IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL DIVISION, PIETERMARITZBURG

Case No: 5148/2020P

In the matter between:

MICHAEL ANDREW ANTHONY DE BEER N.O. **FIRST APPLICANT**

BLUEBAY FREIGHT SOLUTIONS (PTY) LTD **SECOND APPLICANT**
(In provisional liquidation)

D H MACHINE MANUFACTURING (PTY) LTD **THIRD APPLICANT**
(In provisional liquidation)

SAMANTHA DE BEER **FOURTH APPLICANT**

BELINDA DE BEER **FIFTH APPLICANT**

COINT CLUB **SIXTH APPLICANT**

AUTO INDUSTRIAL INSURANCE (PTY) LTD **SEVENTH APPLICANT**

EBS OPERATIONS (PTY) **EIGHT APPLICANT**

MALCOM HENRY DE BEER **NINETH APPLICANT**

And

THE MAGISTRATE OF DUNDEE N.O. **FIRST RESPONDENT**

THE SHERIFF OF DUNDEE N.O. **SECOND RESPONDENT**

THE MINISTER OF POLICE N.O. **THIRD RESPONDENT**

MARCEL EDWIN NEL N.O. **FOURTH RESPONDENT**

CRAIG HENRY PHILANDER N.O. **FIFTH RESPONDENT**

CHRISTINA MAUREEN PENDERIS N.O. **SIXTH RESPONDENT**

RODERICK BRENT **SEVENTH RESPONDENT**

PETER MASKELL **EIGHT RESPONDENT**

IAN HANKINSON **NINETH RESPONDENT**

SEAN MORROW **TENTH RESPONDENT**

NEIL DAVID BUTTON N.O. **ELEVENTH RESPONDENT**

SHIRISHKUMAR JIVAN KALIANJEE N.O. **TWELFTH RESPONDENT**

LAILA ESSOP N.O. **THIRTEENTH RESPONDENT**

THE MASTER OF THE HIGH COURT KWAZULU-NATAL **FOURTEENTH RESPONDENT**

ORDER

A. The application is granted and it is ordered as follows;

1. The departure from the normal Rules of the Court is condoned and this application is entertained as one of urgency in terms of Uniform Rule 6(12).

2. The decision by the Magistrate on 4 March 2020 to issue and authorize the document styled:
Warrant of search for and take possession in terms of section 69(3) of the Insolvency Act No. 24 of 1936 of property belonging to Coint Trading (Pty) Limited (In liquidation' (the warrant) is reviewed and set aside.

3. The execution of the warrant is declared unlawful and it is reviewed and set aside.

4. The fourth, fifth sixth, seventh, eighth, ninth and tenth respondents are ordered and directed to return every item and every copy made of every item removed on 5 March 2020 from the premises situated at 10 Cable Street, Avon Industrial Area, Dundee (the Premises) and to delete all such documentation from any device on which they are copied or saved within 24 hours of this order.

5. The fourth, fifth, sixth, seventh, eighth, ninth and ten respondents are prohibited from using any document or any copy of any document removed from the Premises on 5 March 2020 or obtained from Absa Bank Limited and or Nedbank Limited and/or Bidvest Bank Limited and /or the FSCA in any legal proceedings as a result of a request made by any of respondents before 5 March 2020.

6. The fourth, fifth, sixth, seventh, eighth, ninth and tenth respondents are directed to unlock and release from attachment pursuant to the Warrant every item seized, secured or locked up within 24 hours of this order.

7. The fourth, fifth and sixth respondents in their personal capacity together with seventh respondent, jointly and severally, the one paying the others to be absolved to pay costs of the application including costs of two counsel where so employed.

B The application for leave and authority to oppose the application is refused. Costs to be costs in the main application.

C The application for leave to amend notice of motion is granted. Costs to be costs in the main application.

JUDGMENT

Delivered on:

Mngadi, J

[1] The applicants, apart from seeking leave to amend the notice of motion, seek in an urgent application, setting aside of a warrant of search and seizure, the return of documents and articles seized, prohibition from using seized documents with an order of costs *de bonis propiriis* on a punitive scale. Some of the respondents oppose the application. The fourth, fifth and sixth respondents as joint provisional liquidators seek leave to be authorized to oppose the application on behalf of the company in provisional liquidation. The applicants oppose this application.

Parties

[2] The first applicant Michael Andrew Anthony De Beer (De Beer) is a director of companies. He is the sole director of the second and third applicants and the chairperson of sixth applicant and authorized to institute and act on behalf the mentioned applicants. The second applicant is Bluebay Freight Solutions (Pty) Ltd (in provisional liquidation) (Bluebay) a company duly incorporated and registered in terms of the company laws of the Republic of South Africa. The third applicant is D H Machine Manufacturing (Pty) Ltd (in provisional liquidation) (hereinafter referred to as D H Machine) a company duly incorporated and registered in terms of the company laws of the Republic of South Africa. The fourth applicant is Samantha De Beer (Samantha) an adult female manager employed by WBO Civils (Pty) Ltd (WBO). The fifth applicant is Belinda De Beer (Belinda) an adult female business administrator employed by WBO. The sixth applicant is Coinit Club (The Club) an association of persons with capacity to sue and be sued. The seventh applicant is Auto Industrial Insurance (Pty) Ltd, a company duly incorporated and registered in accordance with the company laws of the Republic of South Africa trading as Cosmic Transport (Cosmic Transport). The eight applicant is EBS Operations (Pty) Ltd (EBS) a company duly incorporated and registered in accordance with the company laws of the Republic of South Africa. The ninth applicant is Malcom Henry De Beer (Malcom) an adult businessperson. The ninth respondent is the sole director of the eight respondent.

[3] All the applicants at the time material hereto were either employed at or operating from 10 Cable Street, Avon Industrial Area Dundee in KwaZulu-Natal (Premises). The

first applicant avers that he is duly authorized to institute the application on behalf of all the applicants and to act on their behalf and to take all steps necessary to bring it to finality. The sixth, seventh, eighth and ninth applicants are legal entities. The first applicant has attached no supporting documentation authorizing him to institute the application and to act on behalf of the said entities. In my view, the mere say so by the first applicant is not enough. He has not established the necessary authority and he may not represent and act on behalf of the sixth, seventh and eight applicants. It appears, in any event, that the interest of these applicants is that they operated their businesses in the Premises subject to the search and seizure.

[4] The first respondent is the Magistrate of Dundee (Magistrate) in his capacity as such. The second respondent is the Sheriff of Dundee (Sheriff) in his capacity as such. The third respondent is the Minister of Police in his capacity as the head of the South African Police Services. The fourth respondent is Marcel Edwin Nel N.O. (Nel) an adult male attorney and liquidator of companies. The fifth respondent is Craig Henry Philander N. O. (Philander) an adult male liquidator of companies. The sixth respondent is Christina Maureen Penderis N.O. (Penderis) an adult female liquidator of companies. The seventh respondent is Roderick Brent (Brent) an adult practicing attorney. The eight respondent is Peter Maskell (Maskell) an adult male auctioneer. The ninth respondent is Ian Hankinson (Hankinson) a candidate valuer. The tenth respondent is Sean Morrow an adult male computer forensic technician. The eleventh respondent is Neil David Button N.O. (Button) an adult attorney and liquidator of companies. The twelfth respondent is Shirishkumar Jivan Kalianjee N.O. (Kalianjee) an adult male attorney and liquidator of companies. The thirteenth respondent is Laila Essop N.O.(Essop) an adult female liquidator. The fourteenth respondent is the Master of the High Court of KwaZulu-Natal (the Master). The applicants seek no relief against the second, third, eleventh, twelfth, thirteenth and fourteenth respondents. These respondents are joined as interested parties. The first respondent authorized the issue of the Warrant to be executed by the second respondent and police officers employed by the third respondent. The fourth, fifth and sixth respondent are joint provisional liquidators of a company whose assets and documents were the object of the warrant.

