REPUBLIC OF SOUTH AFRICA

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

CASE NO: 5261/2013

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

....
DATE SIGNATURE

In the matter between:

IAN DONALD BRAKSPEAR Applicant

and

WEST DUNES PROPERTIES 5 (PTY) LTD Respondent

NEDGROUP TRUST (JERSEY) LIMITED Intervening Party

J U D G M E N T

N F KGOMO, J:

INTRODUCTION

[1] This is an application wherein the applicant discharged the legal representatives that were assisting him in the matter of the liquidation of his company, namely, the first respondent. He is presently acting in person or

representing himself. I have perused the entirety of the paginated papers herein and have satisfied myself that this decision was taken by the applicant consciously and deliberately as well as in the face of or having taken the consequences of his decision into account. I am also persuaded that the Judge President of this Division of the High Court, who case managed this matter until a sage was reached where everybody involved was satisfied that it was trial-ready, has done all that was humanly possible to assist the applicant in preparing for his momentous day.

[2] It is thus my finding that the applicant cannot claim to have been prejudiced or disadvantaged up to the time this trial commenced.

[3] Before the trial proper started in court I took it upon myself to address the applicant, in chambers and in open court, re-assuring him that I am alive to the reality that he is a lay-person and I would take extra care to ensure that he is not prejudiced throughout the leading of evidence until I start considering my verdict herein.

[4] I did so by watching over him very closely for signs of fatigue or loss of the requisite concentration and would afford him the time to rest, or if need be, adjourn proceedings to the following day so that he may regain his strength or composure overnight.

THE APPLICATION

[5] The applicant is seeking a declaratory order that a provisional order for the winding-up of the first respondent on 23 December 2008 was or should be declared a nullity and/or null and void *ab initio* because –

5.1 the case under which it is registered, being Case No 16970/2008 was never called in court or serve before a judge on the date in issue, being 23 December 2008;

5.2 there are no records of court proceedings relative to Case No 16970/2008 which a court of law can review;

5.3 the provisional liquidation order, which was in the form of a rule *nisi*, returnable on 05 February 2009, authorising the winding-up of West Dunes Properties 5 (Pty) Ltd ("*West Dunes Properties*" or "*the respondent*" interchangeably) is a worthless piece of paper as the case never served before Balton J of this Court on 23 December 2008; and

5.4 the sequestrating creditor's statement that –

> "*… it was owned R7 million, and this was due and payable …*"

as contained or set out in the founding affidavit (papers) initiating the liquidation proceedings is fictitious and based on a fraud and on manufactured/tampered evidence.

[6] The application is opposed by both the respondent and Nedgroup Trust (Jersey) Ltd ("*Nedgroup Trust*" or "*the Intervening Party*" interchangeably).

ISSUES TO BE DECIDED

[7] The issues to be decided herein are crisp and can be summarised as being the following:

7.1 Who signed the provisional liquidation order dated 23 December 2008 under Case No 16790/2008?

7.2 Was the application for such an order heard by Balton J?

7.3 Did the respondent in that application (West Dunes Properties 5 (Pty) Ltd) represented by attorney Fiona Scott and Adv S Alberts agree to the grant of such provisional order?

7.4 Did Balton J then grant a provisional winding-up order in her chambers?

7.5 Was the final liquidation order granted on 5 February 2009 unopposed by respondent's counsel thereat present; and

7.6 Is it agreed that Gorven J granted a final winding-up order unopposed on 5 February 2009?

[8] The applicant, Ian Donald Brakspear ("*the applicant*" or "*Brakspear*" interchangeably) is an adult male person describing himself in this application as "*an unemployed adult male*", ordinarily resident at 10 Stanley Place, Durban North, Durban. As on 23 December 2008, the applicant was the sole director of West Dunes Properties or the respondent in this matter.

[9] The respondent, West Dunes Properties 5 (Pty) Ltd, is a limited liability company duly incorporated and registered in accordance with the company laws of the Republic of South Africa ("*RSA*") under registration number 2004/003129/07; with its registered address situate at 1 Henwood Road, Greyville, Durban. The respondent is the registered owner of portion 1 of Farm 1281, Paarl, Western Cape, commonly known as Klein Normandie; held under title deed T.64312/2004.

[10] The intervening party, Nedgroup Trust (Jersey) Ltd ("*Nedgroup Trust*" or "*the intervening party*" interchangeably), was the former and final trustee of the Westley Trust. It has its principal place of business situate at 31 The Esplanade, St Hellier, Jersey, USA. The trust (Nedgroup Trust) ceased to

exist when it stopped having any assets of its own, which in terms of the company laws of Jersey, its existence would end.

[11] The intervening party used to be known as Fairbairn Trust Limited and was a wholly owned subsidiary of the Nedbank Group Limited, which latter group is a public company registered and incorporated in accordance with the company laws of the RSA. The Nedbank Group specialises in private banking and wealth management services. Fairbairn Trust Limited was formerly the duly appointed corporate trustee of the Westley Trust. Fairbairn Trust Limited is now known as the Nedgroup Trust.

BACKGROUND FACTS AND FACTUAL MATRIX

[12] The general background facts and circumstances of this matter can only be best set out by dealing with the evidence led by the respective sides as their respective versions as they appear to be totally divergent. It is to that during cross-examination, especially of the applicant who testified first, most of the dissimilarities appeared to melt away, letting a clearer picture shine through. The lack of legal background and/or legal know-how on the part of the applicant also meant that the court had to navigate carefully around issues, allowing him to lead his evidence as best he could without being interrupted; albeit with due regard to the rules relevant to the leading of evidence. At times this Court had to condescend to his "*level*",[1] explaining

[1] Not used derogatorily, but as an indication of how this Court had at times had to assist the applicant to understand issues or questions.

situations or concepts couched in legalese for him in simple, straight-forward language.

[13] What is common cause is that Fairbairn Trust Limited NO ("*Fairbairn Trust Ltd*") launched an urgent application in this Court under Case No 16790/2008 against the respondent thereat, West Dunes Properties 5 (Pty) Limited ("*West Dunes Properties*") for an order –

13.1 dispensing with the Rules of this Court as to service and notice, directing that the application be heard as one of urgency;

13.2 that a rule *nisi* do issue calling upon the respondent thereat, being West Dunes Properties as well as all other interested persons to show cause, if any, to this Court on a date to be fixed by the court, why West Dunes Properties should not be finally wound up;

13.3 that the order so issued operate, with immediate effect, as a provisional order for the winding-up of West Dunes Properties;

13.4 that a copy of the order, if granted, be served forthwith on the respondent (West Dunes Properties) at its registered office situate at Office 1, Henwood Road, Greyville, Durban; and on the South African Revenue Service ("*SARS*"); and

13.5 that a copy of the order so or if issued be published once in the Government Gazette and once in a daily newspaper published and circulating in KwaZulu-Natal; on or before a specified date.

[14] The matter was pencilled for hearing on 23 December 2008 at 09h30 or as soon thereafter as counsel may be heard.

[15] The application was served on the applicant in our present matter, Ian Donald Brakspear, who promptly opposed the application and deposed to an answering affidavit, both of which were served on Fairbairn Trust Ltd on 22 December 2008.

[16] It is also common cause that the application did serve at court on 23 December 2008.

[17] That is as far as the common cause facts go.

[18] The applicant herein was represented at court by attorney Fiona Scott of F B Scott & Company and Advocate S Alberts, and the applicants at the liquidation hearing were represented by Adv Nicholson and Adv Manca.

[19] At this stage of the proceedings the applicant, Ian Donald Brakspear was the sole director of West Dunes Properties and attorney Fiona Scott and Adv S Alberts were acting for West Dunes Properties at his instance and request.

[20] According to Fiona Scott, she had fully discussed this application with the applicant (Donald Brakspear) in the presence of Adv Alberts and a liquidation expert and lawyer, Graham Perry.[2] She and Adv Alberts consulted with the applicant on 20 December 2008 at her offices at Umhlanga, Durban.

[21] According to Fiona Scott further, the applicant's –

> "*… knowledge of his functions and duties as a director (of West Dunes Properties) and what same entailed was disturbingly lacking. (He) acknowledged that he had no accurate knowledge of his duties as a director and what same entailed, similarly so, in respect of the shareholding and correct legal position of shareholders. He was likewise completely in the dark as to the complex different legal structures which were in place in various foreign jurisdiction, i.e. Guernsey and the British Channel Islands. The matter was further complicated by virtue of the fact that there was an entity known as JAM Brakspear Overseas Trust (JAM) of which (the applicant), his sister and his mother were beneficiaries. Later it was established that the minor children of his deceased brother were also beneficiaries of this Trust …*"[3]

[22] It was also during this consultation that it emerged that there was also a separate entity known as Westley Trust ("*Westley Trust*" or "*WT*") which was also part of the equation. Fiona Scott stated in her affidavit that –

> "*… The (applicant) himself was likewise not clear about the true and correct factual and legal position of a separate trust known as the Westley Trust (WT). The (applicant) believed he was the settler of this trust and that his mother and sister were the sole beneficiaries. This*

[2] Affidavit of Fiona Belinda Scott dated 5 February 2012 in Series 400 folios 30-58.
[3] Series 400 page/folio 32 para 3.

> *trust had been established at the instance of the (applicant) himself pursuant to the advice he had obtained from Nedbank. This trust had received funds from JAM which ultimately enabled WDP (West Dunes Properties) to purchase the immovable property known as Klein Normandie. (He did not have all the documents and supporting documents insofar as the various legal entities were concerned.*"[4]

[23] What was of the greatest importance at this consultation was the applicant's disclosure to them that there was an unsatisfied judgment of approximately R15 million against West Dunes Properties in favour of Rand Merchant Bank and that in satisfaction of that judgment the immovable property belonging to West Dunes Properties, Klein Normandie, was sold at a public auction to Zambrotti Investments 35 (Pty) Ltd for R18 million. The applicant's plan was to settle the judgment debt of R15 million and then utilise the balance of R3 million from the proceeds to pay some sundry creditors of West Dunes Properties including the salaries due to the farm manager.

[24] According to Ms Scott (Fiona) from their discussions with the applicant it was clear and self-evident that West Dunes Properties was insolvent : It did not even have a bank account and there was an ostensible traces of a muddling of finances between the applicant personally, his wife's bank account and West Dunes Properties' finances. It was also clear that the applicant's *modus operandi* were bound to lead to a failure on his part to comply with his statutory duties and obligations as a director which *prima facie* appeared to have been either ignored or disregarded by the applicant.

[4] Series 400 page 32 paragraph 4.

[25] When confronted with the folly of his ways, the applicant is reported to have simply said "*… If I did something wrong, I did not know …*" repeatedly.

[26] Furthermore, the applicant clearly failed to appreciate the fact that he was not a shareholder in West Dunes Properties or the implications of that fact. What was also apparent or clear was that, in spite of all the above, the applicant appeared to be and was the sole controlling mind in respect of West Dunes Properties, more so that he averred that he had continually been using substantial amounts of his own personal funds in West Dunes Properties after a previous shareholder or director had perpetrated a massive fraud in West Dunes Properties.

[27] When it became clear that the applicant did not fully comprehend what a liquidation process entailed, Fiona and Adv Alberts invited an independent liquidator, attorney Graham Perry for the latter to give the applicant independent advice as an independent expert third party in such matters. This was exacerbated by information from the applicant that his previous attorneys had started negotiations with the wealthy Rupert Family of the Western Cape to sell the already in-execution-sold Klein Normandie farm. This attorney was on Christmas period leave, hence the applicant approached Fiona Scott. It also emerged that the applicant and his attorney were embarking on this potentially fraudulent conduct because the transfer of the farm to Zamprotti Enterprises had been held in abeyance so that unlawful occupants thereon or squatters could first be evicted.

[28] According to Fiona Scott's affidavit further it was explained to the applicant that if the liquidation proceedings are allowed to proceed unopposed, the entire process could actually be used to the advantage of West Dunes Properties because if there was a liquidation, the liquidators would have the statutory powers to decide whether to uphold or cancel the sale to Zambrotti as transfer had not yet been effected. This translated to the fact that, since the Rupert Family was prepared to purchase the farm for amounts ranging between R25 million and R30 million, the applicant could be benefitting if the liquidator decides to cancel the R18 million deal and go for the more lucrative Rupert Family one.

[29] After the applicant had consulted with Graham Perry, all of them, including the applicant and Graham Perry ("*Perry*") brain-stormed the matter and arrived at a conclusion that, although an answering affidavit would still be filed in opposition to the winding-up application, at court counsel (Adv Alberts) would nevertheless consent to a provisional order being granted. This would be in keeping with counsel and Perry's advice and recommendation that the provisional liquidation or winding-up order would be allowed to be obtained subject to the *proviso* that they would not be agreeing to the *causa* as raised by Fairbairns Trust Ltd.

[30] The applicant (Brakspear) fully agreed with the advice and gave instructions that the plan be implemented on 23 December 2008 according to Fiona Scott as corroborated by Adv Alberts in a confirmatory affidavit.

[31] The above consultations and decisions took place before the date of the hearing of the winding-up application, being 23 December 2008. According to the applicant's evidence in this Court, decisions were taken on 22 December 2008. To use the words of Fiona Scott –

> "*… Once the complainant had consulted with Mr Perry, Advocate Alberts, myself and Mr Perry again consulted with (him). It was decided that the liquidation would be opposed on the basis that WDP (West Dunes Properties) did not owe the money that was being claimed in the Application. It was further decided, for tactical reasons, that whilst the debt was disputed, it would be prudent to permit the liquidation to be granted so that the Zambrotti sale would be cancelled and the Applemint's (new Rupert Family's) offer accepted. The (applicant) accepted that WDP was in fact de facto insolvent which in essence meant that WDP was unable to pay its creditors, even before the Liquidation Application was served on WDP and the (Applicant).*[5]

[32] At court on 23 December 2008, the applicant's legal team reportedly acted in accordance with the agreed-upon plan or scheme of things, throughout keeping the applicant in the loop concerning developments, also securing his final agreement or mandate to let the winding-up rule *nisi* to be granted.

[33] Reportedly further, the applicant was invited to be at court but he declined the invitation as doing so he would be compounding his frustration and trauma about the state of his affairs.

[34] According to Fiona Scott, the parties had prepared a draft order which Adv Alberts and the applicant's legal team took to Balton J in chambers. The

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[5] Series 400 page 35 paragraph 3.9.

latter made the Draft Order an order of court and his secretary, Mrs Van Rooyen recorded that finding on the cover of the court file as it is or was protocol or usage in this Court. She stamped the Draft Order and signed it. The return date was 5 February 2009.

[35] Even during the period subsequent to the granting of the provisional winding-up order of West Dunes Properties on 23 December 2008 until the return date the applicant on various and/or several occasions met with all of the liquidators appointed independent of Fiona Scott and Adv Alberts, co-operating with the execution of their duties in terms of the interim order : He gave them information, assistance and input in order to facilitate the conclusion of a deal relative to the sale of the farm to a higher bidder before the return date. He also flew to Cape Town in the company of Fiona Scott, Adv Alberts, the three appointed liquidators and one Ian Wyles, the purpose being to take all of them around the farm as well as afford the joint liquidators the opportunity to see it first hand, a fact that would enable them to negotiate a final deal with Applemint (Rupert Family instrument) with better facts and knowledge in hand.

[36] At no stage or point during this period did the applicant voice any shock or horror at West Dunes Properties being liquidated. According to Fiona Scott –

> "*… In fact, he was overjoyed at the higher purchase price, as it would result in his personal liability being reduced to all the creditors.*"[6]

[6] Series 400, page 36 paragraph 3.11.

[37] When the matter served in court on the return date, i.e. 5 December 2008, the applicant was still represented by the same attorney (Fiona Scott) and counsel (Adv Alberts). It is common cause between the parties that the applicant's legal counsel confirmed to Gorven J, the judge presiding over the matter, that the granting of the final liquidation order was not being opposed. The judge granted the final liquidation order.

