IN THE HIGH COURT OF SOUTH AFRICA
WESTERN CAPE DIVISION, CAPE TOWN

REPORTABLE

CASE NO: 22282/14

In the matter between:

GARY VAN DER MERWE N.O	First Applicant
(in his capacity as trustee of the Eagles Trust IT 3019/95)	
FERN JEAN CAMERON N.O	Second Applicant
(in her capacity as trustee of the Eagles Trust IT 3019/95)	
DAVE TADEO NKHOMA N.O	Third Applicant
(in his capacity as trustee of the Eagles Trust IT 3019/95)	
GARY WALTER VAN DER MERWE	Fourth Applicant

and

SIVALUTCHMEE MOODLIAR N.O	First Respondent
GORDON NOKHANDA N.O	Second Respondent

(in their capacities as duly appointed joint liquidators of

Zonnekus Mansions (Pty) Ltd (in Liquidation)

And in	**CASE NO. 21515/2018**
In the matter between	
GARY VAN DER MERWE N.O	First Applicant
(in his capacity as trustee of the	
Eagles Trust IT 3019/95)	
FERN JEAN CAMERON N.O	Second Applicant
(in her capacity as trustee of the	
Eagles Trust IT 3019/95)	
DAVE TADEO NKHOMA N.O	Third Applicant
(in his capacity as trustee of the	
Eagles Trust IT 3019/95)	
GARY WALTER VAN DER MERWE	Fourth Applicant
and	
DARUSHA MOODLIAR N.O	First Respondent
GORDON NOKHANDA N.O	Second Respondent
(in their capacities as duly appointed joint liquidators	
of Zonnekus Mansions (Pty) Ltd (in Liquidation)	

And in	**CASE NO. 380/2019**
In the matter between	
DAVE TADEO NKHOMA N.O	First Applicant
(in his capacity as trustee of the	
Eagles Trust IT 3019/95)	
FERN JEAN CAMERON N.O	Second Applicant
(in her capacity as trustee of the	
Eagles Trust IT 3019/95)	
GARY WALTER VAN DER MERWE N.O	Third Applicant
(in his capacity as trustee of the	

Eagles Trust IT 3019/05)

GARY WALTER VAN DER MERWE Fourth Applicant

and

DARUSHA MOODLIAR N.O First Respondent

GORDON NOKHANDA N.O Second Respondent
(in their capacities as joint liquidators of
Zonnekus Mansion Pty Ltd (in Liquidation)

THE MASTER OF THE HIGH COURT Third Respondent

ZONNEKUS MANSION (PTY) LTD (IN LIQUIDATION) Fourth Respondent

Coram: P.A.L.Gamble, J
Date of Hearings: 25 & 26 June, 10 September, 6 & 7 November 2019
Date of Judgment: 19 November 2019

JUDGMENT DELIVERED ON TUESDAY 19 NOVEMBER 2019

GAMBLE, J:

INTRODUCTION

[1] On 11 September 2014 (and under case no 10634/2014) the Standard Bank of South Africa Ltd ("*the Bank*") obtained an order in this court for the provisional winding-up of Zonnekus Mansion (Pty) Ltd ("*the Company*") on the basis that it was unable to pay its debts. The Bank is a secured creditor of the Company having lent it more than R5,3m and having secured its loans with, *inter alia,* mortgage bonds over

various of the Company's immovable properties[1]. When the Company defaulted on its loan obligations in October 2013 the Bank called up its bonds and subsequently moved to wind it up.

[2] On 28 October 2014 the provisional order was confirmed and a final order for the winding-up of the Company was granted. Provisional liquidators to the Company were appointed by the Master on 1 October 2014 and on 14 December 2014 Ms. Sivalutchmee Moodliar ("*Moodliar*") and Messers George Nokhanda ("*Nokhanda*") and Cloete Murray ("*Murray*") were appointed as the final liquidators of the Company. Murray resigned his position on 5 June 2015, citing a conflict of interest, whereafter Moodliar and Nokhanda continued as joint liquidators of the Company. Accordingly, where I refer in this judgment to "*the liquidators*" it is intended to be a reference to the liquidators as they were, cloaked with the necessary powers, from time to time. Where necessary, I shall refer to the individual liquidators by name.

[3] Zonnekus Mansion (Pty) Ltd is a property owning company in Cape Town which owns the properties already referred to and whose prime asset is the stately residence known as "Zonnekus Mansion" ("*the Mansion*"), situated on Woodbridge Island at the mouth of the Milnerton Lagoon on Table Bay. In a judgment dismissing an application for business rescue of the Company on 19 December 2016 (conveniently hereinafter referred to as "*BR 4*")[2], I set out full details of the Mansion, the company and its principal players and I shall therefore only briefly restate the commercial background relevant to the current suite of applications.

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[1] The properties are situated in Somerset West, Milnerton and on Woodbridge Island near Milnerton.

[2] Van der Merwe and others v Zonnekus Mansion (Pty) Ltd and another (Commissioner for the South African Revenue Service intervening) [2016] ZAWCHC 193 (19 December 2016)

[4] The Company was established on 3 November 1999 with Mr. Gary Walter van der Merwe ("*van der Merwe*") and a certain Leno de Villiers as it first directors. They were subsequently replaced by van der Merwe's mother, Ms. Fern Jean Cameron, as the sole director of the Company but it is not disputed that van der Merwe has at all material times been the guiding mind and public face of the Company. He has lived in the Mansion since 1999.

[5] In 1994 the shares in the Company were acquired by the Eagles Trust ("*the Trust*") whose trustees currently are Ms. Cameron, van der Merwe and Mr. Dave Tadeo Nkoma, an employee of the Company and the estate manager at the Mansion. At a stage, van der Merwe's daughter, Candice, was also a trustee, but she has since resigned. In any event, at all material times van der Merwe has been the controlling trustee and he has represented the Trust in the plethora of litigation in which it has become embroiled since the winding-up of the Company. It is appropriate therefore to refer collectively to van der Merwe, the Trust, the Company and the Trustees (as the liquidators have done) as "*the van der Merwe interests.*"

POST LIQUIDATION DEVELOPMENTS AND LITIGATION

[6] The first meeting of creditors was held on 2 December 2014 and the second meeting on 24 February 2015. The liquidators were evidently not willing to wait for the second meeting to obtain directions from the creditors and members and so on 15 December 2014 they approached this court urgently and on an *ex parte* basis for an extension of their powers under s386(5) of the Companies Act, 61 of 1973 ("*the 1973 Act*"). Davis J, who was on recess duty at the time, was satisfied that

such an order was warranted and granted relief in Chambers embracing the customary wide powers which orders of this type incorporate.

[7] During March 2015 the liquidators commenced steps to hold an interrogation of certain of the van der Merwe interests in terms of s417 of the 1973 Act under the chairmanship of retired Justice Joffee. An order to this effect was granted by the Court on 25 March 2015 but before that enquiry could take off, the van der Merwe interests brought an application in this Court (under case no 4653/15B) to put the Company into business rescue under s131 of the Companies Act, 71 of 2008 ("*the Companies Act*").

BR 1

[8] The validity of that application (which shall conveniently be referred to as "*BR 1*") was challenged by the liquidators who took the view that it was not possible to place a company that had already been finally wound up under business rescue. That argument did not carry the day and on 10 June 2015 Ferreira AJ, relying on then recent authority from the Supreme Court of Appeal ("*the SCA*")[3], ruled that BR1 should continue. After the filing of papers and further postponements demanded by the van der Merwe interests at the end of 2015, BR 1 was heard by Koen AJ on 4 February 2016 and dismissed a fortnight later. Subsequent applications for leave to appeal were dismissed by Koen AJ (on 18 March 2016) and the SCA (on 4 July 2016). There was no further application for leave to appeal the refusal of BR 1 to the Constitutional Court ("*the CC*").

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[3] Richter v ABSA Bank Limited 2015 (5) SA 57 (SCA)

BR 2

[9] On 17 June 2016, and while the application for leave to appeal the refusal of BR1 was still pending before the SCA, the van der Merwe interests commenced a second urgent application in this court (under case no 10504/16) for business rescue, which has been referred to as "*BR 2*". After the exchange of papers, this application was to be heard by Weinkove AJ on Monday 5 September 2016 but on the preceding Friday there was an attempt by the van der Merwe interests to withdraw BR2. This withdrawal was considered defective by the liquidators because the matter had already been set down for hearing and neither the leave of the respondents nor the court had not been procured under Rule 41(1)(a).

[10] In the result the application proceeded before Weinkove AJ on 5 September 2016 and BR 2 was dismissed as an abuse of process, with a punitive costs order having been made against the attorney acting for the van der Merwe interests, Mr. Tim Dunn ("*Dunn*"). An application for leave to appeal the dismissal of BR 2 was refused by Weinkove AJ on 11 November 2016 but a subsequent application for leave to appeal to the SCA was partially successful: on 8 March 2017 leave was granted to appeal to the Full Bench of this Division in respect of the costs order made against Dunn. That appeal was upheld on 2 February 2018 and the costs order in BR 2 was made against only the van der Merwe interests.