The seventh, eighth, ninth and tenth respondents participated in the search and the seizure in execution of the warrant. The eleventh, twelfth and thirteen respondents are the provisional liquidators of Bluebay and DH Machine respectively. The Master is responsible for the appointment of provisional liquidators and liquidators of companies in the KwaZulu-Natal Province.

Filing of affidavits

[5] The fourth, fifth and sixth respondents have filed opposing affidavits and they are represented by counsel. Similarly, the seventh, eighth, ninth and tenth respondents filed opposing affidavits and they are represented by counsel. The rest of the respondents have not participated in the litigation. The Master filed a short report and abides by the decision of the court. In the report it is confirmed that the company Coint Trading (Pty) Limited was placed under provisional liquidation and the appointed joint liquidators are Nel, Philander and Penderis.

[6] The applicants launched the application on 11 August 2020. The certificate of urgency was signed on 6 August 2020. The notice of motion indicated the application will be made on 31 August 2020, the respondents to file a notice of intention within three days from the date of receipt of the application and to deliver answering affidavits by not later than 19 August 2020. The application constituted of 360 pages. On 21 August 2020, Nel filed a preliminary answering affidavit. On 31 August 2020 the application was postponed to 13 November 2020 in the interim the parties to continue to file affidavits with the replying affidavit to be delivered on 9 October 2020 and the last heads of argument to be delivered on 23 October 2020. On 26 August 2020, De Beer delivered the replying affidavit. On 23 September 2020, Brent delivered his answering affidavit. On 25 September 2020 Nel, Philander and Penderis launched the application for leave and authority together with an answering affidavit deposed to by Nel for the three of them. On 8 October 2020, the second respondent delivered its answering affidavit deposed to by Bheki Robert Mbambo (Mbambo). On 9 October 2020,

Samantha delivered a supplementary replying affidavit. On 9 October 2020, the applicants delivered the replying affidavit by De Beer to Nel's answering affidavit of 25 September 2020. The papers consists of 880 indexed and paginated pages.

Background

[7] Coinit (Pty) Ltd (Coinit) whose sole shareholder was De Beer was placed under provisional liquidation on 28 February 2020. The company carried on business at the premises at 10 Conte Street, Industrial Area, Dundee. On 5 March 2020, the Master issued as certificate of appointment of Nel, Philander and Penderis as joint provisional liquidators of Coinit. Coinit apparently conducted business by enticing members of the public to participate in a scheme. The scheme entailed members paying a deposit and monthly instalments towards purchasing a truck tractor, bus or similar equipment. The equipment would be leased out and the rentals paid to the "purchaser". In truth there was no equipment bought and leased. The money was being circulated resulting in a Ponzi scheme. De Beer managed the scheme and he dealt with the money circulating in the scheme as his own money. The scheme was in contravention of the law. Coinit was finally wound up on 28 May 2020.

[8] Nel having learnt that he with Philander and Penderis were to be appointed joint provisional liquidators of Coinit and having complied with all the requirements of the Master and subsequently receiving the certificate of appointment as joint provisional liquidator set out carrying out the duties as joint provisional liquidator of Coinit. He contacted various financial institutions advising then that he has been appointed joint provisional liquidator of Coinit and he issued directions relating to financial affairs and financial records of Coinit. He proceeded to the premises where Coinit operated and presented himself as a joint provisional liquidator of Coinit and made enquiries relating the affairs, assets and documents belonging to Coinit. He proceeded to apply for a warrant to search and seize articles, books and documents belonging to Coinit. The magistrate authorized the issue of the Warrant. Nel directed the execution of the warrant which resulted in the seizure and removal of articles and documents from the

Premises. Two computers belonging to Samantha and Belinda seized were released after three days after they had been cloned.

The issues

[9] The applicants are challenging the actions of Nel on various grounds. It is contended, *inter alia*, that Nel had no authority to contact the various financial institutions before 5 March 2020 relating to the affairs of Coinit; that Nel had no authority on 3 March 2020 to demand and enter the premises as joint provisional liquidator and enquire about the affairs and assets of Coinit; that Nel had no authority to apply for a warrant before the magistrate on 4 March 2020 whereas he had not been appointed a provisional joint liquidator of Coinit and he had no authority either from the creditors or the Master or leave of the court to apply for the warrant; that Nel had no authority to search, seize and remove and retain articles and documents that he searched, seized and removed on 5 March 2020 in terms of the Warrant authorized and issued on 4 March 2020; that the warrant issued on 4 March 2020 was invalid for vagueness and overbroad; that the warrant directed that it be executed by the sheriff and police officers not Nel or his agents; that only articles and documents belonging to Coinit were covered by the Warrant not the articles and documents that were indiscriminately removed and retained; that the manner the warrant was executed resulted in the search, seizure removal and retention of the articles and documents being unlawful.

[10] The respondents have raised various points *in limine*. They contend that there is no urgency shown. De Beer has no *locus standi* to act on behalf of Bluebay and DH Machine since both entities are under provisional liquidation, that the applicants in their urgent application deliberately avoided disclosing the business of Coinit; that there are factual disputes that cannot be resolved without the hearing of oral evidence, that the applicants rely on probabilities whereas probabilities have no role to play; that it is for the court hearing the liquidation applications of Bluebay and DH Machine to decide whether documents seized can or cannot be used in that litigation. In addition, the respondents contend that if it is found that Nel's appointment as joint provisional liquidator of Coinit is valid with effect from 5 March 2020, such a defect is condonable

and it should be condoned as there was no prejudiced caused. In addition, the respondents object to the use of video recording and transcript of the execution of the Warrant in the Premises.

Urgency

[11] The liquidation application for Coinit was issued on 21 October 2019. On 28 February 2020, Coinit was placed under provisional liquidation by an order of court. On 3 March 2020, Nel visited Coinit premises in Dundee. On 4 March 2020, Nel represented by Bret applied for and he was granted the issue of the warrant. On 5 March 2020, the Warrant was executed. On 6 March 2020 Nel, Philander and Penderis obtained an order freezing the bank accounts of Share Coin 2019 and Share-Coin Club entities associated with De Beer. On 12 March 2020, the order freezing bank accounts was served on De Beer. On 28 May 2020, order placing Coinit under final liquidation was granted. On 17 June 2020, in urgent application brought by DH Machine and Duntrance Solutions (Pty) Ltd, De Beer deposed to the founding affidavit. On 8 July 2020, liquidation application of Bluebay was served on the registered address. On 14 July 2020, application for the liquidation of DH Machine was served on the registered address. On 16 July 2020, De Beer received a copy of Bluebay liquidation and he received that of DH Machine on 23 July 2020. On 11 August 2020, this urgent application was launched. It is trite that where an application is brought based on urgency, the Rules of Court permit a court to dispense with forms and service usually required in terms of the Rules. The applicant is required to set forth explicitly the circumstances that render the matter urgent and the reasons he could not be afforded substantial redress at the hearing in due course. The degrees of urgency vary. The requested abridgement of the rules must accord with the degree of urgency in the matter. See *Nelson Mandela Metropolitan Municipality v Greyvenouw* CC 2004(2) SA 1 (SE) at 94H-96c paras 36-40.