[38] In any event, the applicant is not litigating over or about the final winding-up order directly. I am saying so in the light of his pleadings which are resplendent or permeated with statements like:

> "*10. The respondent(sic) and subsequently my constitutional and legal rights were violated in Case 16790/2008, which was allegedly before the Durban High Court on 23 December 2008.*
>
> *11. It is my understanding an order* [sic] *made without any authority at law is a void order. That an order that is 'null and void ab initio' is not an order at all. That, since a void order is not a final order but is in effect no order at all, it cannot even be appealed. That a void decision is not in essence a decision at all, and never becomes final. A void order is equivalent* [sic] *to a blank piece of paper.*
>
> *12. That in principle none of the legal consequences of the order attach to it. It therefore has no status. A void order cannot be ratified and lapse of time* [sic] *makes no difference in this regard. All proceedings founded on a void judgment are themselves regarded as void. A void order is regarded as a nullity, and the situation is the same as it would be if there was no order. It has no legal or binding force or efficacy for any purpose or at any place* [sic], *it is not entitled to enforcement …*"

[39] The above-quoted excerpt comes from paragraphs 10, 11 and 12 of the founding affidavit of the applicant in support of his application in this matter. The entirety of the applicant's founding affidavit is a rambling, incoherent and mostly incomprehensible document littered with assassinated characters of prominent attorneys, advocates and other people. I had to sift very carefully through all the welter of chaff to decant what its gist was all about.

[40] The applicant's papers allege fraud : he avers that Case No 16790/2008 was never heard on 23 December 2008 and that neither did it serve before Balton J in chambers. According to him, the applicant in that matter never filed with the papers any certificate of urgency, there were no exceptional circumstances that would have justified or allowed the matter to be heard by a judge in chambers. On this aspect he concludes:

> "*… Consequently no Provisional Order could have ever been granted by Judge Balton on 23 December 2008 …*"[7]

[41] He also alleges "*criminal fraud*", whatever it means. Regarding this, he avers that –

> "*… The R7 million loan claim by the applicant (put forth as the causa leading to the liquidation application) is fictitious. The founding affidavit of the applicant is filled with misrepresentations, false claims, omissions and no supporting documents. These were fraudulent representations made under oath to induce a decision that caused*

[7] Applicant's founding affidavit at 14(i) appearing at folio 7 of Volume 1 of the paginated bundles.

prejudice to many others and are now the subject of a criminal investigations [sic] *by the HAWKS (CAS 1229/04/2010). Their investigation has revealed that material facts contained in the founding affidavit are not true and not supported by any documentary evidence …*"[8]

[42] Alleging "*fraud upon the Court*" the applicant states that –

"*… (iii) On the extremely improbable possibility that it was before a Judge, the attorney and advocate for the applicant and (the) advocate for the applicant and the respondent* [sic] *have then committed fraud upon the court. A fraud has been perpetrated because material facts were concealed from the court and there would have been some material misrepresentations made to the court by the applicant and respondent legal teams* [sic] *as confirmed in the HAWKS investigation …*"(8.1)

[43] On his allegations of "*forgery and uttering*" the applicant put it as follows:

"*(iv) Forgery and Uttering. The Provisional Liquidation Order dated 23 December 2008 for 16790/2008 which was given to me by my attorney and which has the signature of 'B Chetty' on it, is forged. The appropriate Court Registrar has not signed it. Documents that in law were, at the time they were first used, and to this day remain and are NOTHING BUT FORGERIES …*"

[44] He also relies on "*Usurpation of a Power*" about which he states the following:

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[8] Paragraph 14(ii) of applicant's founding affidavit at folio 7 of Bundle 1.
8.1 loc.cit.

> "*The Provisional Order received by the Master of the (High) Court on 23/12/2008 and upon which* [sic] *file D.198108 was opened, was unsigned and had no authentication showing that it originated out of the Durban High Court notwithstanding that the Order was not typed by a High Court typist and was not in the standard format of the court orders issued out of the Durban High Court. It was, is and remains to this day, a worthless piece of paper. The Master of the (High) Court had no legal power to act on this piece of paper …*"

[45] The date the applicant is referring to when he says "*… to this day …*" is the date the founding affidavit was deposed to, being 15 May 2013.

[46] The applicant's founding affidavit spans some forty-four pages. I will not mention all the allegations and accusation therein contained at this stage. If need be, material parts thereof would be dealt with when the evidence is analysed after *viva voce* evidence leading has been completed. Suffice to state that the applicant avers that his own attorney and his counsel never appeared in court on 23 December 2008 to oppose the application for the granting of a provisional winding-up order of West Dunes Properties; the attorneys and/or counsel for the applicant at that application allegedly equally never appeared in court to move for that application; the court order being bandied around as being one that was granted by Balton J on that date is a forgery or the result of a conspiracy by the abovementioned officials or officers of the court aimed at depriving him, unlawfully and fraudulently, of his control and/or ownership over his company, i.e. West Dunes Properties 5 (Pty) Ltd.

[47] To add "*insult to injury*" the applicant's affidavit(s) are also resplendent with allegations that there were no valid grounds for the liquidation proceedings to be launched in the first place; that resulting in the respondents herein correspondingly tendering evidence that according to them tended to show and prove that the liquidation process was justified.

EVIDENCE LED IN COURT IN THIS HEARING

[48] The applicant was the first witness on the witness stand. I regurgitate it as and how it was led.

The Applicant (Ian Donald Brakspear)

[49] He stated that the "*Court Order*" dated 23 December 2008 was not the result of any valid court proceedings and that the loans upon which the liquidation proceedings that gave rise to the order were all fictitious.

[50] He however did not provide any substantiation for the above allegations despite numerous and sustained requests during cross-examination that he do so. What he relied on as substantiation of his allegation that the court was fictitious was what he termed as intimations by a registrar at the Durban High Court, a Ms Chetty, alleging that a signature appearing on the document purporting to be hers, was in fact not hers – a fact allegedly confirmed by Mr Yossi Vissoker, who calls himself a "*… personal, industrial and document examiner*" or "*graphologist*" allegedly licensed by or

belonging to the American Board of Forensic Examiners – a Board certified in Behavioural Profiling and in *(sic)* Forensic Document Examination.

[51] The abovementioned alleged *ipse dixit* of or by Yossi Vissoker was provisionally admitted because it was hearsay and its full acceptance as evidence would follow formal testimony by him, failing him testifying, the evidence would be struck out or be regarded as struck out.

[52] After the liquidation application was served on him he opposed it and filed an answering affidavit. His attorney was Fiona Scott and his counsel was Adv Sydney Alberts.

[53] According to him, his instructions to his attorney and his counsel were that the granting of the interim or provisional order of winding-up be opposed. Furthermore, he was assured that all relevant facts necessary for such an order to be granted by a court were set out in the application; various relevant and material documents like term loans, payment details and proof of the advancing of money to or on behalf of the respondent would first be requested.

[54] He further stated that he was advised by his legal representatives not to attend court on 23 December 2008 as matters such as these were normally dealt with through the papers filed without leading *viva voce* evidence. Furthermore, he was advised that the order sought would not be granted because the claim was not for a liquidated sum of money.

[55] On 23 December 2008 he was telephoned by Fiona Scott, notifying him that they had lost the case in court; also that from the moment the provisional winding-up order was granted he no longer had control over the farm Klein Normandie situated in the Western Cape. The return date was 5 February 2009.

[56] Fiona Scott recommended to him that they go for the so-called "*friendly liquidation process*" and for that purpose she introduced him to a liquidation specialist and attorney, Graham Perry.

[57] In fact, he was introduced to this Graham Perry the day before the liquidation matter was to serve in court, being 22 December 2008. Graham Perry explained to him the advantages of allowing the liquidation application to proceed and a provisional order to be granted on 23 December 2008. The manner in which facts are set above are not contradictions by this court but hoe the evidence was led.

[58] On 24 December 2008 he met with Fiona Scott, Adv Alberts and Graham Perry in Fiona Scott's offices to strategise how to oppose the final liquidation order being granted on 5 February 2009. After a 3-4 hour consultation it was agreed that the prospects were good for the opposition of the granting of the final winding-up order on 5 February 2009. He was urged to organise as many of the creditors involved as possible to assist in having

Graham Perry appointed as one of the joint or co-liquidators of the respondent.

[59] During January 2009 he led a group comprising Fiona Scott, Adv Alberts, Graham Perry and the three liquidators to Klein Normandie as they wanted to see it and how it was run, first hand. It is so that at this stage, this farm had already been sold in execution to Zambrotti Investments 35 (Pty) Limited during June 2008. That was after the respondent could not satisfy a debt of about R14 million due and payable to First Rand Bank ("*FRB*") and the farm was attached. It was purchased for the sum of R18 million. However, as at the time of the granting of the provisional and final winding-up orders, being 23 December 2008 and 5 February 2009, the farm had not been transferred into the names of Zambrotti Investments 35 (Pty) Ltd ("*Zambrotti Investments*").

[60] During this same period, a better offer to purchase the farm was received from Applemint Properties 99 (Pty) Limited, a company owned by the Rupert Family of the Western Cape ("*Applemint*" or "*Rupert Family offer*" interchangeably). The joint or co-liquidators, by names, Eugene Nel, Marlene Elizabeth Retief and Graham Bryan Perry NNO ("*the joint liquidators*") then instituted or issued an application out of this Court under Case No 2017/2009 in terms of section 386(5) of the Companies Act[9] for an order granting them the power among others to cancel the Zambrotti sale and to then sell Klein Normandie to Applemint.

[9] Act 61 of 1973, as amended.

[61] It should be noted that the applicant herein, Ian Donald Brakspear, fully supported the application. Despite vehement opposition by Zambrotti Investments, the order was granted in favour of the joint liquidators on 13 February 2009. The joint liquidators then cancelled the Zambrotti sale and accepted the Applemint offer.

[62] On 5 February 2009 this witness (applicant) also did not attend court, according to him, on advice from his legal representatives. He was shocked later that day when he was informed that a final winding-up order was granted in court. He rushed to and had a violent argument with Graham Perry, accusing him of having misled him into agreeing to let the provisional order be granted. His world "*fell through*" when upon his enquiry, he was told the liquidation process cannot be reversed. He was however pacified when assured that attempts would be made to have the debt that led to the final liquidation of the respondent expunged.

[63] Subsequent to the above date he co-operated with the joint liquidators and the Master of the High Court's office to take the process forward.

[64] On 3 September 2010 he went to the Registrar's office at the Durban High Court to peruse the court file. He was surprised Adv Manca was recorded on the court file as his legal counsel. He went to confront Adv Alberts about it. The latter assured him that he (Alberts) appeared at court

representing him (Mr Brakspear and/or the respondent) on both occasions the matter served before court.

[65] He phoned the official court proceedings' transcribers, Sneller's, and made enquiries. They told him that the liquidation matter did not appear among the cases called on 23 December 2008 but did serve in court before a judge on 5 February 2009. He then asked for copies of transcripts for 23 December 2008 and 4-5 February 2009.

[66] The witness produced a copy of the front of the court file whereon proceedings for both 23 December 2008 and 5 February 2009 are recorded. Balton J's secretary, a Mrs Van Rooyen confirmed the signature authenticating those inscriptions on the file as hers.

[67] For the record, the material inscriptions on the court file for Case No 16790/2008 (Liquidation Proceedings) are as follows:

67.1 Coram Balton on 23 December 2008 –

"*… Order ito (in terms of) Draft Order marked X.*"

67.2 Coram Gorven J on 5 February 2009 –

"*… Order : Final winding-up granted.*"

[68] He further stated that Mrs Van Rooyen explained that there are matters that are dealt with in court – those matters would appear on or in the court transcription. There were other matters that would serve before a judge in chambers. Those matters would have their outcomes endorsed on the cover of the court file only

[69] This Court was referred to Annexure “LCK4” in Court Bundle 6, folios 566 to 567 as paginated. The two folios are copies of the court roll that was dealt with by the court in chambers on 23 December 2008. Case No 16790/2008 appears as the last but one matter at folio 567. The Registrar’s stamp imprinted on it says 19 December 2008. I take it, without deciding it, that this is the date on which that court roll was compiled.

[70] That concluded the applicant’s evidence-in-chief.

[71] The applicant was taken through a lengthy and rigorous cross-examination spanning four days. The results of this process are such that an injustice would be done to what proceeds it yielded if it is not dealt with in full at this stage.

[72] The first cross-examiner was Adv Hartzenberg SC acting for the respondent i.e. the joint liquidators. It was not that long. The following came out.

[73] The applicant was the sole director of the respondent at the time it was placed under an order of provisional winding-up and when it was finally wound-up. He denied that West Dunes Properties as a company was in financial distress when the application to wind it up was launched. He however conceded that the farm, Klein Normandie was attached in execution for the debts of West Dunes Properties 5 (Pty) Ltd, and subsequently sold in execution at an auction for R18 million to Zambrotti Investments.

[74] It also emerged that after accepting service of the liquidation application the applicant went to consult with Fiona Scott who procured and called in Adv Alberts onto the case. Their consultations spanned two days, i.e. Saturday 20 December 2008 and Sunday, 21 December 2008. After canvassing the idea of a friendly sequestration the lawyers recommended Graham Perry, an experienced and knowledgeable liquidation practitioner. They all consulted with Graham Perry on 22 December 2008 and the conclusion, as advised by Graham Perry, was that it was to the company's and Ian Brakspear's advantage if they conceded to the granting of a provisional liquidation order on 23 December 2008 provided Graham Perry is voted in as one of the joint liquidators to look after the interests of West Dunes Properties and its controllers or owners. The process would allow the liquidators to cancel the R18 million sale to Zambrotti Investments and pursue a more lucrative deal with the Rupert Family through their instrument, Applemint Properties 99 (Pty) Ltd which was worth around R25 million.

[75] It further emerged that the applicant or say Ian Brakspear was happy with this arrangement. He even took the joint liquidator and his lawyers to the farm in the Western Cape. In his own words, the applicant conceded that he played along and did everything after 23 December 2008 well knowing that he was participating in and/or taking the liquidation process concerning West Dunes Properties forward. Some of his party even went to see Mr Johann Rupert to tie up the loose ends around the sale of Klein Normandie to his company. The applicant stated that he went along with the whole scheme of things although according to him there was no monetary difference between the deal involving R18 million and the Rupert Family one in the amount of R25 million as the difference was the R7 million that was the trigger for the liquidation process which he said he still disputed.

[76] The applicant was referred to an e-mail he sent to his attorneys dated 10 December 2008[10] in which he (applicant) advised that –

76.1 the company (West Dunes Properties) records and financial statements were only then being drawn up as "*… we have neglected to have it done in preceding years …*";

76.2 he had been repeatedly assured that the full amount of R25 500,000 (Twenty Five and Half Million Rand) should have been paid into the attorney's trust account by the closing date;

[10] Series 100 bundle, folios 64 to 65.

76.3 the purchaser (Applemint) was fully aware of the fact that the transfer process "*… is almost concluded with Zambotti Investments and that we cannot retract from actions completed. And that the agreement shall not lapse if transfer to Zambrotti occur after the closing date* …";

76.4 a lease agreement had been drawn up between the previous owner, Kingfield Finance (Pty) Ltd and another subsidiary of Money Box, namely, Southern Palace Investments 24 (Pty) Ltd on 29 April 2004;

76.5 the total liabilities of West Dunes Investments could (at the time) exceed R25 000 000 and that same (liabilities) were estimated to be around that figure;

76.6 the claims of Ian Brakspear in his personal capacity could exceed R4 million;

76.7 it has come to his knowledge that squatters have entered the premises (farm); and

76.8 that the company –

> "*… has had a very turbulent past with reference to fraud against the company, ranging from the initial purchase price, the value of agriculture and the previous farm manager's claims …*"

among others. It was clear that taking into account what he wrote about, the liability of West Dunes Properties should have been no less than R32 000 000, making it commercially insolvent. He agreed with it but added a rider that this is but an assumption and insolvency should not be assumed.

[77] When shown documents contradicting his version of events and written by himself, at first he started denying the signatures as his. When the heat of cross-examination intensified, he relented or changed to state that the signature looks like his although he does not remember the occasions he did append them to such documents. At long last he conceded that all those signatures were his.