BR 3

[11] On Friday 2 September 2016 a third application for business rescue under case no. 15861/16 ("*BR 3*") was launched by the van der Merwe interests and

heard by Weinkove AJ on Friday 9 September 2016. That application was dismissed as a nullity because it had been launched while BR 2 was still pending. On 11 November 2016 the van der Merwe interests applied for leave to appeal the refusal of BR 3. Weinkove AJ ceased serving as an acting judge at the end of 2016 and at that stage the application was held in abeyance.

[12] Some 18 months after the refusal of BR 3 and on 21 March 2018 the van der Merwe interests made application for condonation of the failure to timeously appeal the order in BR 3. The application was heard by Sher J and refused on 4 May 2018. A further application for leave to appeal to the SCA was made on 4 June 2018 and refused on 20 September 2018. An application to the CC for leave to appeal BR 3 was dismissed on 12 November 2018.

BR 4

[13] Immediately after the dismissal of BR 3 on 9 September 2016 the van der Merwe interests launched BR 4. This was done in unusual circumstances with the Court's after-hours registrar being called out to issue the papers on a Saturday morning in circumstances where there was manifestly no pressing urgency that warranted such an indulgence. As I have said, BR 4 was dismissed on 19 December 2016. Included in this Court's order in BR 4 was a requirement that any further applications for business rescue were first to be placed before the senior duty judge for authorization before being issued. Mercifully, there were no such further applications.

[14] Leave to appeal the dismissal of BR 4 was refused by this Court on 24 February 2017 and a similar order was made by the SCA on 24 May 2017. An application to the CC to appeal the dismissal of BR 4 was refused on 2 August 2017. With the dismissal by the CC of the application to appeal BR 3 in November 2018 all attempts by the van der Merwe interests to resuscitate the moribund company and return it to solvency came to an end.

CONTEMPT APPLICATIONS

[15] In the second semester of 2017 the van der Merwe interests changed tack and went for the liquidators on a different flank, launching 2 applications for contempt of court. The basis for these applications was founded in an earlier application by the Revenue ("*SARS*") under s163(4)(a) of the Tax Administration Act, 28 of 2011 ("*the TAA*") in case no. 13048/13 to preserve the assets of the Company pending further litigation to recover outstanding taxes from it. A provisional order to this effect was granted *ex parte* on 30 August 2013. On 19 March 2014 Rogers J granted SARS a final preservation order after amending certain of the terms of the provisional order.

[16] On 3 August 2017 the van der Merwe interests launched the first contempt application under case no 13715/17, which was struck from the Motion Court roll on 31 August 2017 and later formally withdrawn on 18 September 2017. In the meantime the van der Merwe interests launched a second application for contempt of court under case no. 16734/17 on 14 September 2017. SARS, which was cited in those proceedings, responded by launching an application for security for costs on 19 October 2017.

[17] The second contempt application eventually served before Slingers AJ on 21 May 2018 and was dismissed on 20 July 2018. The substance of the van der Merwe interests' complaint in the contempt proceedings was that, in seeking to dispose of certain assets of the Company in liquidation which were the subject of preservation under the TAA, the liquidators were acting in violation of the Rogers J order. An application for leave to appeal was dismissed by Slingers AJ on 25 October 2018 and similarly by the SCA on 1 February 2019. An application to the CC was then launched on 18 February 2019 and refused on 2 May 2019.

[18] The effect of the various business rescue applications was to suspend the liquidation proceedings until the business rescue application had been adjudicated upon[4] i.e. from April 2015 to August 2017 when the application for leave to appeal BR 4 was eventually refused by the CC. The van der Merwe interests effectively put a statutory brake on the liquidation proceedings for more than 2 years without any benefit accruing to either the insolvent Company or its creditors. The only true beneficiary of this stratagem was van der Merwe, who continued all the while to reside in the Mansion.

[19] From August 2017 the liquidators were legally permitted to go about their normal work. As demonstrated earlier, the reflexive response of the van der Merwe interests was to launch the contempt proceedings but these did not preclude the liquidators from complying with their statutory duties. One such duty was the preparation of a liquidation and distribution account ("*LDA*") the first of which was eventually placed before the Master on 26 April 2018. After the statutory period for

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[4] See s131(6) of the Companies Act.

objections had passed the first LDA was approved by the Master on 14 May 2018 without amendment.

EVICTION PROCEEDINGS

[20] Around this time the liquidators then turned their attention to what they might have expected would have been the last major foray in the Battle of Zonnekus: the eviction of the occupants – the van der Merwe interests *et al* - from the Mansion to put them in a position, ultimately, to sell the property unoccupied. On 23 March 2018 the liquidators' application for eviction was launched under case no 5150/18 and the necessary s4(2) notice under the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act, 19 of 1998 ("*PIE*") was procured. Predictably, there was resistance and opposition from the van der Merwe interests at every turn. After some interlocutory sparring (including service by the van der Merwe interests of a Rule 7(1) notice, a Rule 30A(1) notice and an application for a postponement), the application served before Bozalek J on 27 November 2018 and then again on 6 December 2018 as well as 13 and 14 February 2019.

[21] Bozalek J handed down judgment in the eviction application on 28 March 2019 and ordered the occupants to quit the premises by 31 May 2019. His Lordship thereafter refused an application for leave to appeal while the SCA similarly refused leave to appeal on 25 July 2019 Thereafter application was made by the van der Merwe interests to the CC on 14 August 2019 for leave to appeal Bozalek J's judgment. This Court was informed from the Bar on 7 November 2019 that the CC's judgment in that application has not yet been handed down.

THE NEW WAVE OF APPLICATIONS

[22] The van der Merwe interests responded to the hearing of the application for eviction by launching three further substantive applications and one interlocutory application. All of these were once again aimed directly at the liquidators and effectively sought to undermine their positions at the very core.

(i) On 21 November 2018, under case no. 21515/18, the removal of the liquidators under s379 of the 1973 Act was sought ("*the removal application*");

(ii) On 16 January 2019, under case no. 380/19, an application was launched by the van der Merwe interests for the re-opening of the first LDA and the institution of an enquiry under s381 of the 1973 Act into the conduct of the liquidators ("*the application to reopen*");

(iii) On 18 March 2019, an interlocutory application under Rule 30A(2) was launched in the removal application directing the liquidators to comply with an earlier notice in terms of Rule 7(1) which sought to attack the authority of their attorneys, Edward Nathan Sonnenbergs Inc. ("*ENS*"), to represent them ("*the interlocutory application*"); and

(iv) On 29 April 2019, there was an application under Rule 6(12)(c) for the reconsideration of the order granted more than 4 years

earlier by Davis J on 15 December 2014 under case no. 22282/14 extending the powers of the liquidators under s386(5) of the 1973 Act ("*the reconsideration application*")

[23] The reconsideration and reopening applications were set down for hearing on 25 and 26 June 2019, the interlocutory application was enrolled for hearing on 10 September 2019 and the removal application was to be heard on 6 November 2019. Adv R.G.Goodman SC represented the liquidators throughout, van der Merwe appeared in person and also represented the van der Merwe interests save that Dunn appeared on 25 June 2019 behalf of the Trust in the reconsideration application. (While Dunn was a regular visitor to in the public gallery thereafter, he did not appear in any of the other applications.) The Court is indebted to the parties for the meticulous preparation of the papers and their heads of argument which have assisted in the preparation of this judgment.

CONSOLIDATION OF APPLICATIONS

[24] During the hearing of the reconsideration application it became apparent to the court that the reopening and removal applications might be interlinked and would best be dealt with in one hearing. The reopening application was accordingly held in abeyance until the November 2019 hearing while, after argument had concluded on the reconsideration application, judgment was reserved. Thereafter the Judge President directed that all matters involving the van der Merwe interests should be handled by this Court. All of the parties expressed their satisfaction with this arrangement. In the result, judgment in the reconsideration application was further

reserved so as to be incorporated in one consolidated judgment dealing with all 4 applications.

[25] After hearing the interlocutory application on 10 September 2019 this Court made the following order:

> 1. *The application is dismissed with costs, such costs to be paid by the Eagles Trust and the Fourth Applicant (Gary Walter van der Merwe), jointly and severally.*
>
> 2. *The reasons for the order are to follow.*

Those reasons will appear from this judgment.

THE APPROACH ON THE PAPERS

[26] At the outset it is useful to set out the approach to be adopted in matters such as these. Firstly, since the Court is dealing with a series of applications and not a trial, it is incumbent on the applicants (the van der Merwe interests) to ensure that the evidence sought to be relied on as well the causes of action are clearly articulated given that in motion proceedings the affidavits serve as both the pleadings and the evidence.[5] Further, in the event that such affidavits incorporate documentary evidence by way of annexures,

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[5] ABSA Bank Ltd v Kernsig 17 (Pty) Ltd 2011 (4) SA 492 (SCA) at [23]; Foize Africa (Pty) Ltd v Foize Beheer BV and others 2013(3) SA 91 (SCA) at [30]

> "*it is not open to a party merely to annex documentation to an affidavit and during argument use its contents to establish a new case. A party is obliged to identify those parts on which it intends to rely and must give an indication of the case it seeks to make out on the strength thereof."*[6]

[27] Then, where a party seeks to rely on fraud as its cause of action it must be properly pleaded and proved. In *Verbri Projects* [7] Zulman J put the position thus.

