IN THE KWAZULU-NATAL HIGH COURT, DURBAN
REPUBLIC OF SOUTH AFRICA

CASE NO: 5530/2011

In the matter between:

AZHAR ANSARI	First Applicant/Intervening Party
ASHRAF MASOOD	Second Applicant/Intervening Party

and

NABIL YOUSEF BARAKAT	First Respondent
COPPER SUNSET TRADING 424 (PTY) LIMITED (IN LIQUIDATION)	Second Respondent
ALBERT IVAN SURMANY N.O	Third Respondent
HEILA MAGDALENA HAMMAN N.O	Fourth Respondent
KURT ROBERT KNOOP N.O	Fifth Respondent
SANJEEV SINGH N.O	Sixth Respondent
MASTER OF THE SOUTH GAUTENG HIGH COURT, JOHANNESBURG	Seventh Respondent
MASTER OF THE HIGH COURT, PIETERMARITZBURG	Eighth Respondent

In re:

NABIL YOUSEF BARAKAT	Applicant
COPPER SUNSET TRADING 424 (PTY) LIMITED (IN LIQUIDATION)	First Respondent
ALBERT IVAN SURMANY N.O	Second Respondent
HEILA MAGDALENA HAMMAN N.O	Third Respondent
KURT ROBERT KNOOP N.O	Fourth Respondent
SANJEEV SINGH N.O	Fifth Respondent
MASTER OF THE SOUTH GAUTENG HIGH COURT, JOHANNESBURG	Sixth Respondent

MASTER OF THE HIGH COURT, PIETERMARITZBURG Seventh Respondent

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J U D G M E N T

KOEN J:

Introduction

[1] Before me are two applications, namely:

(a) an application by the first and second intervening parties to intervene in the application for the compulsory liquidation of Copper Sunset Trading 424 (Pty) Limited (hereinafter referred to as 'the first respondent ');

(b) an application for the compulsory liquidation of the first respondent ('the main application'), to be pursued to a final winding up order, should the application for intervention fail.

In this judgment, the intervening parties shall be referred to as the first intervening party and the second intervening party and the other parties shall be referred to as in the main application.

Background

[2] On 12 May 2011 the applicant launched the main application seeking the following order:

'1. Placing the first respondent under final winding up in accordance with the provisions 346 (1) (e), alternatively 346 (1) (b) and/or (c) of the

Companies Act 61 of 1973 as amended ('the Act').

2. To the extent that it is necessary to do so, directing that the second and third respondents be appointed as the joint provisional liquidators of the first respondent.

3. Directing that the cost of this application be costs in the winding up of the first respondent.

4. Further and/or alternative relief.'

[3] In the main application the applicant alleges *inter alia* that at all material times:

(a) he was a member of the first respondent, holding forty-five percent of the shares in the first respondent, in accordance with a share certificate, annexure 'NB2' dated '04/12/2003';

(b) he was a loan creditor of the first respondent in the sum of USD1,000,387.00, being a loan advanced by way of payments to various of the first respondents suppliers identified by the first intervening party;

(c) the first intervening party was the holder of forty-five percent of the shares in the first respondent, the remaining 10% of the shares being held by Nabil Darwish;

(d) the first intervening party represented to the applicant that he, the first intervening party, was the sole director of the first respondent. A company searched subsequently revealed that it was the second intervening party, and not the first intervening party who was reflected as the sole director of the first respondent in those records;

(e) the applicant never had any dealings with the second intervening party nor had the second intervening party ever been mentioned to him;

(f) the first respondent had been placed under voluntary winding up resulting from a special resolution to that effect registered with the Registrar of Companies on 7 February 2008 in terms of s 351 of the Act;

(g) the first respondent was represented by the joint provisional liquidators of the first respondent, being the second and third respondents appointed by the sixth respondent, the Master of the High Court, Johannesburg, and the fourth and fifth respondents appointed by the seventh respondent, the Master of the High Court, Pietermaritzburg;

(h) The first respondent at the time of the voluntary winding up, carried on business from 31 Silver Oak Avenue, Overport, Durban, which is also his registered address.