[78] For instance, he was referred to an article published in the 13 February 2014 edition the tabloid, "*Noseweek*"[11] from which all the adjectives, language, accusations and allegations of fraud, fictitiousness non-existent court orders are crafted in the same style as the applicant's founding affidavit and heads of argument.

[79] The applicant acknowledged knowledge of the article as well as the fact that he indeed did give information about the liquidation application to it, especially its senior reporter or editor, a Mr Weltz.

[80] Some of the excerpts from this article go along the following lines:

[11] Series 600, folios 164 to 170.

80.1 "*In what must rank as one of the most bizarre cases in recent times, Durban-based business man, Ian Brakspear had his family business liquidated in 2009 for a R7 million bank loan he says he never asked for or received …*

And, he claims, that the signature on the liquidation order that stripped him of everything he owns has been forged. Its not just Brakspear saying that. The police and a top-flight forensic investigator agree with him.

Brakspear, as you can imagine, is pretty angry at the unfortunate turn his life has taken of late. The 7 million which was supposedly loaned by Nedcor-owned Fairbairn Private Bank in Jersey to the Westley Trust, of which he is a beneficiary, is a complete fiction, he says.

> *'The loan never happened. It was all based on fraud. From start to finish. I've been cleaned out.'*

Well, as it turns out, just about everything. Today, Brakspear – having lost just about everything in the liquidation – is now under threat of losing his house and whatever else he still owns. He went from millionaire to pauper in the blink of a banker's eye and was forced to send his mother to the UK where she now lives in a friend's garage …[12]

80.2 "*Brakspear is now seeking a declaratory order from the Durban High Court to determine whether a liquidation order based on a forged court registrar's signature is legal and binding or null and void. If null and void, then he will apply to have the whole liquidation set aside. If legal and binding, he will then apply to have the liquidation set aside on the grounds that it was based on a fraud.*

Should he succeed in his declaratory order, the ensuing damages claims against Nedcor and its subsidiaries should be large enough to melt a few faces at Nedbank's head office at 135 Rivonia Road in Sandton. Even if he doesn't succeed in the Durban High Court, he plans on taking the case all the way to the Constitutional Court …"[13]

80.3 "*… let's wind back the clock to happier times, around 2003, when money was seemingly plentiful and the property boon was in its infancy. The Franschhoek farm – called Klein Normandie – came on the market, and Brakspear teamed up with some partners to acquire and develop the property. They approached Nedbank Private Bank to see if they could raise a mortgage bond, and the subject turned to offshore structures and how*

[12] Folio 164, Series 600, paragraph 1.
[13] Series 600, folio 165, paras 1 and 2.

everyone was doing it. Brakspear already had an offshore trust, the Brakspear Trust, registered in the Isle of Man. These were the days when South Africans were being suckered into shady offshore structures they knew little about. Smooth talking bankers were parachuted into Johannesburg and Stellenbosch to round up the suckers and ship their money abroad where they could be fleezed for outrageous fees."[14]

80.4 "*Brakspear was persuaded to move funds from the Brakspear Trust in the Isle of Man to Fairbairn Private Bank in Jersey. Noseweek covered the story in 2010, showing how convoluted was the structure set up by the bankers:*

> *'The bank would, set up a new Trust, the Westley Trust, which would invest the money in a specially created company on the British Virgin Islands, which would (in turn) provide a bank guarantee to a South African holding company, which would borrow the money locally (using the guarantee) to buy the shares in another company, West Dunes Properties, set up to buy the farm.'"*

80.5 "*Brakspear had no idea what was going on, but he slept soundly believing he had the best bankers money could buy on his side.*

When the bankers decided to fire the old trustees and replace them with trustees of their own, Brakspear didn't bat an eye lid. He thought they knew what they were doing. After all, they were his bankers!

In anyone's book, this is a disaster waiting to happen. Having bankers as our trustees while arranging bank loans and guarantees on your behalf …"

"'*Yes*", *concede Brakspear 'I woke up too late.'*"

80.6 "*The disaster was not long coming. The trust secured a guarantee of £500 000 (five hundred thousand pounds) (then worth about R7 million) which made it possible for RMB (Rand Merchant Bank – the mother bank to First National Bank family) to advance a mortgage loan for the wine estate (Klein Normandie). Brakspear found out that his partners had paid R4 million more for the farm than they let on, and pocketed the difference. He eventually booted the partners, only to find that the farm itself was a black hole that swallowed money faster than it coughed it out again.*"

80.7 "*It was not long before West Dunes fell behind on its bond repayments, and RMB called up the R7 million guarantee.*"

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[14] *Ibid.*

80.8 "*It was downhill from there. Brakspear attempted to sell the farm and rid himself of the headache. He found a buyer for R37,75 million – a good R18 million more than he had paid for it. That would have been an elegant exit from an otherwise fraught business engagement, but then MD of Fairbairn Trust, Justin Thomas, let on to the buyer that this was a distressed sale.*"

80.9 "*Enter the vultures. The R37,75 million offer suddenly disappeared and RMB attached the farm and put it up for auction at R18 million. The same buyer who previously offered R37,75 million managed potentially to save himself R18 million simply by withdrawing his offer and picking up the farm at auction …*"[15]

[81] The applicant did not contradict or show any shock or surprise at all that is quoted above. As already indicated above, the language used above has striking similarities and, simply, affinity to the applicant's papers in this application.

[82] To add fat to the fire, the Noseweek journalist who "*baby-sat*" the story in the tabloid introduced himself to me in chambers on the first day I met counsel and the applicant for introductions, as the applicant's friend and advisor. He also asked for leave to sit next to the applicant in court to assist him with tips as the trial progressed. Although I generally baulked at the idea of a lay-person sitting as some pseudo- or *quasi* counsel to an unrepresented litigant, I relented, at the applicant's plea and entreaty, and permitted him to do so as long as he does not conduct himself in any manner that may be or appear to be obstructive in the court or bringing the decorum of the court and its proceedings into disrepute. Counsel for the respondent litigants indicated that they did not have any objection if the applicant is permitted to sit

[15] Series 600, folios 165-166.

alongside any person he feels comfortable with if that would make him conduct his case meaningfully. Fairness and justice was the overriding consideration when this unusual indulgence was permitted.

[83] Throughout the cross-examination the applicant's case has always been –

> "*I was the only person who had the authority to bind West Dunes to any contractual obligation. I had no knowledge of this (R7 000 000) loan, and West Dunes made no request for this loan, made no board resolution to authorise any borrowings or enter into a loan contract and absolutely did not sign any loan contract. These are the documents I have been asking to see for five years, plus proof of payment and bank statements depicting payment of this loan. To date I have received nothing. Zilch.*"

[84] After reading through all the papers filed in this application, the applicant's above standpoint, which was the high-water-mark of his case, is too simplistic and does not appreciate the intricate mini-plots that collapsed into one another with "*domino-effect*" until West Dunes Investments was called upon to cough up the £500 000 paid on its behalf via various guarantees. There is no doubt, as counsel for the respondent (the joint liquidators) demonstrated to the court and proved to the applicant who in turn did not offer anything to contradict it, that RMB indeed was entitled to call up a guarantee of £500 000 (R7 000 000) on 5 July 2007 when West Dunes failed to carry out its obligations in terms of the mortgage bond granted to it. Fairbairn Private Bank was obliged to pay RMB because it stood surety for Westley Trust. Westley Trust had no money of its own to pay. Through the

intricate relationships created by guarantees Brakspear Trust became liable to "*carry the can*". After Fairbairn Private Bank paid the R7 000 000 (£500 000) to RMB, it called on its guarantee and the Brakspear Family Trust of which the applicant as well as his mother and sister among others were beneficiaries was the next entity to pay in terms of the terms of the applicable guarantees or security.

[85] The applicant had a problem with this as he averred that his liability to pay should be underpinned by a loan agreement to be valid. Adv Hartzenberg painstakingly took the applicant through the paper trail up to the point where the liability landed on West Dunes Investments. He demonstrated to him how it came about that the R7 000 000 be paid out of the distribution amounts in respect of the Brakspear Trust, especially the distribution that stood to his credit therein. It is this amount, which was £7 000 000 in South African rands, that was debited where it was on the books at Fairbairn Private Bank to replace the same amount that Fairbairn Private Bank had paid to RMB.

[86] This process was explained again and in more detail when Adv Woodlands SC cross-examined the applicant on behalf of the intervening party, being Nedgroup Trust (Jersey) Limited.

[87] Adv Woodlands SC continued to ask the applicant pertinent and pointed questions that clearly proved that the applicant was an untruthful as well as unreliable witness when he vehemently denied having anything to do with the decision to circumvent the sale of the farm to Zambrotti Investments

by consenting to the winding-up of West Dunes Investments. It emerged that up to and until the second half of 2010, the applicant was a knowing and willing participant in the liquidation processes relating to West Dunes Investments.

[88] He conceded that he was by law obliged to attend a meeting of creditors in Cape Town on 18 March 2009 but did not. His explanation was that his attorney, Fiona Scott advised him not to attend. He however added that he had authorised or delegated Fiona Scott to attend on his behalf. When reminded that the meeting of creditors was where debtors or representatives of entities liquidated were to be interrogated in person and where they were to prove or disprove claims, he professed ignorance.

[89] He was shown Annexure EN11 appearing in Series 300 folios 64 to 70 which is a claim by himself in his personal capacity lodged with the Master of the High Court ("*the Master*") in the amount of R6 824 260 in respect of money lent and advanced to West Dunes Investments as well as some loan accounts. He denied his signature therein. He also denied signing another claim in the amount of R7 800 000 in favour of Money Box (Pty) Ltd at folios 71 to 75 of Series 300 Bundle.

[90] As the cross-examination continued probing at his credibility he changed tag and stated that the signatures indeed look like his but he cannot remember appending them on those documents. In the same breath, he

conceded that those two claims were lodged with the Master at his instructions.

[91] Such a contradiction in my view can only come from lack of truthfulness and/or sincerity.

[92] Woodlands SC probed this aspect further : The applicant was then shown a letter from auditors Nolands Richmond addressed to his attorneys Fiona Scott dated 17 March 2009[16] in which the auditors stated that Ian Brakspear (applicant) instructed them to notify her that they were finalising claims to the Master in the amount of R6 824 260 in respect of funds advanced, not in the amount of R4 355 355; salaries and expenses to be reimbursed in the amount of R1 050 000; and interest in the amount of R1 418 905. This is the same amount as the claim that he had just denied knowledge of. This time he retracted his denial of his signature on Annexure EN11[17] and admitted those signatures he denied were his.

[93] After again at first professing no knowledge of the Money Box claim,[18] professing to be seeing it for the first time in court and knowing nothing about the documents so displayed to him, he was shown the two resolutions authorising him to sign powers of attorney and all other documents necessary to ensure claims are lodged with the Master.[19]in this regard.

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[16] Series 300, folio 69.
[17] Folios 64 to 70 of Series 300 bundle.
[18] Folios 71 to 75 of Series 300 bundle.
[19] Power of attorney in respect of applicant's personal claim at folio 68 of Series 300; and the resolution at folio 64 and power of attorney at folio 75 in respect of the Money Box claim.

[94] He was immediately hit by the "Damascene experience" and suddenly remembered that he had signed all those documents he was vehemently denying having seen or signatures whereon he professed not to know or recognise.

[95] The applicant then proceeded to also retract his denial of knowledge of the lying-for-inspection of the liquidation and distribution accounts as well as the Government Gazette publications accompanying those liquidation and distribution accounts.[20]

[96] Worse still, even in connection of the Master's approved liquidation and distribution accounts together with their advertisements respectively in the Government Gazette of 25 June 2009 and 10 July 2009, the applicant for an inordinate period of time professed to know nothing about them only to very belatedly concede that he all the time knew everything about them.

[97] Letters written by his attorneys to various functionaries and colleagues acting at his instructions also proved that the applicant was at all times complicit with his attorney and advocate as well as his "*appointee's*" or "*nominee's*" (i.e. Graham Perry)assertions that it was their agreed upon strategic move to still file an answering affidavit opposing the application to wind-up West Dunes Investments while they knew that they were going to concede to the granting of the provisional winding-up order; the reason being

[20] Series 300, folios 118 to 132.

that it should be on record that they nevertheless did not agree as to the rationale or basis tendered by the applicants in that application.

[98] The applicant was also grudgingly forced to admit that he received the Master's intimation to him that his claim and that of Money Box had been rejected. That letter is dated 9 May 2011.

[99] He appeared to be like a defeated dog with its tail between its hind legs when he conceded that he has not substantiated his allegations that the claims and documents were fictitious and fraudulent. He agreed that on the documents shown or displayed to him this far, no fictitiousness, fraud or chicanery had been proved.

CROSS-EXAMINATION BY ADV WOODLANDS SC ON BEHALF OF INTERVENING PARTY

[100] The cross-examination of the applicant by counsel representing the Intervening Party was long but it evoked interesting answers that in my view also helped put even the applicant's case in its proper perspective.

[101] Counsel firstly allowed the applicant to respond to what his case appeared to be in the papers and in his evidence-in-chief. The applicant confirmed that it was his case that –

101.1 there was a fictitious loan by Westley Trust to West Dunes Investments in the amount of R7 000 000;

101.2 Mr Nico Botha("Nico Botha") asserted a fraudulent claim against West Dunes Investment which was the *causa causans* for its liquidation;

101.3 Nico Botha falsified his credentials when he deposed and averred that he was the chairperson of BOE Trust Limited which later changed names to Nedgroup Trust Limited;

101.4 Westley Trust did not have any power or authority to solicit for loans for itself or give out loans;

101.5 several legal representatives on both sides of this matter inclusive of Leonard Katz, Ms Fiona Scott, Adv Sydney Alberts and Adv Manca for the Intervening Party hatched and participated in a conspiracy to defraud the High Court;

101.6 Nedgroup companies, among them Nedgroup Trust (Jersey) Ltd promoted a fraudulent agenda in the affairs that led to the liquidation of West Dunes Investments and had put in a fraudulent or false claim;

101.7 the application for the provisional winding-up of West Dunes Investments never served before a judge in the High Court in Durban on 23 December 2008, be it in open court or in chambers;

101.8 the matter was not dealt with by Balton J on 23 December 2008;

101.9 the matter was never on the motion court roll for 23 December 2008; and

101.10 even if it can be found that it was on the roll and did serve before Balton J, there was no requisite certificate of urgency that would have qualified it to be dealt with in the Urgent Court

among others.

[102] The certificate of urgency was pointed out to him.[21] He was satisfied it was genuine. Folio 146.5 of Series 100 bundle is a copy of the front of the court file which proved that the matter served before Balton J on 23 December 2008 and before Gorven J on 5 February 2009.

[103] The applicant was taken to documents dealing with all the issues raised in paragraphs 104.1 to 104.10 above and many more others and they

[21] Series 100 bundle, folio 1.

all contradicted his version that there was impropriety in the granting of the provisional order of liquidation or winding-up of West Dunes Investments on 23 December 2008 and its final winding-up order dated 5 February 2009. Both orders were granted in the presence of his attorney and advocate, and with their consent. Their affidavits confirming that were displayed to him.

[104] As a result, I am persuaded and am satisfied that West Dunes Investments' provisional and final winding-up orders were granted by judges of this Court in the presence of the applicant's legal representatives. Therefore his allegations of impropriety, fraud and fictitiousness are just that – wild, reckless, unsubstantiated and unsubstantiable allegations. When questioned about the sources of his allegations he stated that he was told by one Lt Mbhele of the Hawks SA Police Unit that the documentation used to justify the winding-up of West Dunes Investments was fake. He could not explain why he did not do anything to verify the authenticity of the information he was fed save to state that he had confidence in the police and thus had no reason to doubt the authenticity or veracity of their information.

[105] Series 100 bundle folio 42 proved that the Westley Trust had the power and authority to raise money by borrowing and also to lend out money to anyone if it has any. This contradicted the applicant's pillar averment that it did not. Consequently allegations by the applicant of chicanery around the guarantees or securities that dragged Westley Trust into the web of debtors when securities were called up are not only untrue but also potentially defamatory, reckless and irresponsible.