> "*At the outset one has to observe that it is trite that fraud is a most serious matter and the type of allegation which is not lightly made and which is not easily established. What is important is that a factual basis must be laid for an allegation of fraud, and it is not sufficient, particularly in an affidavit resisting summary judgment, merely to put up speculative propositions or to raise submissions or to advance arguments of probabilities which might indicate a fraud. What is essential is that there should be hard facts, as it were, upon which the Court can exercise the discretion which it is given in terms of the Rule relating to summary judgment.*"

That approach is all the more applicable in a matter where the evidence advanced in support of the allegations is contained in affidavit form and incapable of proper

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[6] Van Zyl v Government of the Republic of South Africa 2008 (3) SA 294 (SCA) at [40]

[7] Nedperm Bank Ltd v Verbri Projects CC 1993 (3) SA 214 (W) at 220B

assessment through the valuable forensic tool of cross-examination. After all, as Harms DP noted in *Zuma*[8] -

> "*[26] Motion proceedings, unless concerned with interim relief, are about the resolution of legal issues based on common cause facts. Unless the circumstances are special they cannot be used to resolve factual issues because they are not designed to determine probabilities"*

[28] Lastly, there is the approach to be adopted when factual disputes arise on the papers. The most recent pronouncement on the topic is *Wightman*[9] where Heher JA remarked as follows.

> "*[12] Recognising that the truth almost always lies beyond mere linguistic determination the courts have said that an applicant who seeks final relief on motion must in the event of conflict, accept the version set up by his opponent unless the latter's allegations are, in the opinion of the court, not such as to raise a real, genuine or bona fide dispute of fact or are so far-fetched or clearly untenable that the court is justified in rejecting them merely on the papers: Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd 1984 (3) SA 623 (A) at634E – 635C…*
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> *[13] A real, genuine and bona fide dispute of fact can exist only where the court is satisfied that the party who purports to raise the dispute has in his affidavit seriously and unambiguously addressed the fact said to*

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[8] National Director of Public Prosecutions v Zuma and others 2009 (2) SA 277 (SCA) at [26]

[9] Wightman v Headfour (Pty) Ltd and another 2008 (3) SA 371 (SCA) at [12]

be disputed. There will of course be instances where a bare denial meets the requirement because there is no other way open to the disputing party and nothing more can therefore be expected of him. But even that may not be sufficient if the fact averred lies purely within the knowledge of the averring party and no basis is laid for disputing the veracity or accuracy of the averment. When the facts averred are such that the disputing party must necessarily possess knowledge of them and be able to provide an answer (or countervailing evidence) if they be not true or accurate but, instead of doing so, rests his case on a bare or ambiguous denial the court will generally have difficulty in finding that the test is satisfied. I say 'generally' because factual averments seldom stand apart from a broader matrix of circumstances all of which needs to be borne in mind when arriving at a decision…"

THE *LEITMOTIF* IN VAN DER MERWE'S CLAIMS

[29] Before proceeding to assess the individual cases in this application, it is necessary to set out the background against which they fall to be considered. At the heart of van der Merwe's claims involving the liquidators is the recurring theme of greed, collusion and malfeasance in the winding-up process between the Bank, the liquidators and ENS, all of which he maintains is aimed at personal enrichment rather than benefiting creditors. He will stop at nothing in his quest to expose what he claims are exorbitant sums of money earned by lawyers and liquidators alike at the expense of the general body of creditors to the extent that at the end of it all there is nothing but a bare carcass which has been picked clean by the vultures.

[30] Van der Merwe talks in highly emotive language (in the affidavits, the heads of argument and in his addresses to the court) of an "*industry"* run by ENS' insolvency practitioners with the financial support of wealthy commercial creditors like the Bank which he classifies as nothing more than a "*feeding frenzy*" to satisfy corporate greed. Van der Merwe sees ENS as being the driving force behind of all this activity. He claims that they are linked to major corporate creditors such as the banks and that they are the driving force behind what he regards as an insolvency industry: he suggests that they control the creditors' affairs, initiate debt recovery through their Insolvency, Restructuring and Business Rescue Department and procure the appointment of compliant liquidators who ultimately enable the lawyers to achieve their annual fee targets – what might be termed mutual corporate back-scratching.

[31] It is clear that van der Merwe feels personally affronted by the way that his company has been treated in the liquidation process and demonstrates a complete inability to understand that, while he is still the proverbial king residing in his castle, he is no longer in charge of Zonnekus Mansion (Pty) Ltd and that control of the company now vests in the liquidators who have been duly appointed by the Master. In fact, his perverted understanding of the law leads him to believe that, as the appointed agent of the Trust, he is entitled to retain control of the Company on behalf of its member and dictate to the liquidators how they should discharge their statutory functions. Van der Merwe would even go so far as suggesting that his trusty in-house[10] lawyer, Dunn, should be appointed as the attorney for the liquidators, claiming that this will break the hegemony of ENS and lead to a cheaper and more efficient winding-up of the Company.

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[10] Dunn's office is located in the Mansion.

[32] As I said 3 years ago in ***BR 4***[11], van der Merwe is a man on a mission and he seeks to be "Mission Control". And, when the liquidators take steps which are not to his liking, van der Merwe will not hesitate to confront them head-on with any form of dilatory tactic available. One example will suffice. In referring to the manner in which the liquidators set about convening the s417 enquiry, van der Merwe suggested to the Court in argument that "*they were up to their shenanigans again*" and that he was forced to react appropriately, hence the institution of BR1. And, even before that hopelessly doomed corporate rescue effort had been finally disposed of by the SCA, BR 2 was initiated to prevent any possibility that the liquidators might get even just a toe in the door and resume control of the liquidation process. So too, BR 3 and 4.

[33] As I have said, the net result of this particular futile and expensive tactic was to hold up the liquidation process for more than 2 years, in clear conflict with the approach advocated by Kuper J in ***SA Clay*** [12] that "*the whole machinery of the [Companies] Act is directed towards a speedy liquidation and distribution of the assets of an insolvent estate."*

[34] I should not be understood to say that "*the liquidation industry*" about which van der Merwe complains so bitterly is not just that, for one sees all too often the same corporates instructing the same large attorneys' firms who brief a select list of counsel in insolvency related matters. Ultimately, however, control of the liquidators and their practices vests in the Master and the courts can only deal with the cases brought before them. The current wave of applications must, of course, be considered

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[11] At [94]

[12] SA Clay Industries v Katzenellenbogen NO and another 1957 (1) SA 220 (W) at 224

on their merits and the Court will not permit parties to abuse the statutory processes to fight other battles.

LOCUS STANDI

[35] In all of the applications which are the subject of this judgment the Trust and van der Merwe personally have been cited as the applicants. The Trust is cited in the applications *qua* member, as the sole shareholder in the Company. Van der Merwe claims that he is authorized to represent the Trust in terms of a duly executed power of attorney and he seeks to join in the applications in his personal capacity, claiming that he is a creditor of the Company. When asked to, van der Merwe was unable to produce proof of any claim lodged in the winding-up but he said that when the litigation with SARS was concluded it would be apparent that he was indeed a creditor of the Company.

[36] Mr. Goodman SC submitted, correctly in my view, that van der Merwe has no standing in these proceedings *qua* creditor. Counsel accepted, however, that van der Merwe was authorized to represent the Trust and it was conceded that in that capacity he was entitled to address the Court. I agree.

THE APPLICATION FOR RECONSIDERATION – CASE NO 22282/14

[37] The application by the liquidators for the extension of their powers under s386(5) served before Davis J on an urgent *ex parte* basis, as many of these applications so often do. In the result, it was open to an affected party to approach the court under Rule 6(12)(c) for reconsideration of the order. Ordinarily, one would

expect such an affected party to act speedily to right any wrong occasioned by relief incorrectly granted and to preclude any prejudice from either arising or continuing. In this matter, however, there was a delay of more than 4 years by the van der Merwe interests before the order by Davis J was sought to be reconsidered.

[38] At the second meeting of creditors held on 24 February 2015 the liquidators presented a resolution which granted them wide powers in the winding-up. This resolution was approved by the creditors then present but not by the Trust (then duly represented by van der Merwe) *qua* member. It is not clear whether there was any discussion at this meeting regarding the powers given to the liquidators under the order of Davis J or the existence thereof, but in any event, van der Merwe contended during argument before this Court that the substance of the order only came to his knowledge during September 2016. And yet, it still took more than two and a half years for the reconsideration application to see the light of day. Clearly, there was nothing about the order of Davis J which troubled the van der Merwe interests in September 2016.

[39] The reconsideration application was launched on 29 April 2019, fortuitously a month after Bozalek J had granted the eviction order. In a detailed judgment His Lordship had rejected the argument by the van der Merwe interests that the Davis J order under s386(5) was in conflict with the preservation order made by Rogers J in 2014 - the argument advanced on behalf of the van der Merwe interests was that the liquidators could not take steps under s386(5) (such as selling immovable property) where such property was already the subject of a preservation under the TAA. In a judgment, with which I respectfully agree, Bozalek J rejected this

reasoning and went on to find that the Davis J order was still binding and of full force and effect at the time that the eviction application served before him.