[4] On 7 June 2011 Singh A J granted an order, essentially as prayed in the main application, but adding to the terms of the order prayed in the Notice of Motion, in the following terms (with typographical errors corrected):

'1. That the 1st Respondent is placed under provisional winding up in accordance with the provisions of Section 346 (1) (e) of the Companies Act, Act 61 of 1973 as read with Section 9 of schedule 5 to the Companies Act, No 71 of 2008.

2. That the 2nd and 3rd Respondents are appointed as the joint provisional liquidators of the 1st Respondent pending the return date referred to

below.

3. That the costs hereof shall be costs in the application.

4. Prayers 1, 2 and 3 aforesaid shall operate as a provisional order pending the return day of this application on 28th June 2011.

5. That the Applicant is directed to effect service of this provisional order and of the application on:

   5.1 the 5th respondent;

   5.2 Azhar Ansarl;

   5.3 Asharaf Masood;

   5.4 Nabil Darwish;

   But insofar as Darwish is concerned service is effected on him by way of transmission thereof (to) his last known e-mail address and/or fax number.'

[5] On 26 June 2011 the intervening parties launched a substantive application to intervene under the same case number ('the Intervention Application').

[6] The relief claimed in the intervention application is as follows:

'1. THAT AZHAR ANSARI and ASHRAF MASOOD hereinafter referred to as the First and Second Intervening Parties be and are hereby granted leave to intervene in these proceedings and that they become the Eighth and Ninth Respondents in these proceedings respectively;

2. THAT NABIL YOUSEF BARAKAT, the Applicant in the main proceedings, and the First Respondent in this application, be directed

to pay the costs of this intervention on the scale as between attorney and client;

3. THAT paragraph 2 read with paragraph 4 of the order granted on 7 June 2011 be and is hereby reconsidered and set aside alternatively be and is hereby rescinded and set aside alternatively be and is hereby struck out as being part of any provisional order operating in this matter;

4. THAT the costs of striking out paragraph 2 and its operation in terms of paragraph 4 of the order dated 7 June 2011 be and is hereby costs in the cause of the application save and except in the event of it being opposed in which event that the party opposing be ordered to pay the costs of this application;

5. THAT the application be and is hereby adjourned sine die pending the outcome of the review application against the Master of the South Gauteng High Court, Johannesburg, (this Sixth Respondent in the main application) to review and set aside his decision to appoint ALBERT IVAN SURMANY N.O., the Second Respondent in the main application and HEILA MAGDALENA HAMMAN N.O. the Third Respondent in the main application, as liquidators in COPPER SUNSET TRADING 424 (PTY) LTD (IN LIQUIDATION), the First Respondent in the main application, such review to be instituted within 30 day of the grant of this order;

6. THAT the intervening parties be and are hereby granted leave to file opposing affidavits to this application after final determination of the review referred to in paragraph 5 above;

7. THAT this Honourable Court makes such costs order and it deems meet;
8. Further and/or alternative relief.'

[7] On the return date of the provisional order, the liquidation application again came before Singh A J, who granted the following order:

'1. That the provisional order of winding up of the First Respondent in accordance with paragraph 1 of the Court Order dated 7 June 2011 is extended until 1 August 2011.
2. That the application to intervene by Azhar Ansari and Ashraf Masood is adjourned to 1 August 2011.
3. That the applicant is directed to deliver its opposing affidavits in the intervention application on or before 13 July 2011.
4. That the First and Second Intervening Parties are directed to file their replying affidavits in the intervention application on or before 26 July 2011.
5. That a copy of this order shall be published on or before the 23rd day of July 2011 once in the Government Gazette and once in a daily newspaper published in Durban and circulating in KwaZulu-Natal.
6. That paragraph 2 of the Court Order dated 7 June 2011 be and is hereby reconsidered and set aside.
7. That paragraph 4 of the Court Order dated 7 June 2011 be and is hereby amended by the deletion of the reference to "2" therein.
8. That the Master of the High Court, Durban, is directed to forthwith appoint a provisional liquidator and/or provisional liquidators as

liquidators to the First Respondent.