[106] The applicant was also shown the timelines relating to the granting of the court order on 23 December 2008:[22] The judge granted the order at 11h04 and the Draft Order as an order of the court distributed to the parties at 11h07. His gripe with the Draft Order not being in the type set format of the Registrar's office was allayed when it was explained and pointed out to him through documents[23] that it was typed out at and by Edward Nathan Sonnenberg Attorneys and handed in at court to be made an order of court. The applicant responded that he initially did not understand the situation, but on hindsight and with the help of the documents shown to him, he accepted that it was the case.

[107] That meant that the applicant understood that he made damaging allegations at a time when he did not have knowledge or understanding of what the attorney-court-court order- judge's secretary's procedures and processes were. That is why he was made to concede, *ex abundanti cautella*, that on the basis of the evidence shown to him at court in this hearing he cannot deny that the court orders granted were regularly granted in accordance with accepted and acceptable processes and procedures.

[108] The applicant was also referred to the documents pertaining to a complaint he lodged against Fiona Scott with the Law Society of KwaZulu-Natal arising out of similar facts as are in issue in this case.[24]

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[22] Series 400 bundle, folio 8.
[23] Series 400 bundle, folio 114.
[24] Series 400 bundle, folios 30 to 58.

[109] This affidavit clearly set out the mandates, instructions and authority the applicant gave to Fiona Scott and Adv Alberts when they were in court on 23 December 2008 as well as on 5 February 2009. It sets out how the two law persons discussed strategies with the applicant days before the first date at court on 23 December 2008; how Graham Perry advised the applicant and the latter agreed that the granting of the provisional winding-up order would be a decisive advantage to him as director of West Dunes Investments; that this would also allow the liquidators to cancel the Zambrotti deal and accept a more lucrative offer from the Rupert Family. The applicant agreed with what was put to him. He agreed also to the assertion that it was explained to him that for strategic reasons an answering affidavit would still be filed in respect of the application for provisionally winding-up West Dunes, however, at court the order would be allowed to be taken unopposed.

[110] After systematically agreeing with what was put to him as what took place and the only impression being that the applicant was throughout in agreement with the strategy as set out above, out of the blue he changed tag to state that he did not agree that a provisional winding-up order be granted unopposed. This last-minute change of tag is so out of synch with all that the applicant agreed with and which supports the respondent entities' version, that there is no reason why it should not be labelled or categorised as being opportunistic and untruthful.

[111] After the above inexplicable denial or refutation of his own answers the applicant was re-taken through the same tortuous route where he conceded to what was put to him, this time round indeed agreeing that he was part of the strategic filing of the answering affidavit for the reasons already hereinbefore advanced. It became clear that the applicant was saying that although he agreed with the entire *modus operandi* before 23 December 2008, he was only not comfortable with it. That he would have whole-heartedly acknowledged his participation and agreement with its terms if they got things his way.

[112] It is my finding that the applicant's denial of consenting to the strategic arrangement agreed to between him and his legal team before 23 December 2008 is opportunistic, ill-thought and not supported by the facts on the ground, i.e. in the papers and *viva voce* evidence.

[112] The issue of the forging of Ms Chetty (Registrar's) signature on a court order was also dealt with. At the end of it all, all agreed that the appending of whatever signature within a stamp impression on the court order of 23 December 2008 did not alter the fact that that order was, word-for-word, date, names and all, the order that Balton J granted on that date. The applicant insisted that even though the court order was what Balton J issued on 23 December 2008, the fact that some unknown person put some signature on it should render the entire process a fraud and invalid.

[113] The applicant's view is too simplistic, far-fetched and artificial. If such thinking was to be sanctioned, then any person can put his/her signature on a perfectly valid court order and from that moment onwards, then such an order would be unenforceable. That cannot be. Counsel for the Intervening Party then took the applicant through the so-called forensic report by Yossi Vissoker : At the end of it all this report concluded that –

113.1 there as a widespread use of unauthorised or dissimilar signature in the Registrar's section of this Court;

113.2 even the signatures that were given to him as being previous genuine signatures of Ms Chetty did not correspond with the specimens Ms Chetty gave for purposes of analysis and comparison; and

113.3 the specimen Ms Chetty herself provided for analysis purposes had material dissimilarities.

[114] After listening to evidence (through the cross-examination over this aspect) I am persuaded and convinced that Yossi Vissoker's story does not alter the fact that a valid, legal and regular court order was granted by Balton J on 23 December 2008. It is neither fictitious nor the product of any fraudulent activity.

[115] The applicant was also made to painfully retract his allegations that Mr Katz was the man who organised the procurement of a forged signature on the court order of 23 December 2008. That was after the applicant first denied directly saying so and was pointed to his own words where he said just that.[25] He was taken to where in Volume 7 of the bundles[26] he definitely implicates and accuses Katz of having forged or organised the forging of the court order. He also says Nedgroup was also involved.

[116] The above is in my considered view, another indication of unsubstantiated and irresponsible utterances by the applicant.

[117] When ultimately pointedly asked who forged or organised the forging of the court order as he alleges, the applicant's answer was: "*I don't know*".

[118] When it was put to him that the above were the thrust of articles in the Noseweek tabloid newspaper or publication who had used documents and information provided by him, the applicant admitted providing Noseweek with documents and speaking to its writers or reporters, but the denied complicity in the publication of any defamatory or contumacious information by the publication, stating that the format of the articles and the decision when and what to publish was Noseweek's.

[25] Series 400, folio 282 paras 42-43.
[26] At page 639 paras 58-59.

[119] He was specifically asked if he was exculpating Katz and Nedbank or the Nedgroup of any complicity in impropriety regarding the court order allegations herein. He confirmed that he was definitely exculpating them. He capped his series of answers by stating ultimately:

> "*I never said Katz and the Nedbank Group ever had anything to do with the forgery of signatures …*"

[120] The applicant again materially and I dare say, fatally contradicted himself on a vital point of his case against the litigant respondents herein.

[121] About Nico Botha lacking the *locus standi* to depose to affidavits on behalf of the Intervening Party the applicant was shown the requisite resolutions that allowed him to do so. He agreed that he was mistaken. However, he laid the blame at the door of Lt Mbhele from the Hawks police unit accusing him as the person who told him that Nico Botha was not supposed to occupy the positions he was occupying. When asked to produce evidence or proof of his serious allegations he did not have any. He admitted that it was him who laid criminal charges against Botha with the police, andreported him to the public protector.

[122] All of the applicant's allegations and accusations against Nico Botha were proven to be baseless.[27] The applicant was occasioned to admit to his folly step by step during cross-examination : The empowering documents

[27] Series 100, folio 1; Series 400 page 1.11.

were there! He agreed that he had no reason whatsoever to doubt their authenticity and the veracity of their contents. He admitted that his founding affidavit was full of unsubstantiated allegations that have ultimately proven to be untrue and/or unfounded. He blamed himself for trusting the words of policemen without being shown any substantiation. He said when he asked the police to peruse their docket(s) they told him it was not allowed. He admitted further that Botha, the banks, legal representatives and all other people and/or institutions he accused in his papers are facing serious reputational damage as a result. He also admitted that the articles concerning the actors in this case written and appearing in Noseweek were based on incorrect, untruthful and contumacious stories that are not only baseless but also very damaging. Although he admitted having furnished the facts upon which the stories or articles were based, the applicant distanced himself from them.

[123] Can he? The jury is out on it!

THE EVIDENCE OF OTHER WITNESSES

[124] Apart from the applicant (Mr Brakspear) testifying, nine (9) other witnesses testified, by names, Nico Andrew Botha, Fiona Scott, Martha Maria van Rooyen, Graham Bryan Perry, Leonard Charles Katz, Sydney Marius Alberts, Ms Juliette Frances Nicholson, Vivani Chetty (Ms), and Yossi Joseph Vissoker.

Nico Andrew Botha

[125] He was the deponent of the founding affidavit in the winding-up application. He also deposed to the founding affidavit in the intervention application in terms of which the JAM Brakspear Overseas Trust ("*JAMBOT*") proposed to seek a winding-up order in the event of it being held that the Westley Trust, from whom payment of £500 000,00 was claimed pursuant to some signed guarantees, lacked *locus standi*. The Intervention Application was launched as a rear-guard action for safety's sake as the applicant, Mr Brakspear, was challenging the *locus standi* of the Westley Trust in the winding-up application.

[126] Mr Botha made some inexplicable utterances or intimations in his founding affidavit in the winding-up application about which, he put the record straight during cross-examination. Those mistakes in any event, were immaterial and irrelevant to the specific issues which are to be determined in this matter. For all Mr Botha's evidence is worth, it explained the flow of funds, the various guarantees and/or securities and illustrated that the Westley Trust did indeed have *locus standi* to apply for the winding-up of West Dunes Properties.

Fiona Scott

[127] She was the applicant's attorney of record in the winding-up application. She explained how her services were procured by he applicant

some four (4) days or so before the winding-up application was to serve in the urgent court.

[128] She confirmed that the applicant was the sole director of West Dunes Properties. According to her, West Dune Properties was in serious financial distress. At the time the applicant approached her on 19 December 2008, the farm Klein Normandie which was owned by West Dunes Properties had already been sold in execution at a public auction for an amount of R18 million in respect of a different judgment debt. The judgment creditor was Firstrand Bank Ltd. The judgment debtors were West Dunes Properties and the applicant personally.

[129] She told this Court that the applicant was of the view that a higher price ought or could have been obtained for the farm at the public auction. That in pursuit of this "*dream*" he had already made overtures or contact with the Rupert Family from the Cape (Western Province) and the latter were interested in paying a higher price for Klein Normandie.

[130] She explained further that a strategy developed during consultations with the applicant in the presence of Adv Sydney Alberts whom she had engaged to deal with the court appearances, as well as Graham Perry, a liquidation expert she brought on board to advise the applicant and work on a strategy going forward. The strategy was that both the provisional winding-up order and the final liquidation order would be consented to. The object thereof was to facilitate a situation where the liquidators could resile from or repudiate

the sale of the farm Klein Normandie and thus be able to sell it at a higher price to the Rupert Family. It was part of their strategy that whilst an opposing affidavit was prepared and duly filed and served on the instructions of the applicant, in addition to the monetary benefits that could be gained by offering the form to the Rupert Family, during the liquidation process, starting with the period between the granting of the provisional winding-up order and extending right into the liquidation process proper, any disputes with regards to the claim of Westley Trust against West Dunes Properties could be appropriately addressed.

[131] She attended the first meeting of creditors in the winding-up process involving West Dunes Properties on 18 March 2009 on behalf of the applicant who indicated to her that going there would only traumatise him further. She also assisted the applicant in lodging his own personal claim as well as that of his other company, Money Box (Pty) Ltd. The requisite affidavits required for the lodging and proving those claims were attested to at the Durban North Police Station whereto he was accompanied by her (Ms Scott). During this witness's testimony the applicant vehemently denied knowledge of the above two claims. However, later on when proof of his signatures and knowing acting and conduct was demonstrated to him during other witnesses' testimonies, he admitted knowledge of same as well as the signatures thereon being his, thereby negating his earlier denial of same.

[132] Ms Scott confirmed that the provisional winding-up order obtained and/or granted by Balton J on 23 December 2008 and the final liquidation order granted by Gorven J on 05 February 2009 were granted by consent with the applicant's knowledge and blessings. She further confirmed that Adv Sydney Alberts acted throughout with the applicant's mandate.

Graham Perry

[133] He is the liquidation expert who was brought on board by Adv Alberts and Fiona Scott to advice the applicant about the niceties, pros and cons of the liquidation process when they realised that he had no clue as to what it all entailed. It is so that, in line with the strategy the applicant, Scott and Adv Alberts agreed on, Graham Perry ("*Perry*") was appointed as one of the three liquidators of West Dunes Properties. They summised that if they had an "*insider*" within the ranks of the liquidators – one who knew about their strategy in relation to the Rupert Family farm offer and the "*clandestine*" manoeuvring around the liquidation process itself, they would have a head-start on everyone. Perry explained how it was possible for liquidators to resile from or repudiate so-called executory processes or contracts. That would facilitate the disposal of the farm Klein Normandie to the Ruperts at a higher price.

[135] He also stated that during the period between the granting of the provisional winding-up order and the granting of the final liquidation order, he, Fiona Scott, Adv Alberts, Mr Eugene Nel – one of the liquidators of West

Dunes Properties as well as attorney Thys Scheepers – also a liquidator – and a valuer, Mr Ian Wyles, accompanied the applicant on a visit to the farm Klein Normandie in the Western Cape. That was during the middle of January 2009. The object of the visit was for the applicant to show the farm to the party and, for discussions with representatives of the Rupert Family-group to continue.

[136] Their wishes were indeed realised because a deal was clinched that ultimately resulted in the Rupert Family purchasing or putting in an irrevocable offer in the amount of R25,2 million for the farm.

Adv Sydney Marius Alberts ("*Adv Alberts*")

[137] Adv Alberts confirmed the evidence of Fiona Scott and Perry. He also confirmed how he was lead counsel for the applicant at the liquidation hearing at this Court on 23 December 2008 and 5 February 2009. He confirmed that they allowed the two orders to be granted without opposition in keeping with their strategy and set out above, and, most importantly, at the applicant's knowledge and instructions. He emphatically denied any knowledge, let alone complicity in any form of conspiracy, fraudulent activity and/or chicanery of the kind alleged by the applicant and ventilated by publications like Noseweek.

[138] He further confirmed that the application for winding-up – i.e. the provisional order of 23 December 2008 – was granted by Balton J in chambers yet in a properly constituted forum in line with the rules, regulations and/or accepted practices of or at this Court.

Leonard Charles Katz ("*Katz*")

[139] He was the instructing attorney for the applicants in the winding-up application.

[140] Katz readily conceded that there were some imperfections in the founding affidavit of Nico Botha in the winding-up application. The affidavit was prepared for Mr Botha by him. However, he offered explanations with regard to these imperfections, which explanations, after the cross-examination process, appeared to this Court to be plausible and satisfactory. He also corrected certain mistake that he made in correspondence seen by this Court, especially with regard to the question as to whether the provisional winding-up order was granted in open court or in chambers : For instance, in an e-mail to an investigative journalist from Media 24 group of newspapers on 29 October 2010 he stated that the provisional winding-up order was granted in open court. On the same day, after he discussed this issue with Adv Manca SC who was their lead counsel at court on the day, and the latter pointed out the discrepancies, he reverted to the journalist, a Mr Jacques Paauw and corrected the mistake, telling him that in fact the provisional winding-up order was granted by the court in chambers.

Juliette Frances Nicholson ("Adv Nicholson")

[141] She was counsel for the liquidating party or parties. Her testimony corroborated that of Adv Alberts and Fiona Scott with regard to the granting of the provisional winding-up order in chambers by Balton J on 23 December 2008. She also corroborated the versions of Katz about what occurred at court on both 23 December 2008 and 5 February 2009 when the final winding-up order was granted.

Martha Maria van Rooyen ("*Mrs Van Rooyen*")

[142] She is Balton Js' secretary and was in attendance at court on 23 December 2008. She explained the procedures adopted at court when urgent applications are dealt with : if an application is opposed, the matter is dealt with in open court where the proceedings are mechanically recorded and she would note the order granted on the cover of the court file. If the parties reach an agreement, they record it in a draft order that they themselves prepare, i.e. type and bring to court. Then such an unopposed and settled matter is taken by the counsels for both litigants to the judge in chambers. She and the attorneys remain outside : After the matter has been dealt with in chambers in line with their draft order, they bring it (draft order) to her and she records the outcome on the file cover.

[143] She acknowledged the handwriting recording the verdict of what happened in Balton J's chambers as well as her signature thereon. She also explained that she mistakenly wrote Adv Manca's names where she should have recorded West Dunes Properties' counsel's (Adv Albert) names. She realised the error and scratched it out and wrote the correct counsel's names, he being Adv Alberts. She categorically refuted allegations by the applicant that the "*so-called error*" was no error at all but an indication and proof of fraud and misdemeanour. She confirmed that the inscription on the court file –

"*Coram Balton J. Ito (In terms of) Draft Order marked 'X'.*"

was written thereon by her and that it was a genuine recordal of what occurred in Judge Balton's chambers on that day.