[40] At paragraph 46 of his judgment Bozalek J found as follows.

> "*[46] In my view, the provisions of the 1973 Companies Act and the duties imposed upon the [liquidators] to liquidate and wind up the estate of the company in liquidation, if necessary by selling the company's fixed properties, take precedence over the provisions of the Preservation Order. That order was sought at the behest of the Commissioner of SARS who/which has specifically consented to the properties being sold if needs be. The fact that the Preservation Order was taken 'by agreement' does not, in my view, as Mr. van der Merwe contended, mean that it could only be varied by agreement. In any event, that issue is a red herring. The antecedent question is whether that order allows for the sale of the properties and in my view for the reasons furnished above, it does."*

[41] It is apparent that this finding did not suit the van der Merwe interests and that it was the catalyst for the launch of the reconsideration application, given that van der Merwe's express design was that the Mansion needed to be protected at all costs.

[42] The substance of the reconsideration application then was an alleged failure by the liquidators to disclose to Davis J in the supporting affidavit that there was already a preservation order in place per Rogers J. Mr. Goodman SC confirmed

from the Bar that Davis J had not been informed of the preservation order when he moved the s386(5) order in chambers on behalf of the liquidators. In argument before this Court, Dunn submitted that this failure constituted a breach of the *uberrima fides* rule in *ex parte* applications[13] and that, had Davis J been informed of the preservation order, he would most likely not have granted the s386(5) order. The reasoning behind Dunn's submission was that the powers granted to the liquidators under s386(5) were redundant because they could not sell any immovable property which was already the subject of the preservation order.

[43] In my view Dunn's argument is misplaced. Firstly, the powers granted to the liquidators by Davis J were wide and not limited to the sale of the Company's immovable property: there are no less than 11 categories of power contained in the order[14]. And, while the order of Rogers J did place a hold on the disposal of any of the Company's immovable property prior to winding-up, it did not, as Bozalek J held in [46] of his judgment, preclude the liquidators from discharging their statutory duties taking the necessary preliminary steps to market same, find potential purchasers and then approach SARS with a request for its consent to sell and to arrange for the preservation of the proceeds. This would make sense and permit SARS to prove its claim in the winding-up while the attached funds would remain preserved for distribution amongst the relevant creditors.

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[13] Recycling and Economic Affairs Development Initiative of South Africa v Minister of Environmental Affairs 2019 (3) SA 251 (SCA) at [45] – [47]

[14] For example, procuring legal advice, settling lawyers' fees, instituting and defending litigation, carrying on or discontinuing the business of the Company and borrowing money up to a maximum of R2m.

[44] As a matter of fact, that is precisely what happened in respect of the other immovable properties belonging to the company (2 residential properties situated in Burmeister Circle, Milnerton and a property in Somerset West). Van der Merwe and Dunn were fully informed of the liquidators' intentions in that regard (there were exchanges of correspondence thereanant) and van der Merwe actually participated in the pre-sale steps by attempting to procure better offers for the liquidators. No mention was made then of any pressing need to reconsider the Davis J order.

[45] But the approach is not to ask now what Davis J might have done had he known of the preservation order. A court called upon to reconsider an order granted under Rule 6(12)(e) is required to consider the matter afresh in the light of all the facts then before it and when it does so it exercises a general discretion as to whether it should revisit the order or not.[15] It is decidedly not, as Dunn argued, that a court's discretion is constrained so as to almost amount to no discretion at all – such an approach would be absurd.

[46] When one considers the facts as they now stand, in particular with due regard for all that has transpired since the granting of the order by Davis J, one has a situation where the liquidators have exercised their powers extensively, including the sale of properties, the appointment of attorneys, the settling of some of the secured creditors, the launching of the eviction application and the submission of the first LDA.

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[15] ISDN Solutions (Pty) Ltd v CSDN Solutions CC and others 1996 (4) SA 484 (W) at 486H-J; Lorenco and others v Ferela (Pty) Ltd and others (No.1) 1998 (3) SA 281(T); Industrial Development Corporation of South Africa v Suliman and others 2013 (5) SA 603 (GSJ); South African Airways SOC v BDFM Publishers (Pty) Ltd and others 2016 (2) SA 561 (GJ) at 565I

To suggest that all of those activities in the process of winding-up the Company must now be set aside, property transfers must be reversed and the winding-up commence a fresh with a new team of liquidators is cynical in the extreme and manifestly not in the interests of the general body of creditors,

[47] Considering this proposal by the van der Merwe interests and, importantly, considering the timing of the application for reconsideration, I am of the view, not only that no basis for reconsideration has been established, but that the application is an abuse of process on the part of those interests.[16]

[48] In this regard I recall that in BR 4 at [10] I remarked that the Mansion was van der Merwe's "*most treasured possession: a castle which he will defend to the bitter end with every sinew of war available to him*', while at [103] I expressed disquiet as to what might be in the pipeline – "*One shudders to consider what further tricks the van der Merwe interests might have up their collective sleeves".* And now, some 3 years after the dismissal of BR 4 we see that the van der Merwe interests have acted just as predicted.

[49] In the result I conclude that the application for reconsideration falls to be dismissed with a punitive costs order.

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[16] PriceWaterhouseCoopers Inc. and others v National Potato Co-operative Ltd 2004 (6) SA 66 (SCA) at [54]; Ex Parte Harris [2016] 1 All SA 764 (WCC)

THE INTERLOCUTORY APPLICATION – CASE NO 21515/18

[50] I shall deal with the substance of case no. 21515/18 later but it is appropriate, at this juncture, to provide brief reasons for the refusal of the interlocutory application which was argued on 10 September 2019 and dismissed on the turn with a punitive costs order.

[51] In his declared quest to get at the liquidators, van der Merwe launched the application to remove the liquidators under case number 21515/18 on 22 November 2018. In so doing he intentionally, yet cunningly, cited the liquidators in their personal capacities ("*Darusha Moodliar*"[17] and "*Gordon Nokhanda*") without the suffix "*N.O.*" which is used in court documents to indicate that they do not act personally but in their nominated capacities as liquidators.

[52] The citation of the liquidators as such was no mere oversight. Rather, it was a ploy intentionally used by the van der Merwe interests so that when ENS entered an appearance on their behalf to oppose the removal application they could call for powers of attorney under Rule 7(1). And then, when there was a perceived failure to comply with that step, they considered that they would be in a position to utilize the provisions of Rule 30A to demand compliance with the Rule 7(1) notice and, in default of such compliance, ultimately have the liquidators' opposition to their removal application struck out.

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[17] The court was assured by the parties during argument that this is the name by which Ms Sivalutchmee Moodliar is commonly known.

[53] This plot of Machiavellian proportions was yet another step in furtherance of van der Merwe's overall scheme to limit the liquidators' access to the services of ENS, deprive the latter of an opportunity to charge fees for their professional services to the liquidators and so white-ant the powers of the liquidators in the winding-up process to ensure his continued occupation of the Mansion.

[54] After service of the application to remove the liquidators, ENS filed a notice of intention to oppose on 5 December 2018. This elicited an incorrectly dated notice of 9 August 2019 (which was actually sent to ENS via email on 9 January 2019) to the following effect.

> "***KINDLY TAKE NOTICE*** *that the Applicants hereby disputes (sic) the authority of Edward Nathan Sonnenbergs Inc. to act on behalf of the Respondents in this matter.*
>
> ***TAKE NOTICE FURTHER*** *that Edward Nathan Sonnenbergs Inc. are therefore required, in terms of Rule 7(1) of the Uniform Rules of Court, to satisfy the above Honourable Court that they are authorised to so act in this manner on behalf of the Respondents, failing which they may not act on behalf of the Respondents."*

[55] This request was complied with on 22 January 2019 when Moodliar and Nokhanda each filed Powers of Attorney drawn up by ENS and signed by each of them, duly witnessed, on 16 January 2019. One would have thought that this was the end of the challenge. But in so doing one would have omitted to have regard to the fact that the notice came from the van der Merwe interests with a specific agenda.

[56] On 18 February 2019 van der Merwe emailed, inter alia, ENS' Ms. Lisa Melis, one of the attorneys acting on behalf of the liquidators, pointing out to her that he had not received a reply to the Rule 7 (1) notice, and stressing that "*the application is against the liquidators in their personal capacities and not N.O.".* Melis replied the same day and referred van der Merwe to her the email of 22 January 2019 enclosing the powers of attorney.

[57] Van der Merwe lost no time in replying later that day.

> "*I have had a look at the Power Of Attorney that you sent me, (sic) please note as pointed out in my earlier email, the application for the removal of the liquidators is against them in their personal capacities and not in their capacities N.O, (sic) ENS appointment is therefore still in dispute and unless you are able to rectify this (by filing powers of attorney by the (sic) Darusha and Gordon in their personal capacities) I will have no option but to serve and file a notice in terms of Rule 30 (A) on your firm, (sic) kindly revert as soon as possible."*

[58] The following day, 19 February 2019, Melis responded.