[12] The applicants state, which is not disputed, that the execution of the warrant took place on 5 March 2020. They were not given any notice of the application for the Warrant before the magistrate. The warrant was exhibited to them but they were not

furnished with the application together with the supporting affidavit that resulted in the issue of the Warrant. The respondents did not leave the inventory of the documents and articles seized despite it being requested. The respondents refused to leave them with the copies of the documents they seized and they undertook to furnish them with copies as soon as possible but they never furnished them with the copies as per their undertaking. The applicants state that soon after 5 March 2020 the government declared a state of disaster due to the COVID-19 pandemic. The country was placed under lockdown. Movement was severely restricted and places of work were closed except for essential services during upper levels for the first three months from about March to July 2020. The injury the applicants complain of, namely; the withholding from them of seized articles, books and documents continues. In July 2020, contend they applicants, they also realized that the respondents contrary to the undertaking given were using the documents seized against them in other litigation. It is also necessary for them to obtain the seized documents to be used in their pending litigation. The respondents contend that the true reason for the assumed urgency on the part of the applicant is to oppose the final winding up of Bluebay and DH Lawrence by having the documents used in support of those applications declared unlawfully seized. It is contended that the Warrant was executed on 5 March 2020 and the applicants waited for a period of five months before the launched the application. An urgent application, it is argued, must be launched within days or weeks. The respondents argue, that in this division there is no provision for semi-urgent applications.

[13] It is trite that the court exercises a measure of discretion in determining whether urgency exist bearing in mind the interest of justice. Urgency involves mainly the abridgement of times prescribed by the rules and, secondarily, the departure from established filing and sitting times of the court. It relates to form not substance and it is not a prerequisite to a claim for substantive relief. See *The Commissioner, SARS v Hawker Air Services (Pty) Ltd* 2006(4) SA 292 (SCA) para 9. The applicants claim semi-urgency in the matter. Although in this Division there is no provision of semi urgent matters, it is accepted that urgency must be decided in the context of each individual matter and that there are varying degrees of urgency. Urgency, in my view,

should not be used to harass or to outwit and gain an unfair advantage against your opponent. The applicants were presented with a warrant applied for *ex parte* served on them without the application for the warrant. They needed to investigate the circumstances under which the warrant was issued. They needed to obtain legal advice and obtain documents from places and entities not accessible due to the lockdown restrictions. The circumstances prevailing may not be ignored. The applicants are entitled not to be restricted in their participation to the litigation affecting their rights. The applicants might be said to be jumping the queue but they have allowed the respondents time to address all the issues they needed to raise. If the applicants are prejudiced in the presentation of their cases in the ongoing litigation, it may be the prejudice which results in them not obtaining any substantial redress at the hearing in due course. If the applicants succeed in having documents used in the provisional liquidation applications of Bluebay and DH Machine declared unlawfully used, it will be an order to which they are entitled. In my view, the applicants have shown a degree of urgency, which justifies the abridgement of the rules of court as done in this application.

Locus standi

[14] It is contended on behalf of the 4th, 5th and 6th respondents that De Beer does not have the capacity or power to represent Bluebay and DH Machine. Upon the provisional winding up of Bluebay and D H Machine, De Beer as a director ceased to function as director and his powers and duties as director terminated. However, the respondents concede that upon the provisional winding-up of a company, the directors retain the residuary power to oppose a final winding up order. However, in my view, it is significant that the provisional joint liquidators of both Bluebay and D H Lawrence (the 11th, 12th and 13thrrespondents have not raised any objection to the *locus standi* of De Beer. De Beer contends, and it is common cause, that the seizure of documents and articles on 5 March 2020 took place before Bluebay and DH Machine were placed under provisional liquidation. He contends that the documents unlawfully seized have been used in the winding up applications of Bluebay and DH Machine. He needs the seized documents to oppose the final winding-up of Bluebay and DH Machine. In the circumstances, in my view, the representation of De Beer of both Bluebay and D H

Machine falls within his residuary power to oppose a final the winding up of the two entities. In *National Director of Public Prosecutions v Ramlutchman* 2017 (1) SACR 343(SCA) at para 18, it was held that it is unconscionable that a party with a direct and substantial interest in the outcome of the litigation would be denied an opportunity to safeguard his interest.

Use of video recording and the transcript of the recording

[15] The fourth, fifth and sixth respondents contend that no basis have been laid for the introduction of the video recording at the hearing of the application. It is argued that the admissibility of such evidence including the authenticity thereof must be dealt with before the evidence is admitted. Therefore, such an issue should be resolved by the leading of oral evidence. Samantha in her affidavit states that she and Fraser carried out the recording. The images depicted in video and the transcript is a correct version of what took place. However, Samantha concedes that the premises covered a large area and it was not possible to video record the entire search, seizure and removal. In my view, it matters that the equipment, which was used in the recording, which contains the original recording, has not been made available to the respondents. The recording in the memory stick is a secondary version and it is admitted that it is not a recording of the entire search, seizure and removal. In my view, such evidence cannot be admitted without admissibility thereof having been determinedora.

Factual disputes and failure to disclose material facts

[16] The seventh, eighth, ninth and tenth respondents supported by the fourth, fifth and sixth respondents contend that all the issues that arise should be referred for hearing of oral evidence. They submitted a draft order in this respect. The applicants conceded that the issue that is subject to a factual dispute is whether there was ulterior motive on the part of the joint provisional liquidators, the behavior of those who executed the section 69 warrant during the execution of the warrant and whether the documents seized have been used. However, they contend that these issues have no direct bearing on the main relief sought. In addition, they accept that the matter may be decided without proof of ulterior motive on the part of the joint provisional liquidators.

Their case, the applicants contend, is to a large measure based on the version of the respondents and the common cause factors. In my view, the application procedure may not be frustrated by claiming factual dispute on a range of peripheral issues.

[17] Uniform Rule 6(5)(g) provides that where an application cannot properly be decided on affidavit the court may dismiss the application or make such order as to it seems meet with a view to ensuring a just and expeditious decision. It is only where the application, with a view of the relief sought, cannot properly be decided on affidavit that the sub-rule applies. Further, the court must bear in mind that it needs as far as possible to ensure a just and expeditious decision in the matter. *In Peteresn v Cuthbert & Co Ltd* 1945 AD 420 at 428 it was held that in every case the court must examine an alleged dispute of fact and see whether in truth there is a real dispute of fact which cannot be satisfactory determined without the aid of oral evidence. If that is not done, a respondent might be able to raise fictitious issues of fact and thus delaying the hearing of the matter to the prejudice of the applicant. In my view, the alleged dispute of fact are not central to the decision whether to grant the relief sought or not. In my view, the factual dispute to a large measure relates to what happened during the execution of the warrant and whether the seized documents were used in the liquidation applications of Bluebay and D H Machine. In my view, for purposes of this application, it is not necessary to decide whether the execution of the warrant was carried out in such a manner that it rendered the execution of the warrant unlawful. Again, whether the documents seized have been used or not, although there is a strong possibility that they have been used, need not be decided at this stage. It suffices that there is a risk that they might be used. If the articles and documents were unlawfully seized, the applicants are entitled to their return.