[144] According to her, after she had endorsed the court file it is taken by the court usher to the typists or registrars' section and her work therewith is done.

[145] It was her further evidence that after she endorsed the court file and handed same to the court usher, it was the last time she had any dealings with it and that since then, she was seeing the photo-copied version of the file cover for the first time at court on this date that she was testifying.

[156] She also roundly rejected the applicant's insinuation that Adv Albert's names, which appear next to the deleted Adv Manca's on the file, were not there in 2010 when he perused the original court file.

[157] As already alluded to above, the original court file in this matter has since disappeared.

[158] She was also shown an annexure at page 566 of Pleadings bundle Vol 6. She confirmed that it was a court roll that had been prepared by the Court Registry for Judge Balton on 19 December 2008 for the sitting of 23 December 2008. She pointed at Case No 16790/08 (the case in issue here) as being part of the cases that were on the roll for that day.

Bhavani Chetty ("*Chetty*")

[159] She is an Assistant Registrar at the Durban seat of the KwaZulu-Natal Division of the High Court of South Africa. At the times material to this case she was working in the general office as such. Her job entailed issuing processes and signing orders among others.

[160] Initially, when led in evidence by the applicant she stated among others that on 8 July 2013 she deposed to an affidavit before one Lt Mhbele, a policeman investigating a criminal case of fraud, forgery and/or misdemeanour linked to the court order of Balton J dated 23 December 2008.

Her statement is in manuscript. The final paragraph thereof reads or concludes as follows:

> "*On perusal of the order which was shown to me by the cop* [sic] *I don't believe that the signature on the order is mine. I believe the signature is not mine and that I find it disturbing that someone had forged my signature.*"

[161] At bundle Series 600, pages 52-53 the same statement was reduced to a typed version bearing the date of 23 July 2013. Although the first typed page bears Chetty's initials, she did not append a signature at the end of the statement but wrote her names in full, namely Bhavani Chetty.

[162] When she was cross-examined, she started prevaricating, then becoming unsure and towards the end stating that she was not certain if the signatures on the court order(s) were not his. When it grew hotter, she agreed that the signature looked like hers. She also stated that the difference that she saw with the signature was that it was bigger than her normal signature.

[163] I may mention at this stage that when the applicant's handwriting expert testified, he stated that he did magnify (make bigger) the signature for purposes of analysing it.

[164] According to Ms Chetty, it was this bigger signature that she was shown by Lt Mbhele to identify in the presence of a senior member of the staff member of this Court and it was the time when she denied it being hers.

[165] At the end of the day, Ms Chetty's evidence was so muddled up that it can not be regarded as being reliable : Under further cross-examination, Ms Chetty ultimately agreed that she made a mistake and that the signature on the court order was hers.

[166] Thereby, she knocked the last nail into the applicant's case's coffin (excuse my pun!) Her testimony, contrary to what the applicant was throughout before then professing it would prove his allegations, in fact completely negated it. No forgery or fictitiousness of the draft order was in evidence.

[167] When the totality of Ms Chetty's testimony is considered, the provisional winding-up order of 23 December 2008 and the final liquidation order dated 5 February 2009 were granted by judges in the normal course and that there was nothing amiss therewith.

Yossi Joseph Vissoker ("*Vissoker*")

[168] He is the so-called handwriting expert called by the applicant to come and show to the court that the signature on the court order of 23 December 2008 was not genuinely that of Ms Chetty.

[169] What struck this Court about him was that his claim of being an expert could not be proven : He was very hesitant when asked to prove why he says he is an expert on handwritings. What he came up with is that he had a talent for seeing differences in handwritings and some corporate instances would engage him to compare signatures or general handwritings for them. Then he communicated with some remote body in America called American Board of Forensic Examiners who sent him a pile of documents to compare and analyse. When he sent those papers back, that body recognised him as a forensic document examiner. That is the basis whereupon he calls himself an expert. Cadis quaestio!

[170] The nett result of Vissoker's testimony was that none of the specimen signatures given to him to compare with Ms Chetty's genuine signature matched it. These specimen included Ms Chetty's own other signatures.

[171] Mr Vissoker's evidence did not take this matter any further, save that it helped to negative the applicant's allegations.

[172] He had to concede that he had been procured by the applicant at a fee of R26 000,00 to come and testify in favour of his allegations.

[173] What Mr Vissoker's evidence did do was show that there was a general problem in the office of the Registrar of this Court where signatures were generally being forged. However, it did not prove any forgery when the

relevant signature on the court order granted by Balton J on 23 December 2008 is concerned.

EVALUATION

[174] When the applicant's founding affidavit and his evidence in this Court is evaluated, it is clear that he is implicating the following persons in the fraudulent procurement or manufacture of the provisional winding-up order ascribed to Balton J dated 23 December 2008, which he described throughout as "*… a forged provisional winding-up order …*", namely –

174.1 Mr Nico Andrew Theo Botha ("*Botha*"), the then Chairperson of BOE Trust Limited, who deposed to the founding affidavits in the winding-up application and the application to intervene.

174.2 Mr Leonard Katz ("*Katz*"), the attorney who represented Fairbairn Trust Limited in the winding-up application.

174.3 Ms Fiona Scott, the attorney who represented West Dunes in the winding-up application on his instructions.

174.4 Adv Sydney Alberts, who on the instructions of attorney Scott (Fiona) represented West Dunes Properties on 23 December 2008 when the provisional winding-up order was granted unopposed as well as when a final winding up order was granted on 5 February 2009.

[175] In proceedings of this kind (which started as motion proceedings but later referred for trial) the affidavit evidence stands. Oral evidence is used to determine and/or clarify disputes or uncertainties in the affidavit evidence. Such evidence or proceedings do not become the so-called "*rauw actie*".[28]

[176] At the last pre-trial conference of the parties the issues to be determined with the help of oral evidence were limited to the question as to whether the provisional winding-up order granted on 23 December 2008:

176.1 was indeed granted by Galton J;

176.2 if so, whether it was granted properly, and with the knowledge and/or consent of West Dunes Properties; and

176.3 specifically whether such consent was provided in terms of or pursuant to instructions which the applicant gave to attorney Fiona Scott and Adv Alberts.

[177] The other issue to be decided was whether the claim relied upon by Fairbairn Trust Limited (as trustee of the Westley Trust) in the winding-up application was fictitious or not.

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[28] Celliers *et al*, *HERBSTEIN & VAN WINSEN'S Civil Practice of the High Courts of South Africa*, 5th Ed, Vol 1, p 462; *Lekup Prop Co 4 (Pty) Ltd v Wright* 2012 (5) SA 246 (SCA) para [32] at 258E-H.

[178] The ambit of the evidence therefore was limited. Although certain collateral issues were raised and persued during the trial as part of the context provided for the determination of the main issues they are nevertheless not decisive or determinative of the application. I allowed a lot of the *facta probantia* (facts relevant to the facts in issue) to accommodate the parties as very serious allegations that are potentially defamatory or contumacious were bandied about. The parties had to ventilate all issues to prove or disprove either side's case and allegations.

[179] Nienaber JA came up with a useful guide when factual disputes in the nature of those this Court was dealing with in *Stellenbosch Farmer's Winery Group Ltd and Another v Martell Et Cie and Others*[29] when he stated as follows:[30]

> "*[5] On the central issue, as to what the parties actually decided, there are two irreconcilable versions. So, too, on a number of peripheral areas of dispute which may have a bearing on the probabilities. The technique generally employed by courts in resolving factual disputes of this nature may conveniently be summarised as follows. To come to a conclusion on the disputed issues a court must make findings on (a) the credibility of the various factual witnesses; (b) their reliability; and (c) the probabilities. As to (a), the court's finding on the credibility of a particular witness will depend on its impression about the veracity of the witness. That in turn will depend on a variety of subsidiary factors, not necessarily in order of importance, such as (i) the witness' candour and demeanour in the witness-box, (ii) his bias, latent and blatant, (iii) internal contradictions in his evidence, (iv) external contradictions with what was pleaded or put on his behalf, or with established fact or with his own extracurial statements or actions, (v) the probability or improbability of particular aspects of his version, (vi) the calibre and cogency of his performance compared to that of other witnesses*

[29] 2003 (1) SA 11 (SCA).
[30] Para [5] at 14I-15E.

testifying about the same incident or events. As to (b), a witness' reliability will depend, apart from the factors mentioned under (a)(ii), (iv) and (v) above, on (i) the opportunities he had to experience or observe the event in question and (ii) the quality, integrity and independence of his recall thereof. As to (c), this necessitates an analysis and evaluation of the probability or improbability of each party's version on each of the disputed issues. In the light of its assessment of (a), (b) and (c) the court will then, as a final step, determine whether the party burdened with the onus of proof has succeeded in discharging it. The hard case, which will doubtless be the rare one, occurs when a court's credibility findings compel it in one direction and its evaluation of the general probabilities in another. The more convincing the former, the less convincing will be the latter. But when all factors are equipoised probabilities prevail."

[180] What is common cause is that the court file in the winding-up application has gone missing. The precise circumstances under which this has come about are not clear or have not been disclosed. What is a fact is that, at the applicant's instance, a police investigation has been launched. The Hawks carried out and are continuing to carry out investigations : A number of statements from witnesses such as the applicant himself, Ms Nako, the court manager at this Court and Ms Chetty, an assistant Registrar and many others, have been taken. The applicant testified that the last time he saw this court file was on or about 3 or 4 September 2010 when he consulted with the court manager Ms Nako and photocopies of documents therefrom were given to him, being the front cover thereof. Ms Chetty testified that when she was harangued about this matter she did not see it.

[181] Balton J's registrar/secretary, Mrs Van Rooyen's evidence was largely unchallenged : It is to the effect that some of the manuscript entries on the front cover of the court file[31] were in her handwriting. For instance the following, as they appeared thereon:

> "*Ter rolle geplaas vir verhoor op*
> *Set down for hearing on* *23/12/2008*
> *09h30*
>
> *CORAM BALTON J*
>
> *ORDER : I.t.o. Draft Order marked X*
>
> *M. van Rooyen </Reg*
> *23/12/08*"

[182] The portions in italics denote her manuscript writing on the file cover.

[183] Mrs Van Rooyen also confirmed that she recorded the names of Adv Manca SC as having appeared for the applicant in the winding-up application and Adv Alberts as having appeared for West Dunes Properties in the winding-up application. She further confirmed that the matter was dealt with in chambers. She also confirmed that an appropriate entry of the winding-up application appeared in the register kept by the Registrar in respect of matters set down for court for 23 December 2008. She explained the procedure followed when urgent applications are dealt with, especially how opposed ones are heared in open court and the unopposed ones are dealt with in the

[31] Bundle, Series 100, page 146.5.

chambers of the judge. As regards what happens after the judge has granted an order she clarified that the attorney or counsel or usher involved takes it down to Registry for typing after she had used it to endorse the court file. Draft orders come to court already typed by the litigants and the judge only marks them with an "X" after satisfying himself or herself that such an order as set out therein should be granted.

[184] Evidence was also led in respect of Practice Directive 10.2 which applies to urgent applications in this Division. It reads as follows:

> "*In every urgent application (including the ordinary motion court) a draft must be presented to the judge. If the Draft is amended in chambers, practitioners must come to the assistance of the registrar's typist in order to ensure that the order is in a form where it can be issued forthwith.*"

[185] The unchallenged evidence of Adv Alberts was that Practice Directive 10.2 was complied with on 23 December 2008. This was confirmed by Adv Juliette Nicholson who appeared as a junior to Adv Manca SC for Fairbairn Trust Limited on that day. Adv Nicholson also confirmed that she signed and filed a Certificate of Urgency as required in terms of Practice Directive 10.1. Such Certificate of Urgency was handed into evidence as exhibit.

BURDEN OF PROOF

[186] The applicant (Mr Ian Brakspear) bears the *onus* of establishing, on a balance of probabilities, that:

186.1 The winding-up application in respect of West Dunes Properties was not called and heard or determined in this Court before Balton J on 23 December 2008; and

186.2 The rule *nisi* and provisional winding-up order in respect of West Dunes Properties is null and void *ab initio*.

[187] In his various affidavits (founding affidavits and supplementary affidavits) the applicant alleges that Nedgroup Trust and the legal representatives of Wet Dunes Properties knowingly colluded and conspired to advance a false claim against the company (West Dunes Properties) in order to mislead the court into granting the winding-up orders. He further alleged, in both the affidavits and in his evidence during this trial that pursuant to this irregular enterprise, the court order granted by Balton J on 23 December 2008 was fabricated.

[188] After all that has gone before in this trial as well as the lead-up to it, it is very important to note that –

188.1 Fraud is not lightly to be inferred or presumed, particularly where, as in the present case, serious allegations are made against legal practitioners and an established and reputable financial institution.

188.2 It is logically inherently improbable for legal representatives (both attorneys and counsel) for both side in a litigious process – in this instance the winding-up of West Dunes Properties – to collude and place false facts before court and also fabricate a court order.

188.3 The applicant, as a layman, failed to appreciate or understand – whether by design or otherwise – the basic court procedures and the way in which urgent applications are dealt with in this Court. It appears that he seemed to have proceeded from the standpoint that if he was not able to unearth evidence concerning the grant of the provisional winding-up order of West Dunes Properties, this was indicative of some or other irregularity or pure criminality.

APPLICANT'S ALLEGATION OF A FICTITIOUS CLAIM

[189] The facts and circumstances surrounding the winding-up of West Dunes Properties need to be set out fully as these relate to the applicant's allegation and claim that the claims leading to the winding-up application are fictitious.

[190] The petitioning creditor for the winding-up of West Dunes Properties was Nedgroup Trust, the Intervening Party in this matter. Nedgroup Trust was the sole trustee of the Westley Trust, of which the applicant is a

beneficiary. In that application the Nedgroup Trust asserted a claim of £500 000 (Five Hundred Thousand British Pounds), which amounts to approximately R7 million in South African currency. The indebtedness arose on or about 5 July 2007. It is so that Botha made a patent error at paragraph 15 of his founding affidavit when he stated that such indebtedness arose during 2008. Mr Botha explained this patent error in his testimony in this hearing. In any event, this error was glaring as it did not rhyme with the rest of the affidavit.

[191] I find that this was indeed a genuine mistake that was not borne out by the rest of the allegations in the founding affidavit.

[192] The applicant contends that there was a conspiracy between Nedgroup Trust and the legal representatives to advance a fictitious claim by the Westley Trust well knowing that this claim is false. In the process of advancing this point of view, the applicant goes further and alleges that Botha had not only falsified his credentials but also that he had no authority to represent the Nedgroup Trust. These allegations that Botha had no right to speak on behalf of the Westley Trust were proven to be wholly mischievous. They were controverted.[32] The documents presented proved that he was appointed chairperson of BOE Trust Limited on 1 September 2006 and a properly signed power of attorney dated 19 December 2008 proved that he (Botha) was given the full powers by Nedgroup Trust to represent it in all matters pertaining to the claim against West Dunes Properties.

[32] Bundle, Series 400 folio 1.11.

[193] There is no dispute and the applicant also acknowledged that West Dunes Properties became indebted to Firstrand Bank ("*FRB*") through its division, RMB Private Bank ("*RMB*") in respect of a mortgage loan granted to the company during 2004 in order to acquire the farm Klein Normandie in Franschhoek, Western Cape. The mortgage bond was registered in the amount of R20,9 million against the farm.[33] It was also not disputed by the applicant that the Westley Trust had put up a guarantee of £550 000 in favour of RMB.[34] The guarantee was issued by Fairbairn Private Bank to RMB on behalf of the Westley Trust in the amount of £500 000 on 9 October 2006 in accordance with the applicant's instructions.[35] That was after the applicant had, on 22 September 2006, asked and was granted the request or wish that the guarantee be reduced to £500 000.