9. That all questions of costs relating to the appearance on 28 June 2011 are reserved.

[8] Thereafter on 8th August 2011, the intervention application was adjourned to the opposed roll and the provisional order of winding up extended accordingly.

The Test for intervening as a Party:

[9] A party seeking to intervene in proceedings can either do so in terms of rule 12 of the Rules of Court, or in terms of the common law [1].

[10] A party seeking leave to intervene must prove that:

(a) he or she has a direct and substantial interest in the subject matter of the litigation which could be prejudiced by the judgment of the court; and

(b) that the application is made seriously and is not frivolous, and that the allegations made by the applicant to constitute a *prima facie* defence to the relief sought in the main application[2].

The test to be applied in determining whether or not a *bona fide* defence to the main application has been demonstrated is the same as the one that

1 *Minister of Local Government v Sizwe Development* 1991 (1) SA 677 (TkGB) at 678 H; *Ex parte Sudurhavid: In re Namibia Marine Resources v Ferina (Pty) Limited* 1993 (SA) 737 (NmHC) at 741 g; *Shapiro v SA Recording Rights Association Limited (Galeta Intervening)* 2008 (4) SA 145 (W) at 150 a-b para 10 and 11.

2 *Registrar of Banks v Regal Treasury Private Bank Limited (under curatorship) and Another (Regal Treasury Bank Holdings Limited Intervening)* 2004 (3) SA 560 W (at 573 e-f).
Registrar of Banks v Regal Treasury Private Bank Limited (under curatorship) and Another (Regal Treasury Bank Holdings Limited Intervening) 2004 (3) SA 560 W (at 573 e-f).

applies to warding off summary judgment[3].

The submissions of the Intervening parties:

[11] Mr Findlay SC (with him Mr Harrison) for the intervening parties submit, (in summarised form, and not necessarily in the same order), that:

(a) The intervening parties have a direct and substantial interest in the relief claimed which is self evident from the terms of the order granted by Singh AJ requiring that notice be given to inter alia the intervening parties, also because the applicant made defamatory comments of them;

(b) The intervening parties should in any event have been joined as respondents in the main application, arising from practice note 8.1.1.1 of the Practice Manual of the KwaZulu-Natal Division of the High Court read with *Ex-parte Three Sisters (Pty) Limited*[4] and practice note 11 read with *Umthimkhulu v Rampersad and Another (BOE Bank Limited Intervening Creditor)*[5];

(c) Paragraph 5 of the order of 7 June 2011 directing that the order and papers be served *inter alia* on the intervening parties, invited the intervening parties to become parties to the litigation.

(d) A party who obtains leave to intervene is not restricted merely to opposing on the merits but may raise points or objections *in limine*, unless his rights are specifically curtailed[6]. With the court on 28 June

3 *Ex parte Moosa: In re Hassim v Harrop-Allin* 1974 (4) SA 412 T (at 416 G-H).
4 1986 (1) SA 592 (D).
5 [2000] 3 ALL SA 512.
6 *Garment Workers Union v Minister of Labour* 1945 (2) PH F 69 (W) at p 104; Herbstein and Van Winsen The Civil Practice of The High Courts of South Africa p 228.

2011 amending the order granted on 7 June 2011 to ensure that the winding up occurred in accordance with the provisions of the practice in this division, as foreshadowed in paragraph 3 of the Notice of Motion claiming leave to intervene, the intervening parties' intervention had already, to such extent, been successful in ensuring that the error was corrected, and they should be awarded their costs.

(e) The mere fact that the intervention is opposed by the applicant demonstrates the very reason why the intervening parties should be granted leave to intervene.

These submissions will be considered below.