> "*The relief sought in the application under case number 21515/2018 is to remove Ms. Moodliar and Mr. Nokhanda from their office as liquidators of Zonnekus. It is in that capacity that they have instructed ENS to represent them. But for their appointment as liquidators by the Master, no such relief would have been sought against them and the application is therefore inextricably linked to their position as the*

liquidators of Zonnekus. We therefore respectfully disagree with your view that the application is against the liquidators in their 'personal capacities'. In any event it is clear from the powers of attorney that ENS has been instructed by the liquidators in relation to the application and there can be no genuine dispute in this regard which would justify the bringing of a Rule 30(A) application. This would only serve to delay the hearing of the merits of the removal application, which is not in any party's interests."

[59] There was no further correspondence between the parties and on 27 February 2019 the van der Merwe interests filed a notice in terms of Rule 30A(1) claiming that the liquidators had failed to properly respond to the objection to the authority of ENS to act for them and claiming that the firm was not entitled to act for the liquidators any longer unless the court was satisfied that they were authorised to so act. Ultimately, the striking of the liquidators' defences to the application for their removal was sought in this notice.

[60] The issue is indeed a fairly simple one and the position is correctly set out in Melis' email of 19 February 2019. Yet in his supporting affidavit accompanying the Rule 30A(1) notice van der Merwe claims that the purpose of the attack on ENS' authority is so that "*the insolvent estate should not be responsible for the costs incurred by the Liquidators in resisting their removal from office".* Once again the obsession with the alleged predation of the liquidators and lawyers is demonstrated.

[61] But be that as it may, there has manifestly not been a failure to comply with the Rule 7(1) notice - as a matter of fact the powers of attorney given by the

liquidators to ENS to represent them have been duly filed with this Court. The van der Merwe interests may not like the authority given to ENS by the liquidators but they cannot be heard to complain that the liquidators have failed to comply with the terms of the Rule 7(1) notice, nor can they insist that the powers of attorney should be formulated in terms that suit their design.

[62] A liquidator only holds office pursuant to his/her statutory appointment as such by the Master to wind-up the affairs of the insolvent company. There is no dispute that Moodliar and Nokhanda were duly appointed to the office of liquidator by the Master in December 2014 and that with effect from June 2015 they were the remaining joint liquidators charged with the winding-up of the company. Indeed, the Master's revised certificate reflecting this change is attached to the liquidators' affidavits in the interlocutory application. They are therefore creatures of statute and do not hold office in their personal capacities. So, for example, a liquidator does not incur any personal liability in respect of a contract concluded in the course of the winding-up.[18]

[63] The removal of a liquidator from office is also a procedure governed by statute and in the event that a court grants an application for the removal of a liquidator from office it may make an appropriate costs order at the end of the application if the removal is sanctioned. In this case, the van der Merwe interests have incurred no costs in relation to the application to remove the liquidators, given that van der Merwe has appeared in person. The question whether the liquidators' costs should be chargeable against the insolvent estate in the event of removal is a

[18] Stead, Hazel & Co v Cooper 1933 KB 840 at 843

decision to be made at the conclusion of that application when a court exercises its general discretion as to costs.

[64] Similarly, the costs incurred by the liquidators in successfully defending an application for removal might be payable by the van der Merwe interests – this too is a decision to be considered if and when the removal application is refused. But in neither case can it be claimed that the liquidators are not entitled to appoint whomsoever they wish to represent them in litigation relating to the winding-up, including their removal from office, for the obvious purpose of appointing a new person(s) to hold that office,

[65] In the result, I was satisfied that the liquidators had properly complied with the notice issued under Rule 7(1) and that the application under Rule30A(1) was not warranted. Insofar as that application constituted yet another abuse of process on the part of the van der Merwe interests and was only designed to harass the liquidators and delay further the process of winding-up, I was satisfied that the punitive costs order made on 10 September 2019 was warranted.

THE APPLICATION TO REOPEN THE FIRST L&D ACCOUNT – CASE NO 380/2019

[66] On 16 January 2019, and whilst the eviction application before Bozalek J was partly heard, the van der Merwe interests launched their next application. Although it was dubbed "*The Application to Reopen*" (and I shall conveniently refer to it similarly), the notice of motion was far more extensive. After a prayer for urgency the rest of the relief claimed is as follows.

"*2. Declaring that:*

2.1 The purported powers of the First and Second Respondents as joint liquidators of the insolvent estate of the Fourth Respondent to appoint attorneys and counsel to render legal services to the estate lapsed at the conclusion of the meeting of members of the Fourth Respondent and 24 February 2015, by reason of the failure by the First Second respondent to obtain the requisite authority from the members for such appointment;

2.2 The order granted by this Honourable Court under case number 22282/2014 on 15 December 2014 expired and/or was of no further force and effect upon and following the conclusion of the said meeting of members of the Fourth Respondent;

2.3 In addition to the aforesaid and in any event, all powers of the First and Second Respondent as joint liquidators of the insolvent estate of the Fourth Respondent, including the power to appoint attorneys and counsel to represent the estate, were suspended from 13 April 2015 to 7 November 2018 by reason of the series of business rescue applications in respect of the Fourth Respondent that were instituted in this Honourable Court under case numbers 4653/15 B, 10504/16, 15861/16 and 17150/16;

2.4 By reason of the aforesaid the First and Second Respondents were not empowered inter alia to submit the first liquidation and distribution account in respect of the Fourth Respondent to the Third Respondent on 31 January 2018;

3. Authorising and directing the Third Respondent to:

3.1 Reopen the said liquidation and distribution account;

3.2 Launch an enquiry, under the auspices of section 381 of the Companies Act 61 of 1973, into the conduct of the First and Second Respondents in incurring legal costs for the account of the Fourth Respondent and making payment of same in circumstances where they were advised, alternatively independently aware, that their powers to appoint attorneys and counsel on behalf of the estate were (sic) expired and/or suspended on the grounds as set out in paragraph 1 above[19];

4. Further and/or alternative relief;

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[19] Paragraph 1 of the notice of motion was a prayer permitting the application to be brought as a matter of urgency.

5. *Directing that the costs of the application be paid by the First and Second Respondents de bonis propriis, jointly and severally, on a scale as between attorney and own client."*

[67] It will be seen that the substance of the relief sought, other than prayer 3.1, is consonant with the *leitmotif* referred to earlier: an endeavour to cut short the alleged predatory conduct of ENS and an attempt to drive a wedge between them and the liquidators in the hope of putting the kibosh on the entire winding-up procedure. I point out, too, that in his judgment on the eviction application, Bozalek J effectively dealt with the relief sought in prayers 2.1 to 2.4 and the latter part of 3.2.

[68] Before this Court, van der Merwe initially limited his address to the relief sought in prayer 3.1 and the first part of 3.2 (the launch of an enquiry under s381 of the 1973 Act) but as the argument developed I understood him not to press too strenuously for relief based on any part of prayer 3.2. Further, van der Merwe made no attempt to advance argument in support of prayers 2.1 to 2.4 and I understood the van der Merwe interests to abandon those prayers. If I am wrong on this score, they have in any event been dealt with by Bozalek J and are therefore *res judicata.* This judgment will accordingly be limited to considering the relief sought in prayer 3.1.

[69] When arguing the application to reopen van der Merwe relied on a comprehensive set of heads of argument he had filed earlier. He asked that the application to reopen be argued together with the application to remove the liquidators (case number 21515/18) and relied upon the earlier set of heads in relation to the latter. Van der Merwe's main submission was that the matters were interlinked as success in the removal application would necessarily lead to the reopening of the

LAD, and vice versa. I do not agree that the matters are interlinked in the manner contended for and will deal with each application on its own merits.

THE RELEVANT STATUTORY PROVISIONS

[70] The application to reopen is hit by two sections of the 1973 Act. In the first place s408, which deals with the confirmation of an LDA, permits the reopening of an account only in limited circumstances. The relevant provisions read as follows –

> "***408. Confirmation of account***
>
> *When an account has lain open for inspection as prescribed in section 406 and –*
>
> *(a) no objection has been lodged;*
>
> *(b) ….*
>
> *(c) ….*
>
> *the Master shall confirm the account and his confirmation shall have the effect of a final judgment, save as against such persons as may be permitted by the court to reopen the account after such confirmation but before the liquidator commences with the distribution."*

[71] It is common cause that the first LDA has been confirmed by the Master, no timeous objection thereto having been lodged. In *S.A.Clay* a disgruntled creditor approached the court after the confirmation of the LDA but before any payments had

been made in terms thereof, for relief in terms of the erstwhile provisions (s138) of the 1926 Companies Act. Kuper J interpreted the section as follows at 224E:

> "*It must be remembered that the whole machinery of the Act is directed towards a speedy liquidation and distribution of assets of an insolvent estate. It is for that reason that the section precludes the re-opening of an account when a dividend has been paid under the account. After confirmation and before the payment of the dividend the aggrieved person must show something more than ignorance and prejudice: he must show that his failure to object has been induced by justus error or by fraud."*

[72] The provisions of s408 were also discussed by the Galgut AJA in *Kilroe-Daley*[20] in the context of a claim of prescription where it was suggested that the confirmation by the Master had the effect of rendering each item in the account the equivalent of a judgment in favour of the creditor which had then prescribed. The learned Judge of Appeal made the following observations.