[194] Around 4 July 2007 RMB called up the guarantee.[36] Fairbairn Private Bank paid the amount of £500 000, equivalent of R7 019 500 in South African currency, to RMB on 5 July 2007. This was done by the method used by and between financial institutions, known as "*a Swift transfer*".

[195] In his evidence in this Court, the applicant did not dispute the Westley Trust structure by which West Dunes Properties had been funded. He equally did not challenge any of the documents or agreements comprising the structure.

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[33] Series 300, p 63.2.
[34] Series 200, folio 25.
[35] Series 200, folio 42.
[36] Series 200, folio 42.

[196] He was taken through all of them in great detail in the course of his cross-examination : As part of the funding structure, Fairbairn Private Bank had put up the guarantee in favour of RMB on behalf of the Westley Trust.[37] Under cross-examination the applicant accepted the authenticity and validity of the agreements setting up the structure, which culminated in the guarantee of £500 000 being given on behalf of the Westley Trust. When this guarantee was called up by RMB, Fairbairn Private Bank, which was in possession of the money, paid out to RMB on 5 July 2007. This process triggered the following chain-reaction or "*domino-effect*":

196.1 West Dunes Properties was released from its indebtedness to RMB in respect of the mortgage loan to the extent of £500 000 – approximately R7 million in South African currency.

196.2 At the instance of the Westley Trust, Fairbairn Private Bank had issued the guarantee to RMB for the obligations of West Dunes Properties.[38] The indemnity was given on 26 May 2004. A counter-indemnity was given by the Westley Trust to Fairbairn Private Bank in respect of this facility. The Westley Trust thus became liable to the bank in the amount of £500 000. Of course, the bank held security for this indebtedness in the form of a charge over a cash deposit of £500 000 by the JAM Brakspear Overseas Trust ("*JAMBOT*").[39] These moneys were appropriated by Fairbairn Private Bank when payment was

[37] Series 200 : 27.5 and 27.6 – A two-step illustrative diagram is clearly set out there.
[38] Series 200 : 16.
[39] The full amount held on deposit by JAMBOT with the bank was plus-minus £950 000.

made by it in terms of the guarantee. This, correspondingly, gave JAMBOT a right of recourse against the Westley Trust to the extent of 7500 000.

196.3 The Westley Trust, at whose instance Fairbairn Private Bag had issued the guarantee, then had a right of recourse against West Dunes Properties as it was for the West Dunes Properties' indebtedness to RMB that the 500 000 guarantee had been given.

196.4 Consequently, on 5 July 2007 the Westley Trust stepped into the shoes of RMB as a loan creditor to the extent of £500 000 or R7 million in South African currency. In doing so, the Westley Trust was simply in law exercising its right of recourse against West Dunes Properties.

196.5 All the abovementioned come down to is that the Westley Trust was substituted for RMB as the loan creditor of West Dunes Properties in the amount of £500 000 and this amount became due and payable by West Dunes Properties to the Westley Trust on 5 July 2007.

[197] It was this claim of £500 000 which the Westley Trust, represented by Nedgroup Trust, asserted as the petitioning creditor in the West Dunes Properties' winding-up application. I could not come across any evidence to

suggest that this claim was promoted by Nedgroup Trust or its legal representatives otherwise than in good faith. Katz stated in his evidence, which was not challenged, that he had relied on the advice of an experienced senior counsel and insolvency specialist, Adv Manca SC when he formulated the claim(s) which forms the basis and substance of Botha's founding affidavit.

[198] There are no compelling reasons why this Court should not accept the above as representing how things started and panned out. That thus, in my considered view, sounds a death-knell to the applicant's claims or allegations that fraud played a part. His claim further that everything is based on fictitious grounds also stands to be dismissed.

[199] During his evidence in this Court the applicant stated that he had never at any stage adopted the standpoint that JAMBOT was the creditor of West Dunes Properties. This evidence contradicted his standpoint as set out in his papers and other communications as well as what his attorney and counsel said about him having said so.

[200] In his opposing affidavit on behalf of West Dunes Properties in the winding-up application, Mr Ian Brakspear (the applicant) asserted that the creditor in respect of the £500 000 claim against the Westley Trust arising from the guarantee was JAMBOT and not the Westley Trust. This affidavit was deposed to on 22 December 2008 – a day before the winding-up

application was to be heard. He repeated this self-same allegation in his affidavit in the "*extension of powers*" application.[40]

[201] Most tellingly, in his own e-mail dated 8 April 2009 sent to his erstwhile attorney Ms Fiona Scott he stated the following, among others:

> "*Finally as mentioned to you previously I for the life of me do not see or understand how Westley Trust can make any claim as they have been paid by JAM Brakspear Trust 18 months ago and if any money is owed it is owed to JAM Brakspear Trust not Westley Trust ...*"

[202] The applicant's testimony during this hearing was therefore dishonest. Him further disputing his attorney's testimony to the above effect during the hearing can also be described as being mischievous.

[203] This led to the trustees of JAMBOT, *ex abundanti cautela*, intervening on 30 January 2009 in the winding-up application[41] and launching an application to intervene. This was in essence a conditional intervention. Botha also deposed to the founding affidavit in the intervention application. Katz also represented the sole trustee of JAMBOT, being Fairbairn Trust Company Limited. The application was brought on the basis that, if the court found that the Westley Trust was not the true creditors, a winding-up order should still be granted at the instance of JAMBOT.[42] Furthermore, since attorneys Edward Nathan Sonnenberg also represented the trustees of JAMBOT, a winding-up order in respect of West Dunes Properties would in

[40] Series 500 : 163 at para 6.
[41] Series 100 : 147.
[42] Series 100 : 156 para 12.

any event still be justified, no matter what the applicant's feelings could have been.

[204] As Adv Alberts, the erstwhile counsel representing West Dunes Properties at the winding-up application pointed out in his testimony in this haring, West Dunes Properties was liable to be wound-up because it was commercially insolvent and this was not controverted.

[205] That West Dunes Properties was obviously commercially insolvent ought not to be gainsaid. The applicant's say-so to the contrary are not supported by the facts on the ground : The evidence in this Court revealed that:

205.1 West Dunes Properties was unable to meet its bond repayments to RMB;

205.2 RMB called up the £500 000 guarantee on or about 4 July 2007.[43] This triggered the right of recourse by the Westley Trust against West Dunes Properties and the amount of R7 million immediately became due and payable by it. It did not have the liquid resources to meet this claim.

205.3 On 28 November 2007 the Cape High Court granted judgment against West Dunes Properties and Mr Ian Brakspear in his

[43] Series 200 : 43.

personal capacity in favour of RMB in the amount of R12 million in respect of the mortgage loan.[44]

205.4 The judgment was not satisfied and the farm Klein Normandie, which was West Dunes Properties' sole asset, was sold in execution for the amount of R18 million to Zambrotti Investments. That was during June 2008.

205.5 West Dunes Properties was indebted to other creditors, which included Rodel Finance, which it owed R1,2 million for bridging finance or bridging loan.

205.6 In his own e-mail dated 10 December 2008[45] the applicant stated that the liabilities of the company (West Dunes Properties) could exceed R25 million. This was apart from the indebtedness of R7 million which was due and owing to the Westley Trust.

205.7 The liquidators in their report to creditors presented at the second meeting of creditors on 15 April 2009, stated that one of the causes of the failure of West Dunes Properties was that it had never produced sufficient income to meet its expenses and that its liquidation was accordingly justified.[46] From the second liquidation and distribution account of West Dunes Properties

[44] Series 500 : 128.
[45] Series 100 : 64-65.
[46] Series 400 : 72.

dated 11 May 2010 it appears that it had creditors of approximately R29 million.[47]

[206] The applicant further, at no stage made use of any of the legal processes open to West Dunes Properties or himself (Mr Ian Brakspear in person) to expunge the claim of the Westley Trust amounting to approximately R7 million, which had been admitted to proof by the liquidators. It is so that in his testimony Mr Brakspear did pay lip-service to this aspect, shifting the blame to his legal representatives. However he, himself –

206.1 did not attend either the first and second meetings of creditors of West Dunes Properties. In terms of the law, this amounts to a criminal offence(s) on his part. By not so attending he deprived himself the protection or cover of section 44(7) of the Insolvency Act[48] to interrogate the admitted claim of the Westley Trust;

206.2 failed to attend the proceedings which had been convened in terms of sections 417 and 418 of the Companies Act 61 of 1973. The issue of the Westley Trust's claim could also have been ventilated at these proceedings if he did not refuse to attend them for reasons that he would be further traumatised if he did. Failure to attend these proceedings also amounts to a criminal offence;

[47] Series 300 : 120.
[48] Act 24 of 1936.

206.3 in all these non-appearances he had received and utilised witness and travelling fees sent to him;

206.4 failed to seek a review of the Master of the High Court's decision to dismiss his objection to the Westley Trust claim, which decision to dismiss it was communicated to him on 9 May 2011.[49]

[207] From the totality of the evidence adduced in this Court as supported by the papers filed of record, it is not evident what the applicant's complaint is. Even if the Westley Trust was not the creditor of West Dunes Properties (which in my view cannot be the case as there is overwhelming evidence to show that it is indeed the creditor when the guarantee is anything to go by) it was commercially insolent and thus liable to be wound-up. West Dunes Properties was still susceptible to be wound-up at the instance of JAMBOT if it had transpired, as the applicant or Mr Brakspear alleged, that it was in fact the creditor in connection with the guarantee. Nevertheless, there is nothing to suggest that Nedgroup Trust and the legal representatives involved herein knowingly asserted a false claim against West Dunes Properties. It is my considered view also that in any event, the facts, circumstances and probabilities herein points to it being highly improbable that it would have done so : There is no benefit to be derived from such a course. Furthermore, the trustee of JAMBOT was a company in the Nedbank Group of companies which could in any event have wound up West Dunes Properties if the

[49] Series 300 : 115.

applicant, Mr Brakspear's version of events was correct. As indicated above, he was decidedly not correct. As was put to the applicant on several occasions during the course of his cross-examination, there is simply no evidence of fraud in relation to the Westley Trust's claim and the applicant (mr Brakspear) could produce none.

[208] It is my considered view and finding that West Dunes Properties was prima facie, properly wound-up at the instance of the Westley Trust represented by Nedgroup Trust. I cannot find that the claim was not asserted in good faith. I could further find no evidence of Nedgroup Trust advancing any fictitious claim. Neither can I make a finding that its conduct was irregular or fraudulent.

ALLEGATIONS THAT COURT ORDER WAS FABRICATED

[209] The applicant alleged that the provisional winding-up order granted by Balton J on 23 December 2008 was fabricated; that it was a sham and that it was procured by forgery. He goes so far as to say that the winding-up application was not heard in court – be it in open court or in chambers.

[210] This in my view and finding goes against overwhelming evidence to the contrary. As indicated above, I am persuaded and am convinced that Balton J's order dated 23 December 2008 was regular in every material respect. There is evidence by the applicants legal representatives at that winding-up application that he was in the loop all the time when the parties negotiated at

court before they approached the judge in chambers with a draft order and that he consented to the provisional winding-up order being granted without opposition as per that draft order. Significantly also, during the course of her testimony Ms Chetty accepted that she had indeed signed the court order. Two counsel representing the opposing sides who were present in chambers when Balton J granted the order, testified that the draft order that was presented to Balton J was made an order of court. The testimony of Adv Nicholson, junior counsel for the liquidating party, who was also present in chambers when Balton J made the draft order an order of court confirmed the evidence of the two counsel. The evidence presented by Ms Nicholson (Adv) and the applicants then counsel, Adv Alberts, can be regarded as not having been challenged to any effect as it stood unshaken after their cross-examination. There is nothing precluding this Court from accepting it in its entirety.

[211] Adding to all to the above, there is uncontroverted evidence that Adv Nicholson, who appeared for the Nedgroup Trust, herself took the court file to the general office of the Registrar of this Court. The latter affixed an official seal (stamp) thereon, completing the court order's validation. The order was not re-typed at the general office, meaning that what Balton J made an order of court is what the general office validated and it is that which is the object of this Court's enquiry.

[212] I find thus that the Practice Directive(s) of this Court in relation to the granting and general passage of this order for the provisional winding-up of West Dunes Properties were followed and substantially complied with.

[213] The evidence of Mrs Van Rooyen as set out above is also dispositive of this aspect.

[214] The applicant's contentions in support of his allegations that there was impropriety or irregularity regarding the provisional order are either wrong or are simply without substance. The following are examples of how that is so:

214.1 The applicant contends that the liquidation application was not on the motion court roll of 23 December 2008. It is so that it was not reflected on the ordinary motion court roll inside court of that day. However, it was reflected on the roll for the urgent court.[50] This was so because the processes followed in this Court decree as much.

214.2 The applicant alleged that no Certificate of Urgency was filed to justify the application serving in the urgent roll of the Motion Court. The allegation is wrong. That Certificate of Urgency was indeed filed and it formed part of the papers placed before Balton J on 23 December 2008.[51] When it was produced and displayed to the applicant in court he indicated that he assumed

[50] Pleadings bundle 5 : 67 (LCK 4).
[51] The certificate is an exhibit before that court. See Series 100 : 1.

that it was not there because it was not attached to the court order. That is not what is required.

214.3 He contended that the provisional winding-up order was not noted on the cover of the court file. He was plainly mistaken or mischievous because even on his version, when he perused the court file during 2010, the inscriptions or endorsements were there. Mrs Van Rooysen's evidence put this matter to bed.

214.4 He relied for his allegations of impropriety on the fact that the typeface or format on the draft order was not that of the Registrar's office. He misconceived the situation : The draft order was prepared and typed by Edward Nathan Sonnenberg Attorneys. It was placed before the judge in that format and the latter approved and made it an order of court after satisfying herself that it was correct and proper to do so. It did not have to be retyped by the office of the Registrar.

214.5 He also contended that the fact that this draft order did not appear on the computer system of the office of the Registrar was indicative of the fact that it was fictitious. Nothing should turn on this : the fact that it was not typed on or from the Registry system accounts for this.

214.6 Ms Chetty's signature on the order. At the end of it all Ms Chetty admitted that the signature on the court order was hers. Her explanation for the change of tag was that she had been influenced to say to the contrary because when she was interviewed earlier by Lt Mbhele, she was shown a magnified signature and that it was merely the big size of the signature that made her deny it. In any event, the signature is simply an administrative act facilitating the proof of the terms of the order. The order had already been granted by Balton J in her chambers. That much Ms Chetty conceded during cross-examination. She conceded further, that she did not have any reason to believe that the order she signed was not made or granted by Balton J in chambers.

[215] To add salt to an already festering wound, the applicant, prior to the winding-up order being granted, had taken advice from one of the aspiring or prospective liquidators, Graham Perry ("*Perry*"), who explained to him that the less favourable Zambrotti Investments offer could be resiled from if West Dunes Properties was wound up. In this context, it is notable that the applicant at all material times conducted himself in accordance with the strategy agreed upon with Perry and his legal representatives. In this regard:

215.1 He supported the appointment of Perry as one of the liquidators of West Dunes Properties.

215.2 He travelled to the Cape during early January 2009 accompanied by his legal representatives and of the liquidators in order to let them inspect or see first hand the farm Klein Normandie, also to meet with the earmarked new buyers of the farm, the Rupert Family through their instrument, Applemint Properties.

215.3 He supported the liquidators' extension of powers application (which sought mandate to resile from previous deals concerning Klein Normandie) and to that effect, deposed to an affidavit in support of it on 11 February 2009.[52]

215.4 He took no steps to have the provisional order set aside or rescinded. He only belatedly took some action when he launched this application during March 2013 – some 4½ years after the order had been granted. These facts corroborate the evidence of Perry, Scott and Alberts that the applicant (Brakspear) had participated in the implementation of the strategy which required West Dunes Properties to be liquidated. He was unable to explain his conduct which was obviously consistent with his consent that a provisional order should be granted unopposed.

CRITICAL ASSESSMENT OF APPLICANT'S EVIDENCE

[52] Series 500 : 161.