Have the intervening parties shown that they have a direct and substantial interest in the main application:

(a) Do the terms of the court order directing service of the papers on the intervening parties and inviting them to intervene per se have the effect of conferring upon them a direct and substantial interest:

[12] The court order of 7 June 2011 provided that inter alia the intervening parties be given notice of the application. That order did not grant them leave to intervene, nor did it have the effect of joining them as parties.

[13] In deciding whether to grant a particular order or not, a court exercises a judicial discretion. In many instances, as a matter of practice or substantive law or for other reasons, a court, in this division, may require that notice be given not only the respondent, but also interested persons generally, to show cause why a particular order should not be granted, for example:

(a) where a provisional liquidation or sequestration order is issued and not only the respondent, but also all other interested persons are called upon to show cause by a particular date why a final order should not be granted; or

(b) where a court directs that some notice, whether formal notice by service by a sheriff, or informal notice by pre-paid registered post, be given to persons specifically identified by name or by class in the order. This may be done due to a variety of factors, including that, on what is disclosed in the founding papers, the court has identified the particular persons as potentially having an interest which might be affected by the relief claimed. Examples abound but include for example a shareholder or director of a company or a director in a winding up application, or a person to whom improper conduct may have been attributed and/or which may be defamatory of his or her reputation insofar as relevant to the issues arising in the proceedings.

[14] The instances referred to in paragraphs 13 (a) and (b) above, simply recognize *prima facie* that such parties, whether identified by name or class, may have an interest in the litigation to which they are not parties. Their interest is however not such that in their absence there would be a fatal non

joinder. Indeed should they elect not to intervene in the proceedings after receiving such notification, any subsequent relief granted against will not be *res judicata* against them.

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[15] Receiving such notification does not automatically make them parties to the litigation with reciprocal rights and obligations against the existing parties to the litigation. If these persons, having received notice of the litigation, object to or support the relief claimed sufficiently strongly as wanting to advance their views and submissions before the court finally adjudicating on the matter, whether it be on the merits or some point or objection *in limine*, fairness to the existing parties to the litigation requires that the proceedings to which they are parties, not be delayed or burdened by admitting further parties, unless these persons are able to persuade a court that they have a sufficiently direct and substantial interest in such litigation and that their intervention would be bona fide and not frivolous.

[16] The fact that notice was required to be given to inter alia the intervening parties, whatever the motivation for requiring such notice, does not elevate them simpliciter to the status of co-respondents, as the intervening parties wish to become in the main application.

[17] If interested persons are called upon to show cause why a winding up order should not be granted, it serves as an invitation to, for example, a director or shareholder of the respondent who might want to place his views before the court hearing the winding up order, to do so, but unless it is agreed

between the parties that he or she has a sufficient substantial interest in the litigation and that he should be heard, he, in most instances, would be required formally to apply for leave to intervene, proving such direct and substantial interest, and only after obtaining the requisite leave, then become a party to the litigation.

[18] To invite interested persons to show cause, or to specifically require notice of an application to be given to specifically identified persons, but then to require them to have a direct and substantial interest which would justify their elevation to that of parties to the litigation, is, 'not blowing hot and cold'[7].

[19] Having been considered as deserving of being given notice of the application does not per se confer or establish a direct and substantial interest. The person receiving such notice must satisfy this court that he or she has such an interest based on some factual premise founding such an interest.

(b) **Do the relationships of the intervening parties to the first respondent establish a sufficiently direct and substantial interest to entitle them to leave to intervene:**

7 To borrow that phrase from the judgment of Lichtenberg J in *Wolhuter Steel (Welkom) (Pty) Limited v Jatu Construction (Pty) Limited (In provisional liquidation)* 1983 (3) SA 815 (O). What the learned Judge in that case called 'quite ludicrous', is the proposition that where a company is provisionally wound up, having the result that its board of directors is divested of its control of the company, it could be argued that those directors would not be interested in the issue whether a final winding up order should be granted. If the provisional order was to be discharged, it would have the result that the directors be re-vested with their powers. Clearly that consequence would provide a direct and substantial interest justifying their intervention to oppose the grant of a final order of liquidation.