> "*Section 408 provides that once the account has been confirmed it may only be re-opened by such persons as may be permitted by the Court so to do. We were referred to decisions in our Courts in which application was made to have the account of a liquidator (or trustee in insolvency) re-opened. The principle which runs through all these cases is that an applicant must show grounds for restitutio in integrum* such as *justus*

[20] Kilroe-Daley v Barclays National Bank Ltd 1984 (4) SA 609 (A) at 626 *et seq*

error or *dolus* *before a Court will order the re-opening of a confirmed account. See SA Clay Industries Ltd v Katzenellenbogen NO and Another 1957 (1) SA 220 (W) at 223-224 and the cases there cited….*

It may well happen, after the first account has been confirmed, that additional facts come to the liquidators' notice. If, as in my view, the whole account is, after confirmation, final, the liquidator cannot re-open it. This would not preclude him from, in his later account, reducing or increasing a creditor's claim or increasing or reducing a creditor's contribution. He will probably have to make the necessary mathematical adjustments in the amounts to be paid or collected. It could hardly be said that the items in the first account were equivalent to judgments."

[73] It is common cause that in this matter there have been no disbursements made yet by the liquidators other than to certain of the secured creditors. In fact, the estate is cash-strapped and they have called for contributions from the creditors including the sum of R629 289,40 from the Trust which has yet to be paid. It is further common cause that there will be one or more further LDA's drawn up, given that the Mansion has yet to be disposed of. In the circumstances, I am satisfied that this Court may exercise the limited discretion which it enjoys under s408 provided that the van der Merwe interests establish on a balance of probabilities that the Trust's failure to object was induced by *justus error* or fraud. The founding affidavit makes no claim based on the former: only fraud is relied upon by van der Merwe.

[74] The second leg of the application to reopen is a prayer for the institution of an enquiry under s381 of the 1973 Act which is to the following effect.

"***381. Control of Master over liquidators.***

(1) The Master shall take cognizance of the conduct of liquidators and shall, if he has reason to believe that a liquidator is not faithfully performing his duties and duly observing all the requirements imposed on him by any law or otherwise with respect to the performance of his duties, or if any complaint is made to him by any creditor, member or contributory in regard thereto, enquire into the matter and take such action thereanent as he may think expedient.

(2) The Master may at any time require any liquidator to answer any enquiry in relation to any winding-up in which such a liquidator is engaged, and may, if he thinks fit, examine such liquidator or any other person on oath concerning the winding-up.

(3) The Master may at any time appoint a person to investigate the books and vouchers of a liquidator.

(4) The Court may, upon application of the Master, order that any costs reasonably incurred by him in performing his duties under this section be paid out of the assets of the company or by the liquidator <u>de bonis propriis</u>.

(5) Any expenses incurred by the Master in carrying out any provision of this section shall, unless the court otherwise orders, be regarded as part of the costs of the winding-up of the company."

[75] Consideration of s381 will reveal that this Court has no power to order an enquiry such as that contemplated in prayer 3.2 of the application to reopen. That power vests in the Master and the only jurisdiction that a court has in relation to such an enquiry is the discretion to order payment of the Master's costs in terms of ss(4). That is the short answer to the request by the van der Merwe interests for an enquiry. Any such request must be directed to the Master. It follows that the relief sought in prayer 3.2 must be refused. I revert now to consider whether the reopening of the account under s408 should be ordered.

THE FOUNDING AFFIDAVIT

[76] Central to van der Merwe's argument in the application to reopen was reliance on the maxim that "*fraud unravels all",* and the judgment of Lewis JA in ***Bannister's Print***[21]. The learned Judge of Appeal was at pains to point out that the maxim did not afford a party a limitless remedy.

> "*[18] It must be made clear that the statements of the court of first instance and that of the court on appeal to it, that 'fraud unravels all', cannot be taken at face value. Fraud certainly unravels a contract induced by a party to it. But if a party to an agreement of settlement is misled by the conduct of the other party, in appearing to clothe a legal representative with authority to settle litigation, and legal representative dishonestly exceeds his mandate or goes against express instructions…*

[21] Bannister's Print (Pty) Ltd v D and A Calendars CC [2018] ZASCA 17 (15 March 2018)

the effect of the dishonesty does not necessarily unravel an agreement between the parties.

[19] As Cameron J said, in Absa Bank Ltd v Moore 2017 (1) SA 255 (CC) para 39, referring to the maxim 'fraud unravels all':

> *'The maxim is not a flame-thrower, withering all within reach. Fraud unravels all directly within its compass, but only between victim and perpetrator, at the instance of the victim. Whether fraud unravels a contract depends on the victim, not the fraudster or third parties.' "*

[77] The allegations of fraud (and to a lesser degree theft) relied on by the van der Merwe interests relate, in the main, to the conduct of the former co-liquidator, Mr. Cloete Murray. The application is initially described in general terms to serve the following end.

> "*20. The application is brought on the grounds, inter alia, of fraud and theft relating to funds in Zonnekus' estate that had recently been uncovered by the [van der Merwe interests]. The factual basis of these grounds will be addressed in more detail hereunder at the appropriate juncture of this affidavit.*
>
> *21. In summary, the [van der Merwe interests] intend to demonstrate in this application, inter alia, that the liquidators incurred costs*

and authorised certain payments to be made from funds belonging to the insolvent estate in circumstances where:

21.1 They were, to their explicit knowledge, not authorised to make such payments and/or their authority to do so had been suspended;

21.2 The recipients were not entitled to receive such payments;

21.3 The services for which the payments were rendered were unnecessary for the proper administration of the estate; and/or

21.4 The charges to the estate were - to the knowledge of the liquidators - either beyond the bounds of reasonability, inflated and/or fabricated.

22. [The van der Merwe interests] were advised that the methods utilised to make and receive such payments constituted theft of funds from the estate and that the liquidators' willful failure to disclose to the Master, when they lodged the first liquidation and distribution account, that they lacked the authority to make the payments constitutes fraud."

[78] The founding affidavit then raises a litany of complaints against the conduct of the liquidators and ENS along the lines of the "*corporate raiding*" and "*asset stripping*" allegations with which the papers are replete. I do not need to deal

with these allegations by virtue of the effective abandonment of prayers 2.1 - 2.4 in relation to the reopening argument.

[79] A relatively short section of the founding affidavit is devoted to a complaint of misappropriation wherein it is claimed that the reopening is warranted on the basis of a number of payments to Murray which are tantamount to theft. I should mention that Mr. Goodman SC took the point that Murray should have been joined in these proceedings by the van der Merwe interests in light of the seriousness of the allegations made against him. Generally speaking that approach is desirable but in this application it is clear that Murray has had sight of the allegations and has expressly declined to apply to become involved in the litigation. There is, in the circumstances, no merit in the non-joinder point.

[80] The van der Merwe interests attack the liquidators on two fronts in the founding affidavit. The first is in relation to certain cheques in respect of witness fees which were issued by ENS to prospective witnesses to be interrogated at the s417 enquiry before Justice Joffee. When the enquiry did not proceed the witnesses did not avail themselves of the fees, the cheques were not cashed and they went stale after 6 months. This notwithstanding, the cheques were reflected as disbursements in the first LDA, the value whereof is of the order of R6500,00.

[81] Van der Merwe seizes upon this relatively trifling issue in an attempt to justify his continued vilification of both ENS and the liquidators.

> "*146. In fact, the cheques for these payments were not presented for payment, as evidenced by the copies of the unpaid cheques annexed*

hereto… The liquidators are invited to state in response whether <u>any</u> of the ENS cheques for witness fees claimed in this invoice were actually paid.

147. Needless to say, there is no indication in the account to alert a reader (including the Master) that ENS claimed reimbursement for payments that it had in fact not made, which necessarily implies that the account was confirmed in ignorance of facts that were materially relevant to the exercise of the Master's discretion. The Applicants were advised that the lodging of the account in the circumstances amounts to a fraudulent misrepresentation.

148. It is inconceivable that ENS would in good faith include and claim the 'witness fees' concerned as disbursements in their invoices. A simple reconciliation procedure with the use of basic legal accounting software (which I assume is at the disposal of Africa's largest law firm) would have shown that the cheques were unpaid.

149. The Applicants were advised, and I respectfully submit, that the inclusion of these claims in the invoice presented to the liquidators, and the acceptance of payments made by the liquidators in this respect, constitutes nothing less than theft."

It will be observed that reliance is placed, firstly, on a vaguely pleaded fraudulent misrepresentation by the liquidators and then a claim of theft.

[82] There is a further claim by van der Merwe in the founding affidavit that Murray, despite his resignation in mid-2015, continued to receive payments (through his company Sechaba Trust (Pty) Ltd) which were due to the Company's insolvent estate from a tenant of one of the Burmeister Circle properties in Milnerton. It is said that these rental payments were not properly vouched by Sechaba and that they were therefore misappropriated. Together with the allegations regarding the stale cheques, this is the full extent of the allegations of fraud made in the founding affidavit notwithstanding the dramatic introduction set out in paragraphs 20 to 22 thereof, which have been reproduced above.

[83] I quote from the founding affidavit where van der Merwe says the following.