[216] It is common cause that bar for Mr Vissoker, all the other seven witnesses who testified in this matter did not support the applicant's case. Most of them are the witnesses had had subpoenaed to come to testify in support of his allegations. In colloquial parlance it can be said that the applicant was dropped by his own witnesses.

[217] It is my finding that apart from Ms Chetty, all the other witnesses mentioned above passed the credibility test, their evidence was ostensibly reliable and made a good impression on this Court.

[218] That should not be the end of the matter. It is desirable, albeit necessary I dare say, that Mr Brakspear's evidence be analytically critiqued in the light of its reliability, consistency and his performance as a witness also be assessed.

CREDIBILITY

[219] I closely watched the applicant (and all the other witnesses who testified in this Court) with a view to making, should it become necessary, a credibility finding at the end of the day.

[220] After evaluating all relevant aspects relevant to this hearing, as a general observation, the applicant was –

220.1 evasive and argumentative;

220.2 blatantly biased (for which he should not be penalised unless it was extreme);

220.3 often even obtuse; and

220.4 generally made a poor impression on this Court as a witness.

[221] Several instances where the applicant issued threats to people involved with this case as well as intimidation to others were put to him. Especially the affidavit evidence of one Andrew Snyman mentioned that the applicant made remarks like, "… *all attorneys are crooks* …" and "*… if the (applicant) had a gun he would shoot all attorneys …*". The applicant admitted that for the past 5 to 6 years he did experience a lot of anger. He further admitted that he did issue threats to "*… one or two people* …". When it was put to him that he was consumed by anger he acknowledged that that was true. He further acknowledged that he had an altercation with Perry in attorney Scott's office.

[222] The applicant's extreme bias and hostility was graphically illustrated in a letter he wrote to Katz and copied to a number of people, notably journalists,[53] notably Jacques Paauw of Media 24 group of newspapers, Mr Welz, the editor of Noseweek and one Brian Porter.

[53] Series 400 : 25.

[223] It is noteworthy that Noseweek has for some time in the near past been flighting a series of articles that painted the applicant as a "*molested angel*" and the companies (and some of their staff) involved with the liquidation of West Dunes Properties as well as the legal representatives also involved, as uncouth and/or cruel and heartless persecutors. Officers of this Court also did not escape that "*sharp pen*".

[224] It emerged during the leading of evidence herein that both the applicant (Mr Brakspear) and Mr Welz are Zimbabwe expatriates and that both among others worked towards one central goal : to assist the applicant's other family members, being his mother and sisters to relocate permanently to South Africa. The *modus operandi* was to purchase Klein Normandie and through this process, substantiate their applications for permanent residency in this country.

[225] When all the parties met with me in chambers to introduce themselves on the first day of this trial, the self-same Mr Welz was there and he introduced himself as the applicant's friend and advisor, I repeat foe emphasis.

[226] The gist and thrust of the applicant's e-mail would in my view be lost if it is not reproduced in full. It goes like this:

> "*Know this Katz*
>
> *Yesterday I got approval for a large amount in lawsuit funding from a UK firm. For 4 years I have been fighting this improper and illegal*

liquidation and for 18 months now 2 dedicated and hard working detectives from the HAWKS (ably assisted by a state advocate) have been investigating this matter, cumulating in them discovering gross irregularities in Durban High Court and a number of cases of perjury in various affidavits – all involving you in some way or another!

So this is a 'fuck you' letter and to tell you I am now I am coming after (sic) you and am going to expose you even if it means I have to go the Constitutional Court.

I am going to make sure you go to jail. You are someone who craves money and power and you have no vestige or conscious (sic). You pursue your career with a cold passion that tolerates none of the usual moral or legal encumbrances. When it is expedient you doctor the accounting, you stab your employees and clients in the back, tell lethal premeditated lies to people you trust and to persons in authority. You steamroll over people who are dependent and voice less. And all of this you do with the freedom that results from having no conscience at all.

You have attempted to blackmail us, threatened us with criminal proceedings, threatened us with interdicts and threatened to sue us for 'damages already suffered' – what fucking damages? What you are – is gutless thug launching unforgivable campaigns against others using the law to hide behind and at the same time you take advantage of helpless people's complete lack of understanding of the law. You are a sociopath who is in no way moved by the nagging voice of conscience that prevents other people from doing everything and anything they have to do to succeed, you act with a callous disregard for the devastating effects your illegal and improper actions have on others.

You and your partners in crime – Botha and Macready – made an intentional misrepresentation of material facts for the sole purpose of inducing a KZN Judge to act. Those misrepresentations were made deliberately, with total disregard for any consequences and the sole intention of wiping out my family financially but at the same ensuring you a handsome personal gain.

- *Botha was never Chairman of BoE*
- *Botha never had personal knowledge of any facts relating to the farm Klein Normandie.*
- *Brakspear trust never lent £400 000 to Westley trust in 2004*
- *Westley trust never paid £500 000 to anyone in June 2008*
- *Westley trust never borrowed £500 000 from Fairbairn Bank*
- *West Dunes never borrowed £500 000 from Westley trust.*

- *There was no legally enforceable right for Westley trust to call a loan due and payable.*

- *The substantive facts contained in founding affidavit was one big lie!*

Macready as Director of the Bank involved could not ever prove that the information contained in Botha bullshit affidavit was taken from Fairbairn business records, had personal knowledge of Fairbairn procedures for creating these records and were made at or near the time of the occurrence of the matters as stated by because none of it ever happened. You are all complicit in a fraud and I am going to show this to the world despite all the 'outside threats' we have revived by peoples unknown.

And the bullshit that you claim that 'I consented' shows what lying and deceitful son of a bitch you are. And even if, by the slightest remotest possibility it was true, the onus of satisfying the Court still rests with the sequestrating creditor and at no stage of the proceedings is any onus of disproving any of these points shifted to the debtor – which begs the question what lies did you tell the KZN High Court Judge in your supposed 'Chamber meeting' that proved that what you and your client stated was true.

What bullshit did you tell the Judge that convinced her that my answering affidavits version of events was so farfetched and outrageous that it could not be relief on by the Court to decide the case? What, to sue me! – go ahead and prove each and everyone of my statement above is untrue and everything you have said is the truth. I will bring a hundred plus witness's who will testify to the kind of man you really are and to the utter crap you spew out to the courts.

Good companies own up to their mistakes – pull their defective products off shelves, recall faulty mechanical parts, investigate their staff for malfeasance and make public apologies- but you threaten and bully like the testosterone deficient arse hole that you are.

1 Deliberate misrepresentations to the courts,

2 Fraudulent Bills of Costs submitted to the taxing master.

3 False signatures on said Bill of Cost

4 Court cases that were irregular.

5 Irregular Court Orders typed in a different format and font to the usual ones and always signed on the same day as if you are special and the rest of the law firms must wait for days for their Orders

6 Court files that are missing

7 Court transcripts that contain no records of cases ever been before the Judge –

8 Abuse of sections 417 and 418 hearings, applying the law selectively to one party (us) but ignores or fails to enforce that same law against certain members of another party (Botha and the trustees – coincidentally your clients) – simply because the lie you perpetuated would be exposed – the Commissioner has acted Mala Fide and I would bet on your instructions!

All the above have one thing in common, the name 'Leonard Katz'. I have copies of newspaper reports of a doctor, a pharmacists and an optometrist being convicted of fraud for amounts of less than R5 000 – double charging and false invoicing – your fees are in excess of R2 million – add in the improper commission payment of nearly R1 million. And while you carry on with these outrageous fees and fraudulent accounting entries – my 80 year old mother has to live in garage in the UK.(sic)

I am making it my life mission to expose you for what you have done to me and my family and every day you and your firm allow this bullshit to continue I am going to make sure that the damages claim will be so high that it will deter any such behaviour ever again from misbehaving attorneys, and finally I will make sure that you experience the floor and walls of a cold jail cell just like you have done to my mother in her cold and miserable garage.

I make no apologies for including the Chairman of your Group or members of the press when sending this email. (Jacques can you please forward to Chairman as his email address does not up on my computer)

I do apologize to those people cc-ed in this email offended by my swearing

Have a nice day you deceitful thieving twat"

[227] The viciousness and banal nature of the language used above does not need elucidation : Crude, uncouth and unbecoming!

RELIABILITY

[228] The applicant's evidence was mostly unreliable when the affidavit evidence is put alongside his *viva voce* evidence. To mention a few aspects as examples:

228.1 In his evidence-in-chief he alleged, *ad nauseum*, that he had numerous consultations with attorney Fiona Scott and Adv Alberts after 23 December 2008 with a view to opposing the final liquidation order on 5 February 2009. Yet, during cross-examination he conceded and/or confirmed that no answering affidavit(s) were prepared with a view to opposing the granting of the final winding-up order.

228.2 I am inclined to agree with the evidence of attorney Fiona Scott and Adv Alberts that the main purpose of delivering the opposing affidavit on 22 December 2008 was tactical and/or strategic : An effort was made to motivate the liquidators to not proceed with the Zamprotti sale of the farm Klein Normandie for 18 million. On his version the applicant had already prior to 23 December 2009 had a potential offer for the farm of some R25,5 million. That appears from his own e-mail to his erstwhile attorneys, Miller Bosman Le Roux referred to in the attorney's e-mail of 10 December 2008 addressed to one Stephen Levetan.[54] However, during cross-examination he denied ever consenting

[54] Series 100 : 64-65.

to their the provisional or final winding-up order. Instead he came up with a story of his mother and sister having decided to oppose the winding-up application which, he still insisted, was based on a fictitious R7 million claim.

228.3 He made a mighty effort to convey that the company (West Dunes Properties) was solvent. Yet in the same e-mail mentioned above dated 10 December 2008 he mentioned that the total liabilities of the company exceeded R25 million. If that were to be so, and if the so-called "*fictitious*" claim of R7 million was not included in the R25 million; and assuming that such claim was not fictitious, the company, on his own version, would have been hopelessly insolvent.

228.4 It is clear that the applicant participated in the winding-up process from the time when the provisional winding-up order was granted up to and until 31 August 2010 : He conceded under cross-examination that he continued to instruct attorney Fiona Scott in this matter until 31 August 2010. That is evidenced by the fact that Fiona Scott lodged an objection to Claim 2 and Claim 16 in the winding-up.[55] He did so until he perused the court file on 3 September 2010 and the day thereafter, i.e. 4 September 2010. The above information and state of affairs is inconsistent with the stance he took on 7 July

[55] See his letter of that date in Series 600 : 46.

2010 when, in a letter of that date, he alleged that he had laid four (4) charges of fraud and theft with the South African Police Services ("*SAPS*") in relating to the liquidation process. In the letter[56] he averred that the liquidation process was fraudulent.

When asked where he got all the wrong information from, the applicant stated that he got it from Lt Mbhele of the Hawks Police Unit and that he believed and acted on the information so received without verifying it first because he rusted the police.

228.5 He denied signing his own personal claim and that of Money Box (Pty) Ltd when he testified.[57]

However, it transpired that in both instances his signature appears on them. At first he denied the signatures being his but later when it became clear even to him that his denials were unfounded and mischievous, he admitted signing them. In both instances further, he agreed that the claims as set out in the claim forms to the liquidators or Master of the High Court ultimately, were grossly inflated : His own claim on the face thereof appeared to be supported by a letter from Chartered Accountants and Auditors, Nolands Richmond. This letter was dated 17 March 2009 and was addressed to attorney Fiona Scott. At his instructions, Fiona Scott lodged a R4 million

[56] Series 300 : 112.
[57] Series 300 : 71-75.

personal claim. With regard to the Money Box claim, he stated that the claim be knew of was for R3,9 million. When asked to explain why the actual claim lodged was for R7,8 million he could not come up with an explanation. He could equally not explain why the amount of his personal claim lodged with the Master was R6,8 million.

228.6 His entire case was premised on the fact that the trustees of the Westley Trust did not have the power to lend money. When relevant documentation was presented in court it become clear that this denial was contrived. It is trite that the powers of the trustees are couched in the widest possible terms and they conformed to those of an individual : In terms of the powers of the trustees as set out in Schedule 1 to the Trust Deed relevant hereto[58] they are ostensibly and obviously wider. When asked how he came to the conclusions and decisions he arrived at he stated that he obtained a written opinion from an advocate in Jersey. Yet, he did not and could not produce that opinion and it was not part of the documentation to be used in this trial.

Maybe it is privileged!

228.7 On his evidence with regards to the implications of what he alleged in his affidavits, namely, that Nedbank and Katz on the

[58] Series 100 : 42.

one hand and Adv Alberts and attorney Scott on the other were implicated in the "*forging*" of the provisional winding-up order, he was evasive. During cross-examination he was driven to concede that he was not justified to make such allegations. That was after he at first surprisingly denied making such allegation in spite of the fact that they were there in his affidavits and also said so. Eventually he concluded that he did not know who forged the court order. His evidence was very unreliable on this aspect.

228.8 Before Mrs Van Rooyen took to the witness sand, the applicant issued a challenge that if she comes to give her evidence as it appears in her affidavit, she would be telling blatant untruths. His challenge ended up being "*damp squib*" i.e. wild and unfounded because when Mrs Van Rooyen ultimately took the witness stand, he never put to her what he said he would do, i.e. that she was not telling the truth. Instead, Mrs Van Rooyen's testimony was virtually unchallenged.

228.9 When he was taken on during cross-examination he gradually softened his stance on the fact as to whether the provisional order was indeed granted. He conceded that all probabilities point to it having been granted by Balton J in her chambers on 23 December 2008. What he continued to dispute is that he had consented to it being granted unopposed.

At the end it was clear that it was unopposed

228.10 When pressed on his accusations of Nedbank and Katz having been complicit in the "*forging*" of or procurement of a fictitious order as stated in his papers[59] he ultimately conceded that his allegations have no basis whatsoever. However, in the same breath, when the court asked him who in his view specifically, forged the court order, he said he did not know. Yet when a follow-up question in clarification was posed to him as to whether in his view such forgery as he was alleging had anything to do with attorneys Katz and Scott or the Nedbank Group he again answered that he did not know. Those in my view were contradictory answers or versions by the applicant impacting on his reliability as a witness as well as on the reliability of his version.

228.11 With regard to the evidence of his handwriting expert, Mr Yossi Vissoker, at first the applicant conveyed the impression that he would come and conclusively prove that this provisional winding-up order was forged. However, Mr Vissoker's testimony did nothing of the sort : What it did was to point out that even the specimen signatures that were given to him as being those of Ms

[59] Pleadings Vol 7, pages 639-641 paras 58-63.

Chetty were in actual fact not hers at all and also were not the same inter se. What this meant was that there was a widespread problem in the office of the Registrar of this Court with regard to persons signing court orders in the names of other persons other than themselves. He conceded that the problem did not lie with either Katz, Nedbank Group, Adv Alberts, Adv Nicholson or attorney Fiona Scott. He had no comment to offer when asked to comment or reply to this. When the questioners insisted on him answering he conceded that he had no idea who the forger was.

228.12 He attempted to distance himself from his previous or earlier allegations to the effect that the Noseweek articles correctly set out his allegation and his version. However, he was made to concede that in so doing he was not only materially contradicting himself but also perjuring himself as he had stated it on oath that what Noseweek and other publications published in their papers they got or received from him. He grudgingly conceded this aspect.

228.13 He clean-facedly and/or obtusely denied what he meant in para 3.12 of his opposing affidavit dated 22 December 2008.[60] Eventually, when the question was persisted with

[60] Series 100 : 96.

he was not prepared to offer an answer to the question as to who the creditor was to whom West Dunes Properties owed the impugned £500 000. That is perplexing is that an answer to that question is the lifeblood of his case. For completeness' sake the paragraph reads as follows:

> "*3.12 Legal argument will be presented that those proceedings (the liquidation proceedings) are a gross abuse of such process and that an appropriate costs order on the scale as between an attorney and client be made against the Applicant. It is self-evidence that no indebtedness exists on the part of the Respondent (West Dunes) to the Applicant and that the JAM Brakspear Trust was the entity that advanced the funds and repaid the £500 000 to Fairbairn Private Bank*."