[20] This is often also referred to as the parties' locus standi; that is legal standing in the sense of having a sufficiently direct and substantial legal interest in the subject matter of the litigation.

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[21] The high water mark in the founding affidavit in support of the intervention application is the ipse dixit of the intervening parties that they have a direct and substantial interest. They do not however state what this direct and substantial interest is. Neither the first nor the second intervening party dealt with the issue of any shareholding or directorships in the first respondent in the affidavit in support of the intervention application. During argument, the intervening parties however submitted that recourse should also properly be had to the founding affidavit in the main application to determine whether the intervening parties have a direct and substantial interest. I shall accept that it is competent to do so.

[22] The founding affidavit in the main application alleges that the first intervening party is a shareholder of the first respondent. It further states that the second intervening party might, at best for him, be a director of the first respondent based on what is registered in the office of the Registrar of Companies.

[23] Mr Findlay also contended, with reference to the financial statements of the first respondent for the year ended 28 February 2007 annexed to the founding affidavit in the winding up application, reflecting a shareholders loan owing to the first intervening party of R1 500 000 at 28 February 2007, that

the first intervening party also has *locus standi* as a creditor of the first respondent. Nowhere is it however independently confirmed under oath by the first intervening party that he is a loan creditor of the first respondent. More specifically, assuming that the first intervening party might have been a loan creditor at 28 February 2007, nowhere is it confirmed under oath that he is still a creditor at present, and if so, in what amount. The loan amount reflected in the 2007 financial statements, assuming it to be correct as it simply appears in financials which although annexed by the applicant are unsigned statements and alleged to have been prepared by the first intervening party, might for example have been repaid in the interim.

[24] The reliability and correctness of this financial statement is furthermore, in any event, open to doubt. Although it also reflects the applicant as holding a shareholders loan of US dollars 1 000 387, which at an exchange rate at the time of R6,04 converted to R6 420 337, the intervening parties in the intervention application have disputed the existence of this loan and that it is a shareholders loan, contending that the applicant had received consideration for any such monies that were advanced by him in the form of shares held by the applicant in the first respondent. The accuracy and the reliability of the very document now sought to be relied upon by the intervening parties for the status of the first intervening party as an alleged loan creditor, has thus been questioned by the intervening parties themselves. In these circumstances, particularly in the absence of a clear and unambiguous allegation on oath that the first intervening party still is a creditor of the respondent, I am not persuaded that the first intervening party has proved on clear, uncontroverted,

credible evidence that he has *locus standi* as a creditor of the first respondent.

[25] I shall accept, based on the contents of the founding affidavit in the main application that the first intervening party is a 45% member of the first respondent, that the first intervening party has locus standi as such to pursue the application for intervention.

[26] The position of the second intervening party as the sole director of the first respondent is extremely tenuous. The allegations do not go beyond the applicant in the founding affidavit in the main application stating that he had been advised by the first intervening party that the latter was the sole director of the first respondent, but that a subsequent company office search revealed the second intervening party as the sole director of the first respondent, not the first intervening party. This came as a surprise to the applicant as he had never had any dealings with second intervening party, nor was the second intervening party ever mentioned to the applicant. The *locus standi* of the second intervening party as a director of the first respondent has not been established by the intervening parties on a balance of probability on clear and satisfactory evidence.

[27] But, even if I am wrong in that regard, it nevertheless seems to me that the application for intervention falls to be dismissed on other grounds, not only in respect of the second intervening party, but also in respect of the first intervening party. These will be considered further below.