[18] The provisional liquidators received the email from the Master dated 2 March 2020 at 15h14 on 2 March 2020. The email advised: ' that the Insolvency Panel convened on 2 March 2020, the Master is prepared to consider M.E. Nel, G.H. Philander and C.M. Penderis for appointment as provisional Trustee/ Liquidator in the matter of Coinit Trading (Pty) Ltd, provided the following is lodged with this office within 7 days hereof;

1. Undertaking and Bond of Security together with Suretyship to the value of R100 000 000-00.
2. Affidavit of Non-interest.
3. Certified copy of the proposed provisional Trustee/Liquidator's identity number.

Should the abovementioned not be lodged as mentioned above, the matter will be reconsidered by Panel',

Nel in his preliminary answering affidavit states that the provisional joint liquidators accepted the abovementioned email as their appointment as joint provisional liquidators of Coinit and thereupon immediately set about investigating the affairs of Coinit. Brent in his answering affidavit states that by no later than 2 March 2020 Nel and Philander had met the requirements of the Master and Penderis met the requirements not later than 4 March 2020.

[19] The claim for non-disclosure is the applicants did not disclose the nature of the business of Coinit. It is not clear why the applicants would be expected to disclose the business of Coinit in their application to have articles and documents seized from them that did not belong to Coinit returned to them. In addition, the respondents are the joint provisional liquidators of Coinit or associated with the joint provisional liquidators of Coinit. The business of Coinit is well known to them. In my view, the applicants were not obliged to disclose the business of Coinit for purposes of the relief they seek. If the business of Coinit formed the context justifying the actions of the respondents, it was for the respondents to make averments relating to that in their answering affidavits.

Application for the warrant, vagueness of the warrant and execution of the warrant

[20] Section 69(2) of the Insolvency Act 24 of 1936 (Insolvency Act) provides that if a trustee has reason to believe that any property, book or document is concealed or otherwise withheld from him, he may apply to a magistrate having jurisdiction for search warrant mentioned in ss(3). Section 69(3) provides:

'If it appears to a magistrate to whom such application is made, from a statement made upon oath, that there are reasonable grounds for suspecting that any property, book or document belonging to an insolvent estate is concealed upon any person, or at any place or upon or in any vehicle or vessel or receptacle of whatever nature, or is otherwise unlawfully withheld from the

trustee concerned, within the area of the magistrate's jurisdiction, he may issue a warrant to search for and take possession of that property, book or document.'

[21] It is common cause that the magistrate was approached in chambers with the application to authorize the issue of the warrant. Brent acting as Nel's attorney approached the magistrate with the application. No notice of the application was given to any person. The application was not enrolled for hearing. It took a form of a final order with no provision that an affected person could challenge it. The provisions of s69 stipulates that there be an application and a statement on oath. Nel's application was supported by an affidavit. It complied with the requirements of the provisions of s69. The applicants' complainant that they were not given any notice and had no means of opposing or challenging the issue of the warrant are matters of no moment. Further, the applicants contend that the application was made to the magistrate whereas Nel had not been authorized to launch such application by the creditors of Coinit or the Master or by leave of the court. Nel concedes that prior to the application for the warrant before the magistrate he had not sought or be granted authority to make such an application and to appoint attorneys and counsel for the said purpose as contemplated in section 386(4) (a) read with item 9(1) of Schedule 5 of the Companies Act No. 61 of 1973 and further read with item 9(1) of Schedule 5 of the Companies Act No. 71 of 2008. He contends that the applicants are not entitled to raise the issue as it relates to a matter between the joint provisional liquidators and creditors of company in liquidation. In my view, the applicants are affected in their rights by the warrant. They are entitled to investigate whether the warrant was properly authorized and issued. If not, to seek to set it aside.

[22] The magistrate authorized and issued a warrant with the following heading: **'Warrant to search for and take possession in terms of section 69(3) of the Insolvency Act No. 24 of 1936 of the property belonging to Coinit Trading (Pty) Ltd (in liquidation)'**

The warrant is addressed to:'The sheriff of the magistrate's court for the district of Dundee and all police officers'. It reads:

'On the grounds set out in the affidavit of Marcel Edwin Nel there exist reasonable grounds for suspecting that the hereinafter mentioned property, books and documents belonging to Coinit Trading (Pty) ltd (hereiafter referred to as " Coinit" are concealed or at the hereinafter mentioned premises or otherwise within the area of jurisdiction of the Magistrate's Court for the District of Dundee and are unlawfully withheld from the joint provisional liquidators of Coinit.

You are hereby authorized and instructed to enter and search the hereinafter mentioned premises during the day, or any other premises or any person found on such premises or other premises and to take such property, books and documents into your possession and hand the same over to the said Marcel Edwin Nel or duly authorized representatives of the joint provisional liquidators of Coinit

Such property, books and documents are as follows, namely;

1. All books, records and documents whether in hard copy format or electronic format belonging to and relating to Coinit;
2. All movable property of whatsoever nature, inclusive office furniture, office equipment, computers, laptops and tablets;
3. Mechanical horses;
4. Truck tractors;
5. Rigid trucks;
6. Earthmoving machinery and equipment;
7. Buses;
8. Workshop and engineering equipment.

You are further authorized and directed to enter and to search the following premises for the abovementioned purposes, namely; The whole of the premises situate at10 Cable Street, Avon Industrial Area, Dundee'.

[23] The warrant authorizes and instructs the sheriff and all police officers only. The sheriff and police officers are not authorized to authorize other persons. The sheriff and police officers must execute the warrant by themselves identifying the premises to be searched in terms of the warrant and to search the premises for property for books and documents belonging to Coinit. They must take what they have found into their

possession and hand it over to Marcel Edwin Nel or the duly authorized representatives of the joint provisional liquidators of Coinit.

[24] It is common cause that when the warrant was executed, the sheriff and two police officers did not participate in the actual search and seizure. Nel in the preliminary answering affidavit states that he was not present during the execution of the section 69 warrant. He states that he had authorized the seventh respondent(Brent) his attorney, the ninth respondent(Maskell) and the tenth respondent(Hankinson) to represent him during the execution of the section 69 warrant, he briefed and tasked them to assist in the identification and collection of documents the subject of the warrant. Maskell and Hakinson are employees of Peter Maskell Auctioneers. He states that he also briefed and tasked Sean Morrow (the tenth respondent) who is an information technologist to examine computers and data storage devices for purposes of identifying data and electronic documents relating to the affairs of Coinit.

