1), subsection 84(2) also only applied in instances where the applicable instalment sale still remains in force. The respondents' counsel, on the other hand, contended that subsection 84(2) applied autonomously of subsection 84(1), simply by virtue of the fact that a debtor had returned property to a creditor 30 days prior to the sequestration of the debtor. Thus, the respondents' counsel averred in relation to the present case that irrespective of whether the applicant had removed its motor vehicles on the 23rd of January 2009 or the 26th of January 2009, subsection 84(2) still applied.

[65] As it is not in dispute in the present proceedings that the debtors as envisaged in section 84 are no longer in possession of the property, which was the subject matter of the instalment sale agreements between the parties, it is common cause that the provisions of subsection 84(1) are not applicable to the circumstances of the present case. However, it may be mentioned by way of background in relation to subsection 84(1) that in the case of *Absa Bank Ltd v Cooper NO and Others* 2001 (4) SA 876, Botha J found that the whole tenor of subsection 84(1) of the Act suggested an agreement, which is still in

force at the time of sequestration. Thus, the learned Judge found that this subsection envisaged a situation where a debtor was still in possession of goods at the time of sequestration in terms of an instalment sale agreement. In addition, he also found that if the wording of subsection 84(1) was ambiguous, in the sense that it could refer to an agreement which was still in force as well as an agreement which had already been cancelled, then in those circumstances, subsection 84(1) should be interpreted in a way which is least invasive to a creditor's right of ownership.[21]

[66] Botha J made reference in his judgment to the case of *Epsom Motors (Pty) Ltd v Estate Winson* 1961 (1) SA 687 (E) at 692 E, where O'Hagan J also expressed the view that section 84(1) of the Act presupposes the existence of a contract binding on both parties. Thus, O' Hagen J also opined that section 84(1) of the Act did not apply where a creditor had unequivocally asserted that such a contract between a creditor and a debtor had been lawfully cancelled, prior to sequestration. The *dicta* in these cases have more recently been supported in the case of *Roering and Others NNO v Nedbank Ltd* 2013(3) SA 160 (GSJ), where van Oosten J concluded that section 84(1) of the Act applies to an instalment sale agreement, only in circumstances where such transaction is still in force as at *concursus creditorium.* [22] Thus, van Oosten J also expressed the view that it was "abundantly clear" to him from the wording of "section 84" that this section only related to agreements, which are in force.[23]

[67] Even though van Oosten J referred to section 84 of the Act in his judgment, it is clear from the context of his judgment that his comments were limited to subsection 84(1). The question accordingly remains whether the provisions of subsection 84(2) also presupposes an extant agreement between the parties. The editors of *Meskin* on *Insolvency Law* indicate in their commentary to this subsection that although the

---

[21] at 881 H-I and 882 A-B
[22] at paragraph 7
[23] also at paragraph 7, *supra.*

facts before Botha J did not relate to subsection 84(2) of the Act, the latter subsection also only applied if the relevant contract had not been cancelled, as at the date of sequestration of the purchaser's estate.[24]

[68] As already indicated, subsection 84(2) entitles a trustee of a sequestrated debtor to demand from a creditor, delivery of property returned to a creditor, or the value of such property as at the date the property was returned to the creditor, subject to payment by the trustee to the said creditor of the "difference between the total amount **payable under the transaction** and the total amount actually paid **thereunder"**(my emphasis).

[69] It appears to me from the wording of the above formula, that subsection 84(2) also contemplates an extant instalment sale "transaction" and not a transaction, which has already terminated. This is particularly so as the preceding subsection 84(1) also refers to "under a transaction" in relation to the insalment sale agreement, which is defined in subsection 84(1). Therefore, it appears to me that the wording of the Act envisages "such a transaction", which is in force, in relation to both these subsections.

[70] At a more fundamental level, as indicated by Botha J in relation to subsection 84(1), a number of startling anomalies and inequities could arise if subsection 84(2) was interpreted to apply to all cases where property is delivered to a creditor 30 days before sequestration, irrespective of whether the instalment sale agreement in question had previously been cancelled or not. This is particularly so as in the present case, where the creditor, has the undisputed contractual right to exercise its rights as an owner, without the encumbrance of a contract, by terminating the contract immediately, without any formal steps, as was required in the *Imperial Bank* case, *supra*. Furthermore, as indicated by Botha J in relation to subsection 84(1), it is also my

---

[24] 5 – 74(1).

view that to the extent that subsection 84(2) is ambiguous in the sense that it could apply to circumstances where property is returned to a creditor before sequestration of a debtor, after the applicable agreement has been cancelled, as well as circumstances where property is returned to a creditor, whilst the applicable agreement with a sequestrated debtor is still in force, then this subsection should be interpreted in a way, which is least invasive to the creditor, as the undisputed owner of the property in question.