(c) Whether the intervening parties should and ought to have been joined as respondents in the winding up application:

[28] Essentially the contention here is that the failure to join the two intervening parties is akin to a fatal non- joinder. Reliance is placed by the intervening parties on inter alia practice directive 8.1.1.1 and the decision in *Ex parte Three Sisters (Pty) Limited (supra).*

[29] The *Ex parte Three Sisters* decision dealt with the position where a company resolves to apply to court for its own compulsory winding up. The present application is not such an instance. Practice directive 8.1.1.1 accordingly does not find application.

[30] But even if it did, creditors wishing to intervene would, in the absence of agreement, be required to satisfy the court that they were entitled to intervene.

The order of 28 June 2011:

[31] On the return day of the provisional winding up order, the court had a discretion which it had to exercise namely, whether to discharge the provisional order, or to extend the provisional order further and if the latter, the terms on which it might be extended.

[32] The reference in paragraph 6 of the order of 28 June 2011 that paragraph 2 of the original order was 'reconsidered', should not be construed as the result following after a formal reconsideration application was considered. There was no formal application for reconsideration of the provisional order in terms of rule 6(12)(c) by any of the parties to the litigation at that stage which was adjudicated upon that day. The Honourable Judge might have perused the application to intervene by that time, he might have had certain matters pointed out to him during argument, he might even have raised the correctness or desirability of paragraph 2 of his original order mero motu. Whatever the motivation for paragraph 2 of the original order being 'reconsidered' and paragraph 4 being amended, the learned Judge in extending the provisional order further, was entitled to stipulate and amend the conditions upon which this would be done.

[33] The intervening parties had not yet however at that stage been granted leave to intervene. That much is patently clear from par 2, 3 and 4 of the order dated 28 June 2011. Indeed the relief that leave be granted to intervene in paragraphs 1 and 2 of the application to intervene, was framed as separate and distinct from that relating to the points *in limine.* The application for leave to intervene and the costs order pertaining thereto were formulated as paragraphs 1 and 2 of the application to intervene. The points *in limine* and the costs order relating thereto, form the subject matter of paragraphs 3 and 4 of the application to intervene. But the *in limine* objections could and should only have been heard at the instance of the intervening parties once they were admitted as parties to the litigation.

[34] The fact that the learned Judge amended the terms upon which the provisional order was extended, to in effect take account of what was foreshadowed in the *in limine* point and objections of the intervening parties, does not necessarily mean that the 'intervening parties intervention had already been successful … to ensure that … the second and third respondents are not appointed joint provisional liquidators in the liquidation.' They were not parties to the litigation prior to them being granted leave to intervene, which at that stage had not yet occurred. Accordingly, they cannot succeed with a claim for costs either.

[35] In any event, what prompted the learned Judge to amend the original order as he did on the 28 June 2011 is not clear. Neither the leading counsel for the intervening parties nor the applicant was present on that day. Junior counsel for the intervening parties was present and advised through Mr Findlay that his recollection was that the issue of the possible irregular appointment of the second and third respondents was argued, or at least alluded to during some argument presented on that day. Any such argument should, with respect, not have been entertained where the intervention application was opposed and the opposed hearing not before him.

[36] All questions of costs relating to the appearance on the 28 June 2011 were reserved in terms of paragraph 9 of the order of 28 June 2011. The intervening parties have not persuaded me that they had advanced a basis upon which the appointment of second and third respondents was necessarily

irregular. They were in any event at that point not yet parties to the litigation having not yet been granted leave to intervene. On what is before me, the applicant never conceded the relief in paragraphs 3 and 4 of the application to intervene. The order the learned judge granted on the 28 June 2011 in fact gave effect to what is claimed in paragraph 3 of the Notice of Motion in the application to intervene, but on what grounds he did so, is not clear.

[37] That a party who obtains leave to intervene is not restricted merely to opposing on the merits but may raise points or objections *in limine,* unless his rights are specifically curtailed, is undoubtedly a correct statement of the law. However, it is a power open only to a party who has obtained leave to intervene. Prior to obtaining leave to intervene, there is no lis between a party who is seeking, but still has to be granted, leave to intervene and the existing parties to the litigation. The objections raised by the intervening parties to paragraphs 2 and 4 of the original order of 7 June 2011, clearly would qualify as such points or objections *in limine* which they may raised once they were granted leave to intervene.