[25] Brent states that on 2 March 2020 Nel appointed him as their attorney. On 2 March 2020 he appointed Peter Maskell as their auctioneer, agent and valuators with effect from 2 March 2020 and authorized him to execute the section 69 warrant. Nel attaches as proof of appointment emails addressed to him and Peter Maskell dated 5 March 2020. The emails in respect of Maskell, that it is confirmed that he is appointed as auctioneer, agent and valuator for the provisional liquidators with effect from 2 March 2020 and that in addition he is appointed as agent for the provisional liquidators in executing the s 69 warrant. The one to Brent states it is confirmed that he is appointed as attorneys for the provisional liquidators with effect from 2 March 2020. The emails are from Nel.

[26] Brent states that on 5 March 2020 he visited the premises at 10 Cable Street, Avon Industrial Area, Dundee to execute the warrant. The following persons accompanied him:

1. Michael Kinsely an associate of his employed by Hay & Scott.

2. Peter Maskell who was accompanied by Ian Hankinson his employee and Gail Horsely his other employee.
3. Sean Morrow an IT specialist with two assistants Ryan Zwart and Cullen Morrow. Peter Maskell engaged Sean Morrow.
4. Peter Maskell's loading staff.

Brent denied that in executing the warrant they acted rudely, overbearingly, illegally or irregularly. They acted with propriety throughout. He states they arrived at the premises before 8.00am. The sheriff Mbambo and an assistant accompanied them. There were two police officers present to ensure law and order. They were observers throughout. The sheriff arranged for a locksmith to unlock the premises. The locksmith arrived but his services were not required because the premises were opened for them. They exhibited the warrant to Fraser after he requested to see it. They executed the warrant by questioning the applicants who were there. They searched the premises and found a myriad of offices. The premises covered an area of 25 000 square meters. He states that they found documents of Coinit showing transfers of interest to Coinit Club after the date of liquidation. They demanded to take the Coinit Club documents for investigation but the applicants were refusing. It was agreed with Shabangu that they would place the documents in boxes and seal them until there was an agreement or court order. The applicants did not want to agree but eventually accepted. The documents are still sealed and kept in safe place. All the computers have been cloned but have not been accessed. They have offered the clones could be accessed and copied jointly or under supervision but this offer was refused. He states that at all times they were acting as agents of the provisional liquidators. The sheriff and SAPS monitored and watched them.

[27] In my view, unlike *in Minister of Safety of Security & others v Bennet & others* 2009 (2) SACR 17 (SCA) at para 21, where the deal related to the handling of potentially privileged documents, it is clear from the affidavit of Nel that there was no deal made with the applicants relating to the execution of the section 69 warrant in terms of which Nel can justify anything done not authorized by the warrant. The affected persons as put by Brent 'they had to and accepted' what Brent wanted to do

and what he claimed the warrant authorized him to do. In my view, the issue is whether the persons who executed the warrant were authorized by the warrant to execute the warrant. The further issue is whether the persons authorized to execute the warrant could delegate their authority to execute the warrant to others.

[28] In *Nadoo & others v Kalianjee NO & others* 2016(2) SA 451(SCA) it was held that section a s69 a warrant differ from criminal warrants and it may not be scrutinized for technical imperfections like criminal warrants. However, in my view, this does not mean that broad principles relating to entry, search and seizure warrants are not applicable to s 69 warrants. Parties affected by s 69 warrant are entitled to the protection of their enshrined constitutional rights in no less measure than those affected by criminal warrants. The rationale of the principles is that entry, search and seizure warrants impact on constitutionally enshrined rights of the affected persons, *inter alia*, right to dignity, privacy, freedom, security, trade and property which are held by all people . The general principles are some of the following:

1. The courts examine the validity both authority under which a warrant is issued and the ambit of its terms restrictively, and in bearing that section 14 of the Constitution entrenches everyone's right to privacy, including the right not to have one's person, home, or property searched, possessions seized. See *Thint (Pty) Ltd v National Director of Public Prosecutions & others ; Zuma & another v National Director of Public Prosecutions & others* 2008(2) SACR 421 (CC) at para 76.
2. A person against whom a warrant has *ex parte* been issued is entitled to the copy of the warrant and the affidavit in support of the application for the issue of the warrant. See *Goqwana* below at para 31.
3. The *ex parte* applications must be brought in utmost good faith. All material facts should objectively and fully disclosed including possible lack of authority on the part of the person applying for the warrant for consideration by the judicial officer. See *Mineral Resources* below at paras 105 and 112.
4. Warrants that contain vague, unintelligible or overbroad provisions may be found to be invalid in its entirety. See *Zuma* at 493.

5. The warrant must be executed strictly in its terms. Participation in the execution of the warrant by persons not authorized by the warrant may result in the setting aside of the warrant. See *Mineral Sands Resources (Pty) Ltd v Magistrate of the District of Vredendal, Kroutz NO & others* [2017] 2 All SA 599(CC).

[29] The persons who entered the premises and conducted the actual search and seizure were all not authorized by the s69 warrant. The warrant is vague to authorize and instruct the sheriff and all police officers. It must specify the name of the sheriff and the names of the police officers to execute the warrant. The persons to whom it is directed are entitled to deal with persons properly identified in the warrant and the persons identified in the warrant must take responsibility and account for the proper execution of the warrant. *See Goqwana* below at para 22.

[30] The warrant to authorize search of any other premises and any person found on such premises without identifying the other premises is vague and overbroad. Further, it is vague to authorize search and seizure of all books, records and documents whether in hard copy format or electronic format relating to Coinit. Section 69(3) authorizes search and seizure of what belongs to the insolvent estate. The magistrate did not have authority to extend the ambit of a warrant by covering any other premises and by including books, records and documents relating to Coinit.

[31] The affidavit in support of the application for the issue of the warrant was not presented to the persons in the premises; in particular, since the warrant was applied for *ex parte*. The persons directed in the warrant to execute it did not present the warrant. It is not surprising that there was no return of service of the warrant by the sheriff and no list of articles and documents seized was left with the applicants. The applicants were also not served with the copy of the application for the warrant. The failure deprived the persons affected by the warrant to exercise their right in relation to the warrant. See *Goqwana v Minister of Safety and Security NO & others* 2016 (1) SACR 384 (SCA) at para13.

[32] Nel contends that he authorized the persons who actually conducted the search and the seizure of articles and documents. However, he himself was not authorized to execute the warrant and neither did he have authority to authorize other persons other than those authorized by the warrant to execute the warrant. Both the sheriff and police officers have not claimed to have authorized those who executed the warrant. In fact, the names of the two police officers are unknown and it cannot be verified whether they were police officers and whether they executed the warrant. See *Goqwana* at paras16,2 and 22. It is not a requirement as contended by the applicants that before Nel applied for the warrant, the Deputy Sheriff must have completed an inventory in terms of s69(1) of the Insolvency Act of property belonging to the insolvent estate. The provisions of s 69(3) in my view are self-standing.

Appointment of provisional liquidators

[33] Section 368 of the Companies Act 71 of 2008 provides that as soon as a winding-up order has been made in relation to a company, the Master may appoint any suitable person as provisional liquidator of the company, who shall give security to the satisfaction of the Master for the proper performance of his or her duties as provisional liquidator and who shall hold office until the appointment of a liquidator. The Master is the officer of the High Court, referred to in s 2 of the Administration of Estates Act No. 66 of 1965, who has jurisdiction over a particular matter arising in terms of this Act. The jurisdiction was defined as that in a winding-up by the Court. The Master concerned is the Master who has jurisdiction in the area of the jurisdiction of the Court, which issued the winding up order.