The applicant in my considered view laid down the marker as to what costs order should await a party herein found to have told untruths or uttered unsubstantiable allegations.

228.14 His evidence was inexplicable when regard is had to the objective facts : He did not take any steps to object to the proof of the claims by the Westley Trust. His explanation that he did not know that a review application could be launched does not hold water. The fact remains that at this stage he was still represented by Ms Scott. As such this excuse rings very hollow. Asked why he did not go to the Master instead, he said he decided to go to the Public Protector who advised him to go to court. He did not do

so. He instead went to the police. His further explanation that he all the time occupied himself by doing research as to what to do next is not borne out by the facts and circumstances. He failed to attend the first and second meetings of creditors as well as the section 417 and section 418 enquiries. During the first meeting which was held in Cape Town he said he did not go because his advocate became ill. However, the second meeting was brought to his hometown of Durban. Still he did not attend. When asked to give a reason for thus making himself guilty of criminal transgressions he had no comment. He also failed to lodge his statement of affairs. Later during the cross-examination and "*out of the blue*" he stated that he did not attend the meetings "*out of protest*". He compounded problems of his own making by failing to avail himself of legitimate opportunities to question and challenge the claims at every turn.

PROCEDURAL ASPECTS

[229] The applicant represented himself at this trial. In anticipation of the difficulties he was likely to encounter in the trial, especially where, as *in casu*, he was facing a senior counsel and his junior from each of the respondent and the Intervening Party, I took time to warn and advise him of the folly of representing himself in this trial.

[230] He was adamant that he did not want to see any legal person representing him. I adjourned the trial to allow him to ruminate over my advice and take advice. When the court resumed, he was still adamant he would represent himself.

[231] When he started leading his evidence, he started reading from a bundle of papers into the record. I advised him that he was to tell the court his story independent of the prepared "*speech*" or "*address*" as what he was doing was not allowed. He then led his evidence the accepted way. I went out of my way to help him do so by intermittently pointing at elements that he should prove in his evidence. The respondent and the Intervening Party's counsel's appreciated what I was doing. I did so in the interests of fairness and justice.

[232] As was held in *Lekup Prop Co No 4 (Pty) Ld v Wright,*[61] Cloete JA put it as follows:

> "*[32] Before making the appropriate order, I wish to say something about the manner in which the trial was conducted. It will be recalled that the appellant initiated motion proceedings and that the matter was referred to trial after the respondent had filed his answering affidavit. At the trial the respondent was allowed to read from that affidavit and did so, extensively. That was not the correct procedure. A witness who gives evidence in trial proceedings must do so in the ordinary way. In our practice, lay witnesses are not usually permitted to read from pre-prepared statements even if those statements have been prepared by themselves ...*"

[61] 2012 (5) SA 246 (SCA) at para [32].

CONCLUSION

[233] The evidence in this trial overwhelmingly establishes that the impugned draft order in issue here was presented to Balton J in chambers and that an order was made by her in terms of such draft order. This was the evidence of Adv Alberts, Adv Nicholson, Mrs Van Rooyen, attorney Fiona Scott and Mr Katz. The order bearing the Registrar's stamp dated 23 December 2008 and issued or authenticated by the Registrar's stamp on the day was issued by the Registrar's office in the normal cause. Adv Nicholson's evidence establishes that she took the court file with the court order to the Registry office for it to be authenticated or issued and this was done in her presence. The signature that was allegedly forged on the court order has been proven to be authentic. Ms Chetty confirmed that it was hers.

[234] When the provisional winding-up order ended up before Gorven J on 5 February 2009 for purposes of confirming or dismissing the rule *nisi* issued on 23 December 2008, it was confirmed without opposition from the applicant's counsel present thereat. The transcript of the proceedings of 5 February 2009 confirms this. Adv Alberts representing the applicant thereat also confirmed this.

[235] This Court would be justified to infer that Gorven J satisfied himself of the validity and authenticity of the application before he confirmed the rule

nisi. None of the parties herein, including the applicant, raise any issue or objection relative to this aspect.

[236] There is a presumption that official business is carried out regularly unless the contrary is proved. It is worded as follows: "*omnia praesumuntur rite esse acta donec probetur in contrarium*", literally translated meaning, "*acts are presumed to have been lawfully done until proof to the contrary is proved*".[62]

[237] The copy of the provisional winding-up order dated 23 December 2008, bearing the Registrar's stamp or seal with Ms Chetty's signature thereon is clearly the best evidence of the existence of such a document. Although the original court file with the original court order in it disappeared mysteriously, the applicant can testify and has testified to seeing it on 3 September 2010 and on 4 September 2010 when he caused copies to be made for him of the front of the court file and the court order.

[238] The applicant has not proved that the provisional winding-up order in issue here dated 23 December 2008 was forged or that it was fraudulently obtained.

[239] This Court is also persuaded and convinced that the applicant was unable to point to any documentation which supported his allegations of fraud

[62] *Absa Bank Ltd v Botha NO and Others* 2013 (5) SA 563 (GNP) at para [8] at 566.

on the part of attorneys Katz and Fiona Scott, Advocate Alberts, Nicholson (Ms) and Manca Sc, or Mr Botha or the Nedbank group of companies.

[240] As a rear-guard action the applicant pointed, albeit belatedly, to a so-called distribution made by the trustees of JAMBOT amounting to £500 000 in his favour. In this regard he pointed to a statement of account[63] which talked about a "*distribution*". He attempted to pass or justify these documents as indications of a genuine distribution.

[241] What this "*distribution*" document and the statement of account mentioned above were nothing more than a confirmation that his interest as a beneficiary of JAMBOT Trust had been debited with the amount of £500 000, being the amount which JAMBOT had in effect been obliged to forfeit as a result of the disastrous investment he was responsible for at West Dunes Properties, which resulted in the foreclosure by Firstrand Bank ("*FNB*") of the bond. The applicant would have none of it, irrespective of the fact that the "*distribution*" document was not a bank statement or actual or physical distribution of assets at JAMBOT. Despite him being taken laboriously through the documentary evidence indicating the chain process that culminated in the Westley Trust acquiring a right of recourse against West Dunes as a result of having to perform in terms of a guarantee which it furnished to Firstrand Bank, the applicant's final answer was that this was a genuine distribution made in his favour and that for that reason the Westley Trust had no claim against West Dunes Properties.

[63] Series 600 : 108.

[242] The improbability of his answer came about from the fact that when each and every step or procedure was explained to him, he agreed with it every time. He would come up with this answer of his only at the end when it was put to him that his agreement with all the procedural steps pointed to him denying the undeniable just for the sake of denying.

[243] It is my view and finding that indeed the applicant agreed with the scenario's he was taken through by counsel, thus making his final denial or answer to stick out like a sore thumb, it (answer) thus pointing to him as an untruthful and unreliable litigant who is not prepared to admit to the obvious.

[244] When the totality of the evidence as represented by affidavits and oral evidence in this Court is taken into accounts in the light of all the surrounding circumstances and the concomitant inherent probabilities, I find that the applicant made the following concessions which may be dispositive of issues raised herein.

[245] During his cross-examination on 13 August 2014, when the terms of Practice Directive 10.2 were put to him, he conceded that his entire criticism of the way in which the draft order was presented to Balton J, including the fact that the draft order was not in the type face of the orders typed by the Registrar's office, was entirely unfounded and, in fact laid to rest of his conspiracy theory with regard to this aspect of the case. He acceded to this without any ambivalence or prevarication.

[246] After some stubborn resistance, he eventually conceded that judgment was granted against him personally as well as West Dunes Properties on 28 November 2007 in favour of Firstrand Bank for the amount of R12 745 030,91 on account of West Dunes Properties defaulting on its bond instalments.[64]

[247] Again, after some lengthy and rigorous cross-examination which entailed also references to source documents, the applicant conceded that the claim relied upon by the Fairbairn Trust Limited in the winding-up application, which was the claim of the Westley Trust, was for the repayment of the £500 000, on account of the calling up of a guarantee furnished to Firstrand Bank. He also accepted the flow of funds as depicted in the diagrams put up as exhibits in Series 200 at 27.5 and 27.6, which, summarised, went as follows:

JAMBOT put up £951 000 (held as a deposit at Fairbairn Private Bank,) against which Fairbairn Bank, Guernsey, furnished a guarantee to Firstrand Bank on behalf of the Westley Trust. It is that guarantee that was called up by Firstrand Bank and which resulted in the Westley Trust in turn having a right of recourse or claim against West Dunes Properties.

[248] He also, after lengthy cross-examination and meticulous examination of the allegations made by Botha in his founding affidavit and replying affidavit, accepted that Botha did possess the necessary authority to start and

[64] Series 500 : 128.

prosecute the winding-up application on behalf of Fairbairn Trust Limited and that his (Botha's) allegations, particularly in paragraphs 1 and 2 of his founding affidavit, that there was no fraud, forgery and impropriety could not be gainsaid.[65]

[249] Consequently, the applicant's denial that the advice that he received from attorney Fiona Scott, Advocate Alberts and Graham Perry that the liquidation of West Dunes Properties was a good plan, is in the peculiar circumstances of this matter, improbable. That is so when regard is had to the financial distress of the company at the time which had culminated in the sale in execution of the farm Klein Normandie to Zambrotti Investments for R18 million. He attempted to defend by insisting that he did not agree with the plan allegedly hatched between him, Fiona Scott, Adv Alberts and Graham Perry and persisted with his claim that the claim advanced by Fairbairn Trust was fictitious even to the end in the face of a wall of evidence militating against such a denial and persistence. Belatedly he also claimed that the liquidator's fees, when taken into account or reckoning, did not make any business sense. That in my considered view and finding is palpably untenable.

[250] It is on record that neither attorney Fiona Scott nor Advocate Alberts, the applicant's legal team when the provisional and final winding-up orders were granted, had previously met Adv Manca SC or attorney Katz before they encountered them at court on 23 December 2008. That in my further view

[65] See Series 100; paras 1-3 at page 8 for Botha's averments and also para 58 in the Pleadings bundle, Vol 1, page 25.

renders it entirely improbable that they would in any way have improperly colluded and conspired with them. The reported hostile encounter between Adv Alberts and attorney Katz at court on 23 December 2008 cannot be reconciled with any collusive or corrupt scheme or conspiracy having been contrived between the two parties in that liquidation application to procure a fraudulent provisional winding-up order. That in my view renders the scale of the grand conspiracy theory sketched by the applicant, which would implicate both attorneys Katz and Scott from opposite sides of the litigation and at least Adv Alberts, preposterous.

[251] The evidence of the applicant (Mr Ian Brakspear) himself must be treated with great circumspection where it is not consistent with that of his own legal team, the Nedgroup Trust or the liquidators. That is so because he jumped from one standpoint to another and back without blinking an eyelid. In my view and finding he was a mendacious witness whose evidence was resplendent or shot through with contradictions and inherent improbabilities. This is best illustrated by his testimony that an attempt was made on his life when he was accosted by unknown men in an underground parking lot, where he was doused with petrol and the assailants flicking a cigarette lighter in the process of warning him from continuing with his "*crusade to arrive at the truth*" concerning this matter. Yet he did not report such a serious matter to the same police that he has reported the alleged "*illicit*" or "*fraudulent*" court order to or at least, report it to the parkade's security or neighbours.

[252] He was evasive while giving evidence and/or answering questions during his cross-examination. As he has conceded to being angry, frustrated and combustible, it was clear that he was to some degree actuated by extreme malice towards the liquidators, Nedgroup Trust and its attorney, Leonard Charles Katz who was and is a senior practitioner with attorneys' firm, Edward Nathan Sonnenberg among others. This was amply demonstrated, not only in the allegations in his affidavits but also in his "*know this Katz*" e-mail of 1 November 2012.[66]

[253] The applicant confirmed in his evidence that it was his "*life mission*" to bring about the downfall of Mr Katz. As a result, it is my view that because of his hostility and vindictiveness he (applicant/Mr Brakspear) cannot reasonably be said to have had the commensurate ability to present or view facts objectively. It also bears mentioning that as part of his ostensible vendetta, he used the fringe publication, Noseweek edited by his friend and advisor at court Mr Martin Welz, as a platform to publish allegations which may amount to criminal defamation unless they are proven to be true or in the public interest, among others. His demeanour in the witness box showed him to be somewhat unbalanced and irrational. He could not be categorised as a credible witness.

[254] For the reasons hereinbefore set out, the applicant's application stands to be dismissed with costs. The only aspect to be determined then is what

[66] Series 400 : 24. As quoted at paragraph 226 of this judgment at page thereof.

costs order should be made when the peculiarity of these proceedings is considered.

COSTS

[255] In the circumstances, the allegations by the applicant that the provisional winding-up order granted by Balton J on 23 December 2008 should be declared a nullity and/or null and void *ab initio* cannot succeed. Contrary to the applicant's contention that the case was never placed before a judge on 23 December 2008, there is evidence conclusively proving that it did serve before Balton J on that day. There are definitely records of this matter being on the court roll of 23 December 2008 and it served in chambers before the judge in keeping with the practice followed at the court when dealing with urgent matters.

[256] The applicant's prayer that this Court regard or treat the provisional winding-up order (rule *nisi*) of 23 December 2008, which was returnable on 5 February 2009 as "*a worthless piece of paper*" because the matter never served before Balton J has been proved untrue and irresponsible for the reasons already set out hereinbefore. Furthermore, the applicant prayed that this Court regard the sequestrating creditor's statement that says: "*… it (sequestrating creditor) owed R7 million and hat this was due and payable …*" as being fictitious and based on manufactured or tampered evidence. The applicant's evidence woefully falls short of proving the above. On the contrary, the applicant himself also acknowledged that he could not justify his

abovementioned serious accusations or allegations The evidence herein overwhelmingly pointed to the applicant having "*barked up a wrong tree*" and proves that *prima facie*, there was merit in the decision to wind up the respondent.

I must hasten to point out that this Court was not reviewing the liquidation proceedings here. As such what is said above is clearly *obiter* and for purposes of elucidation, especially in the light of the evidence led in this trial.

[257] This issue of costs that should accompany the ruling in this matter is a simple one in my view.

[258] If the lead presented to this Court by the applicant is anything to go by, the losing party herein ought to be ordered to pay the costs on a scale as between attorney and client. On the other hand, both counsel for the respondent and the intervening party, i.e. West Dunes Properties and Nedgroup Trust respectively, argued and ultimately submitted that should the court rule in their favour, i.e. against the applicant and/or the application, such a ruling or dismissal of the application should be accompanied by an order *re* costs, that the applicant, by names, Mr Ian Brakspear, should be ordered to pay the costs of the respondent and the Intervening Party on a scale, if interpreted in the ordinary everyday sense, as between party and party, which costs should include the costs of two counsel where these were employed.

[259] The issue of costs of litigation is in the discretion of the trial court, which must exercise that discretion properly and/or judicially or judiciously.

[260] After considering all the salient aspects inherent in this matter and weighing same, it is my finding that the cost order to accompany the ruling herein should be in the terms prayed for by both the respondent and the Intervening Party. They did not ask for punitive costs. I will not exercise my discretion to grant a punitive costs order.

ORDER

[261] The following order is thus made/issued:

> "*1. The application is dismissed.*
>
> *2. The applicant, being Mr Ian Brakspear, is ordered to pay the costs of the application to each of the respondents and the Intervening Party, which costs shall include the costs of two counsel where these were employed.*"

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N F KGOMO
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

BUT

SITTING IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL LOCAL DIVISION, DURBAN

FOR THE APPLICANT IN PERSON
Tel:

FOR THE RESPONDENT ASSISTED BY	ADV C J HARTZENBERG ADV R M VAN ROOYEN SC
INSTRUCTED BY	EDWARD NATHAN SONNENBERG 303 Pixley KaSeme Street, Durban Tel: 031 301 9340
FOR THE INTERVENING PARTY	ADV G W WOODLANDS SC
INSTRUCTED BY	EDWARD NATHAN SONNENBERG, DURBAN Tel: 031 301 9340
DATE OF HEARING	21 AUGUST 2014
DATE OF JUDGMENT	20 OCTOBER 2014