Whether the intervention application is made bona fide and seriously and discloses a *prima facie* defence to the relief in the main application, or whether it frivolous.

[38] It is not stated clearly by the intervening parties whether their intention is to support or oppose the main application.

[39] A reading of the papers, notably the concluding paragraph of the replying affidavit where it is stated that the replying affidavit "is in no way intended to be an opposing affidavit…. (w)e simply seek leave to file such an affidavit", would suggest that they intend opposing the main relief claimed. However in the founding affidavit in support of the application to intervene, the concern expressed by the first intervening party is that "the applicant is trying to hi-jack the liquidation proceedings in order to avoid the investigation and dealings into his conduct in the matter", which together with an allegation elsewhere in the replying affidavit that "it is indeed the applicant who is being duplicitous", would suggest that the intervening parties also want the first respondent wound up, specifically that they desire some investigation into the applicant's conduct, such as could follow upon a compulsory winding up order.

[40] Interpreted generously, it appears that the intention of the intervening parties to intervene in the main application is confined to the following:

(a) to dispute the applicants claim as a loan creditor;

(b) to correct certain alleged irregularities in the order of the 7 June 2011 relating to the appointment of the second and third respondents in the main application;

(c) to maintain that the applicant should have followed a different procedure to the compulsory winding up of the first respondent.

The question arising is whether the pursuit of these objectives is not frivolous or irrelevant to the main application.

[41] Any alleged irregularities relating to the appointment of the second and third respondents, have already been corrected by the learned judge in his order of the 28 June 2011.

[42] Perhaps Justice has the intervening parties to thank for highlighting and drawing attention to those parts of original order providing for the immediate appointment of the second and third respondents as provisional liquidators, and causing that part of the order to be amended in the order subsequently issued on the 28 June 2011. But the fact remains that:

(a) those parts of the order, which also form the subject matter of the relief claimed in paragraphs 3 and 4 of the intervention application, have been altered;

(b) any such alleged irregularity was corrected before the intervening parties had been granted leave to intervene and became parties to the litigation.

[43] No purpose will be served in now granting leave to the intervening parties to intervene to claim relief, which has already been incorporated in an amended order and which therefore is no longer in issue.

[44] Earlier in this judgment I have referred to the dilemma of the third intervening party in seeking to rely on the financial statements of the first respondent as at 28 February 2007 to establish his own *locus standi* as loan creditor, but which, *ex facie* the document, also reflects the applicant as a

loan creditor in the amount alleged by the applicant, but which loan the intervening parties then dispute.

[45] At the level of probability, the probabilities certainly lean heavily on balance in favour of the contention by the applicant that he is in fact a loan creditor of the first respondent.

[46] However and in any event, the *locus standi* of the applicant in the main application is not confined to him having been a loan creditor. If his status as a loan creditor was the only basis on which the applicant claimed *locus standi* in the main application, the position might (but probably would not) have been different, but the allegations in the founding papers are also sufficiently wide to entitle the applicant to found his application for the winding up of the first respondent on his membership of the first respondent, as provided in section 346 (1) (c) of the Act No. 61 of 1973. The applicant has been registered as a member for a period of at least six months immediately prior to the date of the application[8]. The share certificate relating to his shareholding was issued to him on the 4 December 2003.

[48] To burden the estate with the costs of a full application, probably with oral evidence, to determine whether the applicant is in fact a loan creditor in the first respondent, when there are other grounds upon which the application for the compulsory winding up of the first respondent should follow and cheaper, more expeditious administrative procedures exist to resolve the

8 s346 (2) of the Act. However, on the strength of his membership, the application would be confined to the grounds in s 344 (b) (c) (d) (e) or (h) - see s 346 (2) of the Act.

status or otherwise of potential creditors, would not be in the interest of justice to grant leave to intervene on such basis alone. The applicant's allegations as to his loan and the amount thereof will not be binding on the liquidator of the first respondent[9].