The Master is the only official authorized to appoint liquidators and provisional liquidators and to exercise certain powers in terms of the Act and the appointment cannot be made by the Court. See *City Capital SA Property Holdings Ltd v Chavonnes Badenhorst St Clair Cooper and Others* 2018 (4) SA 71 (SCA) at para 32.

[34] The provisional liquidators received the email from the Master dated 2 March 2020 at 15h14 on 2 March 2020. The email advised: ‘ that the Insolvency Panel convened on 2 March 2020, the Master is prepared to consider M.E. Nel, G.H. Philander and C.M. Penderis for

appointment as provisional Trustee/ Liquidator in the matter of Coinit Trading (Pty) Ltd, provided the following is lodged with this office within 7 days hereof;

1. Undertaking and Bond of Security together with Suretyship to the value of R100 000 000-00.
2. Affidavit of Non-interest.
3. Certified copy of the proposed provisional Trustee/Liquidator's identity number.

Should the abovementioned not be lodged as mentioned above, the matter will be reconsidered by Panel'.

Nel in his preliminary answering affidavit states that the provisional joint liquidators accepted the abovementioned email as their appointment as joint provisional liquidators of Coinit and thereupon immediately set about investigating the affairs of Coinit. Brent in his answering affidavit states that by no later than 2 March 2020 Nel and Philander had met the requirements of the Master and Penderis met the requirements not later than 4 March 2020.

[35] The applicants contend that when Nel embarked on the liquidation process he had no authority to do so because he was only appointed a joint provisional liquidator with Philander and Penderis by the Master on 5 March 2020. The certificate of their appointment issued in terms of Act bears the date 5 March 2020. The Master who is the fourteen respondent has not disputed what is reflected in the reading of the certificate that the joint provisional liquidators of Coinit were appointed on 5 March 2020. The Master has not stated that he appointed the provisional liquidators on a date prior to 5 March 2020, the date reflected in the certificate of appointment. It may be accepted that it is not a requirement of the Companies Act that that the provisional liquidator be appointed by a certificate of appointment. However, where the evidence of the appointment is a certificate of appointment and the contents of such certificate is not disputed or corrected by the person who issued the certificate and who made the appointment it makes it difficult to contend otherwise than what is contained in the certificate. It is of no help that Nel and the other joint provisional liquidators complied with all the requirements for appointment as provisional liquidators before 5 March 2020 or that they assumed that they were appointed before 5 March 2020. No person in terms of the Companies Act 71 of 1973 or the Insolvency Act can act as a provisional liquidator before being appointed by the Master of the High Court. It is difficult to

understand how Nel an attorney could construe the above quoted email of 2 March 2020 as an appointment as a provisional liquidator. It unequivocally stated that the Master was prepared to consider named persons for appointment.

[36] Nel in the affidavit in support of the s69 warrant application deposed to on 4 March 2020 attached the provisional liquidation order of Coinit but attached no document to prove that he was appointed a provisional liquidator. He stated that pursuant to the winding up of Coinit on 28 February 2020 he, Philander and Penderis were appointed by the Master provisional liquidators of Coinit. He stated that they have been in office for a very limited period of time without specifying the time. He then stated that on 3 March 2020 he attended the premises of Coinit for purposes of identifying and taking control of the movable property, books and records of Coinit where he introduced himself as one of the joint provisional liquidators of Coinit. In my view, although Nel claims that it is only from 4 March 2020 after the Master's requirements in respect of Penderis were met that he started to act as joint provisional liquidator he is misleading. He mislead the magistrate, from 2 March 2020 he started acting as joint provisional liquidator when he knew that he could not do so. Philander and Penderis who are curiously silent as to when they were appointed provisional liquidators could not retrospectively condone what Nel did before they were appointed provisional liquidators.

[37] Nel all along knew that joint provisional liquidators would be appointed. He knew that by 2 March 2020 not all three joint provisional liquidators had complied with requirements of the Master and those that had not complied with the requirements of the Master could not act as joint provisional liquidators. He knew that as a joint provisional liquidator he could not alone act in matters relating to the affairs of the company in liquidation. Joint provisional liquidators must all act as one. Nevertheless, he proceeded to act as joint provisional liquidator. He further failed to disclose to the entities he communicated with and to the magistrate that the other or others were in the process of being appointed as joint provisional liquidators. He conveyed in his affidavit before the magistrate that he was one of the appointed provisional liquidators, which he knew, was not correct. He proceeded to appoint on 2 March 2020 other persons

including Brent, Peter Maskell whereas the three joint provisional liquidators could only make those appointments. In my view, the evidence show clearly that the Master appointed Nel, Philander and Penderis joint provisional liquidators Coinit on 5 March 2020 and I so find.

Acts performed prior to 5 March 2020 not invalid

[38] Nel, Philander and Penderis contend that the application for the s69(3) warrant on 4 March 2020 in the absence of appointment as provisional liquidators constitute a formal defect contemplated in section 157(1) of the Insolvency Act 24 of 1936 due to the following circumstances:

'1. On 28 February 2020 Coinit was placed under provisional liquidation and the Master was directed to appoint a liquidator forthwith.

2. On 2 March 2020, a notice was posted on the notice board at the Master's office reflecting the names of Nel, Philander and Pendertis as provisional joint liquidators of Coinit.

3. On 2 March 2020, the Master panel responsible for insolvency appointments in writing appointed the provisional liquidators and produced a file note to that effect.

4. On 2 March 2020, the provisional liquidators received an e-mail from the Master that he was prepared to consider their appointment as provisional liquidators provided an undertaking and bond of security together with suretyship to the value of R100 million , an affidavit of non-interest and a certified copy of their identity books are lodged within seven days, and should the requested documents be lodged the matter will be reconsidered by the panel.

5. All the documents required in respect of Nel were filed on 2 March 2020, in respect of Philander on 3 March 2020 and in respect of Penderis before 11h30 on 4 March 2020.

6. By the time an application for s69 warrant was moved on the afternoon of 4 March 2020 the Master's requirements for the appointment had been met.

7. The certificate of appointment was issued on the same day as the execution of the section 69 warrant on 5 March 2020.'

[39] The respondent contend that the above-mentioned factors show that the joint provisional liquidators acted *bona fide*. The documents seized that do not belong to Coinit should be returned, it argued. The joint provisional liquidators are entitled to and should keep the documents belonging to Coinit. The issue constitutes, it is contended,

a formal defect envisaged in section 157(1) and (2) of the Insolvency Act , which provides:

'(1) Nothing done under this Act shall be invalid by reason of a formal defect or irregularity, unless a substantial injustice has been thereby done, which in the opinion of the court cannot be remedied by any order of the court.