> "*157. It appears from the first liquidation and distribution account that, despite Mr. Murray's resignation, the firm of which he is a director (Sechaba Trust (Pty) Ltd - 'Sechaba') subsequently received a substantial number of payments that were due to the estate in respect of rental paid by the tenant of one of the immovable properties in Milnerton.*
>
> *158. These payments were made from 1 November 2014 to 1 September 2015 and amount to R150 000 .00. A bundle of the ABSA Bank statements of Sechaba evidencing the receipt of the payments, which are included in the liquidation and distribution account, is annexed hereto…*

159. It will be noted from the bank statements that on 6 August 2015 an amount of R102 400.06 was transferred from the Sechaba account to another ABSA Bank account with the number 40-5369-2789. The latter account is apparently operated by an entity named 'Sechaba Travel'.

160. This amount is reflected on page 7 of the liquidation and distribution account (in respect of the property concerned, under the heading 'Cloete Murray') and is simply described as 'Sechaba Disbursements'.

161. It will be noticed that there is no voucher number associated with the alleged 'disbursements', which means that an invoice was not presented to the liquidators by Sechaba (or 'Sechaba Travel') in claiming the amount. No such invoice can indeed be found in the supporting vouchers lodged with the account.

162. The upshot is that Sechaba received rental payments due to the estate, for a period of eight months after Mr. Murray's involvement as co-liquidator was terminated, and then appropriated almost 70% thereof without producing a substantiating voucher or indeed any explanation at all for the appropriation.

163. I respectfully submit that in the circumstances, as appears from the liquidation and distribution account, this amounts prima facie to theft from the estate by Mr. Murray and/or Sechaba, which was aided by the liquidators' unexplained failure to investigate the situation."

THE ANSERING AFFIDAVIT

[84] In the answering affidavit Moodliar explains what transpired regarding the stale cheques.

"***Ad paragraphs 145 -151 thereof***

104. The witness cheques referred to in this paragraph were issued in respect of the section 417 enquiry which was not proceeded with due to the fact that Van der Merwe began launching business rescue applications.

105. If the cheques remain uncashed, they have now become stale and the charges can be reversed. I have requested ENS's accounts department to verify whether or not the cheques were cashed and to ensure that any stale cheques are reversed. Zonnekus will then be credited with these amounts.

106. I do not follow the logic of Van der Merwe's argument that this amounts to 'theft'. One of the cheques was issued to him. Does this imply that he has benefited from such alleged 'theft'?

107. As before, the vexatious and speculative allegations and contentions are denied.

[85] The allegations in the founding affidavit regarding Murray's travel expenses are answered by Moodliar as follows.

"***<u>Ad paragraphs 156 to 163 thereof</u>***

117. When Murray was appointed as provisional liquidator of Zonnekus, he opened an estate bank account at Absa.

118. After Murray's resignation, I opened a new estate bank account. Murray's Absa estate bank account was closed and the funds were transferred to the new the estate bank account after deduction of Murray's costs.

119. Included in Murray's costs was an amount of R102 400.06. When I asked Murray for further details about this, he provided me with a statement of all the travel expenses which he incurred in the scope of his appointment as a liquidator of Zonnekus, and a bundle of supporting vouchers. I attach a copy of the statement hereto… The only amounts which did not have supporting vouchers are the three small amounts which I have circled i.e. R145.00, R6.00 and R65.74. According to Murray these amounts were paid for parking.

120. I was satisfied that the deduction of R102 400.06 by Murray for travel expenses was legitimate and I accordingly included it in the first L&D account. The Master did not query the payment either. The baseless contentions regarding theft and the liquidators' failures are denied."

In my considered view, Moodliar's explanation sets up a plausible and credible denial of the allegations in the founding affidavit and such denial must therefore stand in terms of the rule in *Plascon-Evans*.

[86] A further aspect of Moodliar's answering affidavit which merits mention is in relation to the preparation of the first LDA. She explains how the account was drawn up by a member of her staff and lodged for approval on 31 January 2018. Moodliar points out that once submitted to the Master for approval, the Assistant Master who dealt with the account issued so-called "*query sheets"* in February and March 2018 to which her office responded. I understand these to be queries in relation to expenses and in respect whereof the Assistant Master required explanations and verification.

[87] According to Moodliar, on 9 April 2018 the Master advised the liquidators that all her queries had been addressed satisfactorily and that they could proceed to advise creditors that first LDA was open for inspection. On 23 April 2018 a member of Moodliar's staff addressed an email to, inter alia, van der Merwe attaching a copy of the first LDA.

[88] Shortly before that, however, and on 17 April 2018, Dunn had directed a query to the liquidators asking for copies of the agreements concluded by them with ENS and full details of their payment of legal fees. Moodliar says that she responded to that letter by emailing him a copy of the first LDA on 20 April 2018. When Dunn requested electronic copies of supporting documentation relevant to that LDA, Moodliar says she referred him to the Master where the vouchers could be examined, adding that they were too voluminous to be sent in electronic format.

[89] There was further correspondence between Dunn and the Master during May and June 2018 in which it was pointed out to Dunn, inter alia, that the time for objection to the LDA had expired on 11 May 2018, that no written objections to the LDA had been received timeously and accordingly the account had been confirmed. To the extent that the van der Merwe interests had purported to raise a late objection to the LDA on 17 May 2018, Dunn was informed that the Master was *functus officio* and unable to deal with such objection.

[90] Moodliar says that it is apparent to her from this correspondence that the Assistant Master had considered the LDA carefully, including the issuing of the query sheets. She concludes by pointing out that the van der Merwe interests had known since 13 June 2018 what the Master's attitude was to the purported late objection, that they had not sought to review her decision and that they had waited for more than seven months before issuing the application to reopen. This, says Moodliar, demonstrates that the application is not *bona fide* and is part of the stratagem to delay the eviction of the occupiers from the Mansion.

THE REPLYING AFFIDAVIT

[91] The replying affidavit filed by the van der Merwe interests of 18 April 2019 raises new matter which follows on a notice issued to the liquidators in terms of Rule 35(12) requesting copies of documents referred to in the answering affidavit. An attack is then launched on the travel expenses of Murray (who is from Pretoria), inter alia, because it is said that he was accompanied by his wife to Cape Town on a number of occasions in respect whereof disbursements were claimed. There are other duplications alleged too.

[92] In the reply van der Merwe refers to a spreadsheet which he drew up after receipt of the Rule 35(12) documentation, *"and which is intended to assist the Court in having regard to and drawing conclusions from Mr. Murray's conduct…"* He goes on to point out that the hearing of the matter he will present "*a detailed analysis of these documents in order to support the conclusions*" to which he thereafter alludes in broad terms.

[93] In argument Mr. van der Merwe did indeed refer to annexure GVDM 5 to the replying affidavit and for the first time the Court and the liquidators had some inkling of the case being advanced. The document is in spreadsheet form and in fine print and is difficult to follow. Little wonder then that the liquidators (who did in fact file a supplementary answering affidavit) did not deal with the allegations made in argument relying on the spreadsheet. Van der Merwe, who is no stranger to litigation[22] and who in any event regularly enjoys the services of Dunn, did not heed the directive in *van Zyl* by identifying the relevant parts of the annexure relied upon in the replying affidavit and he is now precluded from relying thereon, the point being that, notwithstanding the filing of a supplementary answering affidavit at van der Merwe's invitation, the liquidators have not been afforded an opportunity of dealing with the facts underlying the conclusions sought to be drawn.

THE SUPPLEMENTARY ANSWERING AFFIDAVIT

[94] In her supplementary answering affidavit filed on 13 June 2019, Moodliar attempted to deal with some of the new matter advanced in the replying

[22] See, for instance, BR 4 at [94]

affidavit. In my view, she offers a plausible explanation regarding the payment of rentals by the lessee of the Burmeister Circle property. I do not intend burdening an already burgeoning judgment with the minutiae thereof. Suffice it to say that there is nothing inherently improbable therein and that explanation, too, by Moodliar must stand in terms of *Plascon-Evans.*

[95] Turning to the allegations regarding Murray's travel expenses, Moodliar indicated that she had experienced difficulty in contacting Murray but that shortly before filing her supplementary answer, she had been furnished with an affidavit by him. What Moodliar's supplementary answer illustrates is that Murray had been involved in litigation relating to a number of entities linked to the van der Merwe interests and that he had to attend meetings in Cape Town over a period of time in that regard. Evidently Murray's wife has been an employee of Sechaba for some 20 years and she accompanied Murray to meetings in that capacity on numerous occasions, helping with the taking of notes etc. Her visits to Cape Town are therefore explained in this context. In conclusion Moodliar said that while compiling the first LDA she had received Murray's vouchers, had considered them and was satisfied as to the accuracy thereof, particularly because she knew him to be a person of integrity.

MURRAY'S AFFIDAVITS

[96] In an affidavit dated 10 June 2019 annexed to Moodliar's supplementary answer Murray indicates that he does not intend to intervene in these proceedings but offers an explanation in response to the allegations levelled at him, refuting any suggestion of fraud on his part. These allegations appear to be in response to the founding affidavit of van der Merwe and I will recite only the relevant parts thereof.