Should the intervening parties be allowed to intervene to oppose the winding up on the basis that the applicant should have extended the powers of provisional liquidators under s 388 rather than proceeding under s 346:

[49] There is no reason in law which compels the applicant to pursue relief in terms of s 388 of the Act, as opposed to that pursued in the main application in terms of s 346[10].

[50] The choice to proceed either in terms of s 388 or 346 was that of the applicant, he being *dominus litis.* The argument that the applicant could have proceeded only in terms of s388, is frivolous and without merit.

[51] In either event, that is whether the relief was claimed in terms of s 388 of the Act or in terms of s 346 (1), an application to court would have been necessary. At best an application in terms of s 388 might have been less costly. But that would only be a valid argument which could at best afford a direct and substantial interest, if it could be said that there was any obligation

9 Swadiff (Pty) limited v Dyke NO 1978 (1) SA 928 (AD).

10 *Corigraim Trading SA v Resora (Pty) Limited* 2004 (2) SA 348 W at 351 A.

in law upon the applicant to have pursued an application in terms of s 388 as opposed to one in terms of s 346 (1). However s346(1)(e) of the Act recognizes that the applicant could apply in terms of s 346 (1) instead of bringing an application in terms of s 388.

[52] I am accordingly not persuaded that the intervention application is bona fide and not frivolous, in the legal sense.

Conclusion in respect of the intervention application:

[53] The intervening parties have not satisfied this court that leave to intervene should be granted. It accordingly follows that the application for leave to intervene should be dismissed with costs.

The winding up application :

[54] It clear from a reading of the allegations in the founding papers *per se,* but also when contrasted with those in the application for intervention, that there are accusations and recriminations between the applicant on the one hand and the first intervening party on the other, both holding 45% of the issued shares, of alleged wrongful, if not criminal conduct in regard to the affairs of the first respondent. The first respondent is a company with only three share holders. Being akin to a partnership, there should be close co-

operation and trust amongst the shareholders, particularly the applicant and the first intervening party. Clearly the basis of any such trusts has disappeared. The first intervening party contends apparently for the sole directorship of the first respondent being vested in the second intervening party, whereas the applicant knows nothing about that. In the absence of any trust between the parties[11] it is clear that the affairs of the first respondent have degenerated to a level where it is just and equitable that it should also be wound up in terms of s 344 (h) of the Act.

[55] All the formalities in respect of the winding up have been complied with. The applicant is entitled to a final winding up order in respect of the first respondent.

[56] There is no reason why the costs should not follow the result and that all costs relating to the application for the winding up be paid from the estate of the first respondent.

Orders granted:

To summarise, the following orders are granted:

(a) The application to intervene is dismissed with costs, such costs to include any costs relating to the application to intervene which were reserved on the 28 June 2011.

11 see Emphy v Pacer Properties (Pty) Limited 1979 (3) SA 363 (D)

(b) The first respondent, Copper Sunset Trading 424 (Pty) Limited is placed under a final winding up order in accordance with the provisions of s 346 of the Companies Act.

c) The costs relating to the winding up application, including any costs reserved on 28 June 2011, are directed to the costs in the administration of the estate of the first respondent.

DATE OF HEARING: 21/10/11

DATE OF DELIVERY: 16/01/12

FOR THE INTERVENING PARTIES:

MR A FINDLAY SC with him
MR G M HARRISON

INSTRUCTED BY: ASMAL & ASMAL ATTORNEYS
Ref.: M Asmal/ss/A224/GEN

FOR THE FIRST RESPONDENT IN THE INTERVENING APPLICATION
AND THE APPLICANT IN THE LIQUIDATION APPLICATION:

MR A G SAWMA SC

INSTRUCTED BY: BRIAN KAHN INC.
Locally represented by:
GARLICKE AND BOUSFIELD INC.
Ref.: Victoria Mc Donald