(2) No defect or irregularity in the election or appointment of a trustee shall vitiate anything done by him in good faith.' Reference is made to *Swart v Starbuck and others* 2017(5) SA 370 (cc) at 385 para 40 it was held: ' In addition, to ss(1), ss(2) makes plain that no defect or irregularity in the appointment of the trustees can vitiate anything done by them in good faith. If there were a defect or irregularity in the appointment of the trustees, this would not vitiate the sale of the properties if the sale of the properties were effected in good faith'. The respondents contend that acts performed prior to 5 March 2020 by the joint provisional liquidators are not invalid. Further, it is argued, section 375(4) of the Companies Act 1973 provides the acts of a liquidator shall be valid notwithstanding any defects that may afterwards be discovered in his appointment or qualification. The respondents' argument that acts otherwise invalid are automatically validated in terms of the quoted provisions is misdirected. The court must decide whether in the facts and circumstances of a particular case the particular act should be found to be valid or not. In the case where the person knew of the defect in his/her appointment but committed the act in question and he is unable to explain what caused him to commit the act in question, in my view, the court would not found his act valid except if it is shown to be in the interest of innocent third parties.

[40] The applicants contend that the communication between Nel and the Master's office made it abundantly clear that no appointment of provisional liquidators had been made but it was being considered. Nel was an attorney and a liquidator of companies. He was receiving legal assistance from another attorney Brent. Both Philander and Penderis were liquidators of companies. They must have been familiar with the communication from the Master's office relating to the appointment of liquidators as well as the legislation regulating the appointment of liquidators. They were under no allusion that appointment of liquidators is done by the Master by a certificate of appointment. There was no urgency, which necessitated them to act as joint liquidators before the

Master appointed them. The applicants contend that Nel well knowing that he had not yet been appointed a joint provisional liquidators held himself out to financial institutions as a joint provisional liquidator of Coinit. He an officer of the court deposed to an affidavit that he had been appointed with others as joint provisional liquidators. He caused Brent to appear before a judicial officer and move an application supported by averments in a founding affidavit he knew to be false in order to be issued with a warrant of search and seizure. He held back from the applicants the affidavit with false averments and directed the execution of the unlawfully obtained warrant. Nel with Brent directed the execution of the warrant in manner contrary to its terms. They knew that the sheriff and the police were to execute the warrant but instructed other persons to execute the warrant. They knew that the warrant could only authorize removal of articles and documents belonging to Coinit. However, they removed personal computers of Samantha and Belinda and cloned them. Further, they removed documents and keep documents that they had not identified to belong to Coinit.

[41] It remains, in my view, unexplained why Nel decided to act as a joint provisional liquidator before he was so appointed. Nel as an attorney and liquidator of companies knew better. There are no basis to hold that Nel when he held himself as an appointed provisional liquidator of Coinit before he was appointed he was acting *bona fide*. I must accept that it has not been shown that he acted with *ulterior* motive. However, I find that he acted in a reckless manner. Philander and Penderis made common cause with Nel. They have totally failed to objectively and independently apply their own mind to the issues although they were appointed to make their own independent professional input. Their silence coupled with the fact that they were to benefit from the activities of Nel justify in tying them up with the mishaps of Nel.

[42] It must be pointed out that Nel was neither a trustee as envisaged in section 157(1) and (2) of the Insolvency Act and neither was he a liquidator as envisaged in section 375(4) of the Companies Act 1973. There must be basis for including a provisional liquidator in the said provisions. The Acts distinguish the appointment and functions of trustees, provisional liquidators and liquidators. Since the provisions do not

include a provisional liquidator, the inclusion of a provisional liquidator cannot be done through a process of interpretation, a provision in the statute including the provisional liquidator must be found otherwise the provisional liquidator is excluded. Even if the said provisions include a provisional liquidator there was no defect in the appointment of Nel as a provisional liquidator and it remains a valid appointment with effect from 5 March 2020. There are no basis and no power to backdate it to 2 March 2020. In addition, the applicants are not seeking to set aside an act performed by Nel but a section 69 warrant issued by the magistrate. It is only the court, which may on proper grounds review and set aside the section 69 warrant. I am unable to find that Nel was entitled to act as provisional liquidator before his appointment on 5 March 2020. I further find that I have no power to declare acts performed by Nel as a provisional liquidator before he was appointed a provisional liquidator valid. Even if I had such a power no basis has been shown to exercise such a power.

Application for leave and authority to oppose and appoint attorneys and counsel

[43] The fourth, fifth and sixth respondents seek leave and authority in terms of s386(4)(a) read with s 386(5) of the Companies Act 1973 and further read with item 9(1) of Schedule 5 of the Companies Act 2008 from this court to oppose the application and appoint attorneys and counsel for the said purpose and to pay the costs and disbursements of such attorneys and counsel on the scale as between attorney and client. Nel states that the Master cannot convene the first creditors' meeting due the lockdown restrictions due to the Covid-19 pandemic. He states it is in the best interest of the creditors of Coinit and also the creditors of Bluebay and D H Machine to grant the leave. The application is opposed by the applicants.

[44] Section 386(4)(a) provides that a liquidator with authority granted by meeting of creditors or on the directions of the Master shall have the power to bring or defend in the name and on behalf of the company legal proceedings of a civil nature. Section 386(5) provides that the court may grant leave to the liquidator to do anything, which the Court may consider necessary for winding up the affairs of the company and distributing

its assets. The court is granted wide powers to authorize anything necessary for winding up the affairs of the company. The application although it is brought against Nel, Philander and Penderis in their official capacity, it is not brought against the company in liquidation. It is therefore not necessary for Nel. Philander and Penderis to seek leave to defend the application. Compare position of liquidator acting in his official capacity but not on behalf of the company in liquidation See Henochsberg *on the Companies Act* 71 of 2008 vol 2 APP1-123 (Issue). Even if, Nel, Philander, Penderis were sued in the name and on behalf of the company in liquidation, it would mean that it is not necessary for them to obtain leave to oppose the application in the name and on behalf of the company in liquidation because they cannot stop the applicants from suing them in that capacity. Further, in view of findings made hereinabove, Nel, Philander and Penderis have not shown that it is in the interest of the company in liquidation or its creditors or those of Bluebay or D H Machine to grant the leave they seek.

[45] The applicants in the notice of motion sough costs against Nel, Philander and Penderis in their personal capacity on scale of attorney and client. The seventh respondent Roderick Brent opposed the application and he deposed to an answering affidavit. He is as far costs are concerned in the same position as the fourth, fifth and sixth respondents. The applicants argue that in essence the relief sought is against the fourth, fifth and sixth respondents in their personal capacity. They acted in their personal capacity before they were appointed joint provisional liquidators of Coinit.

[46] Nel in the supporting affidavit states that he acted in good faith in the best interest of the creditors of Coinit. He states that at all times he acted under *bona fide* impression that he had been appointed as provisional liquidator of Coinit. Philander and Penderis participated in and consented to his actions in good faith in pursuit of the interests of the Creditors of Coinit. He reiterates the communication with the Master's office and their compliance with the Master's requirement, which caused him to assume that he had been appointed the joint provisional liquidator of Coinit. He insists that by11h30 on 4 March 2020 all the provisional liquidators were lawfully entitled to act as provisional liquidators of Coinit. The absence of the certificate of appointment when he

applied for the section 69 warrant on 4 March 2020 is a formal defect which does not affect the validity of the warrant.