[71] I was also not persuaded by the submissions in this regard made by the respondents' counsel on the basis of an article on section 84 of the Act by H N Pretorius and JD van der Vyver in relation to hire-purchase agreements in terms of previous legislation, prior to the enactment of the NCA.[25] The authors pointed out problems pertaining to the interpretation of the provisions of section 84 of the Act in this article, and also commented on subsection 84(2). Specifically, the said authors set out possible scenarios in relation to the return of goods in terms of previous legislation relating to hire-purchase agreements: thus, it was suggested in this regard that goods could be voluntarily returned by a hire-purchase buyer to the hire-purchase seller, and goods could also be returned to a hire-purchase seller on the basis of a court order based upon breach and cancellation of the relevant agreement. It was further suggested that if there was no court order then the hire-purchase buyer could not "return" the property in question as envisaged in section 84(2). I agree with the applicant's counsel that the reasoning in this respect appears to be flawed as the suggested scenarios were not mutually exclusive: a hire-purchase buyer could of course return goods voluntarily to the hire-purchase seller after a court order is granted.

[72] In the final analysis in this regard, for the reasons given, it is my view that the respondents have no interest in the motor vehicles returned to

---

[25] In the (1973) 36 *Tydskrif vir Hedendaagse Romeins-Holland Reg* 396

the applicant, nor can they claim any portion of the proceeds of the said vehicles on the basis that the proceeds of the said vehicles form part of the assets of the liquidated companies in this matter. Indeed, the joint liquidators effectively concede as much, to the extent that they appear to admit that they are liable to the applicant for 90% of the applicant's claims.

MOTION PROCEEDINGS

[73] The respondents' counsel further contended that the applicant had improperly used the present proceedings to make submissions in relation to section 84 of the Act, thereby claiming monetary relief under the guise of seeking declaratory relief. As already indicated, it was also averred in this respect that the applicant was not entitled to claim a money judgment based on enrichment, in view of the fact that there is a clear dispute of fact. For the reasons already indicated, I was not persuaded that there was any genuine dispute of facts on the papers. Furthermore, the respondents did not dispute receiving the liquidated amounts claimed by the applicant, both prior to and after the institution of proceedings in this matter. In addition, the joint liquidators did not establish any legal basis for withholding repayment of such liquidated amounts to the applicant. Indeed, as already indicated, the joint liquidators appear to admit liability for 90% of the applicant's claims, without tendering repayment to the applicant. As such, I am not persuaded by the averments in this respect.

SECTION 111 OF THE INSOLVENCY ACT

[74] Finally, it was contended by the respondents' counsel that as the applicant had objected to the accounts of the joint liquidators, the applicant had effectively set in motion the procedure set out in section 111 of the Insolvency Act relating to objections. As such, it was contended that the applicant was precluded from claiming the monetary relief sought in the notice of motion. I was also not persuaded by this submission in this regard, not least so by virtue of the fact that the joint liquidators appear to have conceded 90% of the

applicant's monetary claims, without making a formal tender for the repayment of the said portion of 90% of these claims to the applicant. The applicant's attorneys accordingly correctly informed the joint liquidators in this regard that pursuant to the cancellation of all the applicable floor plan agreements in each case prior to the commencement of liquidation proceedings, the joint liquidators were not entitled to retain 90% of the amounts claimed, and were also not entitled to deduct the remaining 10% as their fees.

CONCLUSION

[75] For the reasons given, the applicant is entitled to the declaratory relief sought relating to the cancellation of the floor plan agreements in this matter. The applicant is also entitled to the repayment of the proceeds of the sale of the applicant's motor vehicles, which were mistakenly paid by the applicant to the joint liquidators.

ORDER

[76] Based on the aforegoing, the following order is made:

A. It is declared that the floor plan agreements concluded between the applicant and PMG Motors Alberton (Pty) Ltd (now in liquidation), PMG Motors Kyalami (Pty) Ltd (now in liquidation) and PMG Motors Westville (Pty) Ltd (now in liquidation), were each cancelled on the 23rd of January 2009;

B. Judgment is granted in favour of the applicant:

i) against the first respondent for payment of the sum of R4 244 746-38;

ii) against the second respondent for payment of the sum of R9 126 987-12; and

iii) against the third respondent for payment of the sum of R3 993 171-89;

C. Each respondent is directed to pay interest on the above amounts at the rate of 15.5% per annum from the date of payment of the said amounts by the applicant to the respondent

concerned until date of repayment of the said amounts by the respondent concerned to the applicant; and

D. The first, second and third respondents are directed to pay the costs of the applicant, jointly and severally, the one paying the other to be absolved, including costs occasioned by the previous postponement in this matter as well as costs occasioned by the utilization of two counsel.

DATED AT JOHANNESBURG THIS 12th DAY OF AUGUST 2013.

_____

MAYAT J
JUDGE OF THE HIGH COURT
OF SOUTH AFRICA

Applicant's Counsel	:	A Gautschi SC and B Belger
Applicant's Attorneys	:	Lanham-Love Attorneys
Respondents' Counsel	:	A Kissoon Singh SC and G Harrison
Respondents' Attorney	:	V Chetty Inc.
Date of Hearing	:	24th of July 2013
Date of Judgment	:	12th of August 2013