[47] Nel states that convening of the first meeting of creditors is done by the Master. There are in excess of one thousand creditors of Coinit. Convening of such a number of persons shall be a contravention of the lockdown rules. He insists that he was entitled to appoint persons to assist in the execution of the warrant. He denies that the warrant was void for being overbroad and vague. It is significant, in my view, that Nel, Philander and Penderis made themselves available for appointment as liquidators of companies. They conveyed the impression that they possessed the necessary expertise and knowledge to act competently as liquidators. I do not see how the court can grant Nel leave to defend what he was not supposed to do. Nel has not indicated whether Master was requested to give consent to the joint provisional liquidators to oppose on behalf of the Coinit the application and to appoint attorneys and counsel for the purpose. In my view, for all the above mentioned reasons, the application falls to be refused.

[48] Nel applied for the s69 warrant before the magistrate without having been granted authority either by the first creditors meeting or the Master or by the court. If he was a duly appointed joint provisional liquidator and he was acting with concurrence of the other joint provisional liquidators he would have been doing an act, which was part of his duties as a provisional liquidator. Leave in terms of s368 is necessary in the case of civil proceedings. The application for s69 warrant is not civil proceedings. There is no prescribed formal procedure to be followed, no rules for any hearing, no record of the proceedings is kept, no judgment with reasons is given, there is no appeal, and no order of costs can be made. It may be done *ex parte* or on notice depending on the circumstances of each individual case.

Leave to amend notice of motion

[49] In prayer 1.5 of the notice of motion, the applicants sought an order: ‘that the fourth, fifth, sixth, seventh, eighth, ninth and tenth respondents are prohibited from using

any document or any copy of any document removed from the Premises in any legal proceedings.' The amendment seeks to add the following at the end of prayer 1.5:' or obtained from Absa Bank Limited and or Nedbank Limited and/or Bidvest Bank Limited and /or the FSCA in any legal proceedings.' The motivation for the amendment is that Nel before 5 March 2020 held out to the mentioned financial institutions that he was an appointed joint provisional liquidator and he requested to be furnished with financial information relating to Coinit. The fourth, fifth and sixth respondents oppose the application for leave to amend in that as joint provisional liquidators of Coinit they are entitled to obtain financial information of Coinit. In my view, the respondents are not entitled to financial information of Coinit, which was furnished to them as a result of any request made by them before 5 March 2020. In the result, the leave is granted to amend prayer1. 5 of the notice of motion by adding the sought amendment with addition 'furnished in terms of a request made before 5 March 2020'. The costs for the application for leave to amend to be costs in the application.

Costs

[50] The applicants initially sought costs of three counsel *de bonis propriis* and on a punitive scale. During the hearing, counsel did not persist with an order of costs of three counsel but confined himself to the costs of two counsel nor with an order of costs on a punitive scale. Counsel for the fourth, fifth and sixth respondents argued that it would be improper to grant an order of costs *de bonis propriis* without referring the matter to oral evidence and finding that the fourth, fifth and sixth respondents acted *mala fide*. Further, he argued that personal costs order could not be made against the mentioned respondents because they were cited in the proceedings in their official capacity only.

[51] It is correct that the said respondents are cited in their official capacities. The case made and proved against them is that although subsequently appointed joint provisional liquidators, they recklessly acted as joint provisional liquidators before the Master appointed them joint provisional liquidators. They were not authorized to act on behalf of the company in liquidation and therefore the company in liquidation should not be mulcted with the costs. Secondly, the fourth, fifth and sixth respondents have been

given a full opportunity to present their version and from inception knew that costs were sought against them *de bonis propriis* on attorney and client scale. I have found that they acted recklessly in acting as provisional liquidators before they were so appointed. They also acted recklessly in failing to ensure that a section 69 warrant issued at their instance was proper and properly executed. It is not a requirement that *mala fide* be shown before an order of costs *de bonis propriis* is made. It may be made in an instance of reckless conduct or improper conduct. Their conduct is a gross material deviation from the expected reasonable conduct of the holder of such an office. See *Bell v Bell's Trustee* 1909 TS 51 at 62; The *Master v Atherstone* 1937 CPD 394 at 401. They recklessly exposed the company in provisional liquidation to costs. In my view, it is in the interest of justice that the fourth, fifth and sixth respondents be ordered to pay costs *de bonis propriis* together with Brent.

[52 In the circumstances, the warrant falls to be set aside on the basis that Nel had no authority to apply for the warrant on 4 March 2020 and he failed to disclose full and correct facts to the magistrate. Secondly, the warrant in the respects mentioned was vague and overbroad. Thirdly, the warrant was not served without the supporting affidavit to the affected persons. Thirdly, the persons directed to execute the warrant failed to do so and allowed persons not authorized by the warrant to execute the warrant. Fourthly, in the execution of the warrant items, books, documents not shown to belong to Coinit were removed.

[53] I, accordingly, make the following order.

A. The application is granted and it is ordered as follows;

1. The departure from the normal Rules of the Court is condoned and this application is entertained as one of urgency in terms of Uniform Rule 6(12).

2. The decision by the Magistrate on 4 March 2020 to issue and authorize the document styled:

Warrant of search for and take possession in terms of section 69(3) of the Insolvency Act No. 24 of 1936 of property belonging to Coint Trading (Pty) Limited(In liquidation'(the warrant) is reviewed and set aside.

3. The execution of the warrant is declared unlawful and it is reviewed and set aside.

4. The fourth, fifth sixth, seventh, eighth, ninth and tenth respondents are ordered and directed to return every item and every copy made of every item removed on 5 March 2020 from the premises situated at 10 Cable Street, Avon Industrial Area, Dundee (the Premises) and to delete all such documentation from any device on which they are copied or saved within 24 hours of this order.

5. The fourth, fifth, sixth, seventh, eighth, ninth and ten respondents are prohibited from using any document or any copy of any document removed from the Premises on 5 March 2020 or obtained from Absa Bank Limited and or Nedbank Limited and/or Bidvest Bank Limited and /or the FSCA in any legal proceedings as a result of a request made by any of respondents before 5 March 2020.

6. The fourth, fifth, sixth, seventh, eighth, ninth and tenth respondents are directed to unlock and release from attachment pursuant to the Warrant every item seized, secured or locked up within 24 hours of this order.

7. The fourth, fifth and sixth respondents in their personal capacity together with seventh respondent, jointly and severally, the one paying the others to be absolved to pay costs of the application including costs of two counsel where so employed.

B The application for leave and authority to oppose the application is refused. Costs to be costs in the main application.

C The application for leave to amend notice of motion is granted. Costs to be costs in the main application.

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Mngadi, J

APPEARANCES

Case Number : D5870/2019

For the Applicants : John Suttner SC
With A Fleming and K Pillay

Instructed by : Anand Pillay Attorneys Inc.
Pietermaritzburg

For the 4th, 5th, and 6th respondents : GME Lotz SC

Instructed by : Hay & Scott Attorneys
Pietermarizburg

For the 7th, 8th, 9th, and 10th respondents : AJ Dickson SC

Instructed by : Edward Natha Sonnenberg Inc. b
Durban

Heard : 13 November 2020

Judgement delivered on : 19 November 2020