"*4.4 The following is of specific import in respect of the issues of rental income, travel costs and accompanying vouchers, as raised by the applicants in its (sic) founding papers:*

4.4.1 firstly, although it is correct that Sechaba received rental income in respect of Zonnekus' immovable property on behalf of the insolvent estate, such income was effected into the estate account and after payment of all expenses in relation to the estate, including expenses incurred for my services rendered during my appointment were deducted from the total rental income received, the balance was accounted for in the estate;

4.4.2 unfortunately, and in light of the fact that Zonnekus was incorporated in a different province, the majority of my attendances had to be executed and performed in Cape Town. Having regard to the attached reconciliation account and detailed travel report… it is evident that the expenses incurred in respect of travel costs in execution of my duties during the period of October 2014 to May 2015 were not unreasonable;

4.4.3 inopportunely and on several occasions, my attendance was required in Cape Town on urgent bases and as a result several last-minute arrangements had to be made to enable me to fly to execute my duties, which resulted in business class tickets being required, as seats in the economy class had already been booked and the flight options were limited;

4.4.4 all expenses and payments made to me in my capacity as erstwhile joint provisional liquidator alternatively, Sechaba, as reflected in the first and final liquidation account were properly substantiated by vouchers, which vouchers, and payments had been properly considered and approved by the Master…

4.7 It is my respectful submission that no payments received in respect of my duties as erstwhile joint provisional liquidator of Zonnekus constituted any form of fraud or theft as alleged by the applicants. No concrete or conclusive proof other than mere conjecture has been advanced. All payments received from the estate were effected for my services rendered and to reimburse Sechaba for all expenses incurred, specifically that of travel expenses.

4.8 In addition, the Master did not raise any concerns relating to the fees allocated to me and accordingly, approved same, similarly without objection from creditors for the simple reason that no impropriety existed.

4.9 Having regard to the above, the cost effected towards my services and expenses incurred are not unreasonable or unsubstantiated and the mere fact that the Applicants allege that payments made by the estate of Zonnekus towards my fees and expenses constitutes theft alternatively, fraud are simply derisory and accordingly denied…"

[97] In an affidavit dated 21 June 2019 Melis explains that ENS engaged with Murray's attorneys in an effort to clarify certain of the issues raised by the van der Merwe interests in the supplementary replying affidavit. Melis attaches a further affidavit by Murray dated 20 June 2019 in which he says that he has had an opportunity to source his files and that it has now come to his attention that there were certain *bona fide* errors made in his earlier affidavit.

[98] Murray explains that over the years he was involved in a number of matters involving the van der Merwe interests, *viz* Executive Helicopters Ltd, Candice van der Merwe, Aeronastic Properties Ltd and Zonnekus Mansion (Pty) Ltd all of which necessitated frequent (and sometimes urgent travel) to Cape Town. He explains that disbursements incurred were, in some instances, debited to the wrong estates due to a *bona fide* clerical error in his company's accounts department. In the instances where this occurred, says Murray, he has repaid the relevant amounts to Moodliar and he attaches proof of an EFT payment of the sum of R22 396,34. He concludes his affidavit as follows.

> "*3.9 The allocation of the payments is not as a result of fraud occasioned by any specific or implicit conduct of any of the parties, but merely an administrative, clerical error on the part of our accounts department and as a result of the multiplicity of matters which Mr. van der Merwe was involved and our offices were tasked to administer.*
>
> *3.10 I trust that this allays any fears that Mr. Van der Merwe could have in respect of any untoward conduct or fraud, as he mentions or*

avers. I accordingly also respectfully request the honourable court to accept the explanation as put forward."

CONCLUSIONS ON THE FRAUD ALLEGATIONS

[99] In considering the allegations of fraud made by the van der Merwe interests a court will be guided by the judgment of Eksteen AJA in the recent SCA decision in *Raubex Construction*[23]

"(F)raud will not be readily inferred; particularly where it is sought to be established in motion proceedings. A mere error, misunderstanding or oversight, however unreasonable, does not amount to fraud and it is insufficient merely to show that contentions are incorrect. A party has to go through and show that the representor advanced the contentions in bad faith, knowing them to be incorrect."

[100] As far as the stale cheques are concerned, it will be borne in mind that the cheques were issued by ENS as part of the subpoena process preceding the s417 enquiry. The liquidators obviously did not have access to ENS' bank account and would not have known whether the cheques had been cashed by the witnesses or not. At worst, the inclusion of the ancillary costs relating to the subpoenas was no more than an oversight on the part of the liquidators. Importantly, they have indicated that they are in a position to correct the error in a following LDA and have undertaken to do so. There is therefore no prejudice to creditors.

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[23] Raubex Construction (Pty) Ltd v Bryte Insurance Company Limited [2019] 2 All SA 322 (SCA) at [24]

[101] The conduct on the part of the liquidators complained of by the van der Merwe interests in relation to the cheques is no more than a reasonable error on their part and has certainly not been shown to have been fraudulent or made in bad faith. It manifestly does not warrant the reopening of the LDA at this advanced stage of proceedings.

[102] Turning to the question of Murray's travel expenses, the first point to mention is that the Master issued query sheets and did not raise any concerns about the extent of the expenses. Secondly, the remaining two trustees have not been shown to have been party to any misrepresentation. Rather, the argument advanced by van der Merwe in argument was that Murray had "*unlawfully and intentionally misrepresented to the current liquidators"* who are accused of "*apparent complicity with Mr. Murray in his misappropriation and fraud".* These are bare, unsubstantiated accusations which are not based on fact, nor has Van der Merwe demonstrated that the liquidators had any knowledge of the alleged misrepresentations made by Murray to them, that they intentionally associated themselves therewith or that they made any false representations in bad faith.

[103] The true motive behind the application to reopen is contained in a repetition of the *leitmotif* under the heading "*Conclusion"* at the end of the founding affidavit. I recite the paragraph in full as it usefully summarises the core of the case generally sought to be advanced by the van der Merwe interests in the current wave of applications.

> "*188. As appears from the contents of this affidavit and the annexures thereto:*

188.1 The winding up of Zonnekus occurred at the behest and direction of ENS, with the liquidators apparently content to be passengers in the process;

188.2 The motive of ENS was plainly to create the groundwork for a situation where they could first: i) charge fees to the estate (more than R 2 million as at the date of the first liquidation and distribution account, with more undoubtedly to be added) without any fear of opposition by the liquidators or institutional creditors advised by them, and then, ii) paint a sheen of legality on their conduct by engineering the Master's confirmation of the liquidation and distribution account;

188.3 The liquidators exhibited gross dereliction of their statutory duties (insofar as the Second Respondent was in fact involved in the administration of the estate at all), by allowing ENS to run rampant in stripping the estate of its assets;

188.4 This occurred in circumstances where the liquidators not only may have reasonably suspected - but were actually expressly advised - that their powers, specifically the power to lodge liquidation and distribution accounts, were suspended by reason of the business rescue applications;

188.5 This constitutes not only a blatant disregard of the duties incumbent on the liquidators, but also a fraud perpetrated upon

> *the Master, given that the liquidators (assisted by ENS) deliberately chose not to disclose to the Master that there were - at the very least - doubts about their ability to mandate ENS to render legal services to them and to seek the Master's confirmation of the fees charged to the estate through confirmation of the liquidation and distribution account."*

[104] These excessive claims in the founding affidavit were repeated *ad nauseam* by van der Merwe in argument and reached unprecedented levels of baseness when he suggested that as part of the "*feeding frenzy*" the liquidators and ENS were co-conspirators liable to be charged under the Prevention of Organised Crime Act. In fact, it was necessary for the Court to caution van der Merwe that he should exercise restraint lest he go beyond the reasonable bounds of litigation privilege.

[105] Finally, it is reasonable to infer ulterior motive (and hence an abuse of process) from the delay in bringing the application to reopen and its timing in relation to the proceedings before Bozalek J. In the result, I am of the view that the application to reopen, too, must be refused with a punitive costs order.

THE APPLICATION TO REMOVE THE LIQUIDATORS (CASE NO 21515/18)

[106] The removal application is based upon the provisions of s379 of the 1973 Act, which is to the following effect.

"***379. Removal of liquidator by Master and by the Court***

(1) The Master may remove a liquidator from his office on the ground –

(a) that he was not qualified for nomination or appointment as liquidator or that his nomination or appointment was for any other reason illegal or that he has become disqualified from being nominated or appointed as a liquidator or has been authorised, specially or under a general power of attorney, to vote for or on behalf of a creditor, member or contributory at a meeting of creditors, members or contributories of the company of which he is the liquidator and has acted or purported to act under such special authority or general power of attorney; or

(b) that he has failed to perform satisfactorily any duty imposed upon him by this Act or to comply with a lawful demand of the Master or a commissioner appointed by the Court under this Act; or

(c) that his estate has become insolvent or that he has become mentally or physically incapable of performing satisfactorily his duties as a liquidator; or

(d) that the majority (reckoned in number and in value) of creditors entitled to vote at a meeting of creditors or, in the case of a member's voluntary winding-up, a majority of the members of the company, or, in the case of a winding-up of a

company limited by guarantee, the majority of the contributories, has requested him in writing to do so; or

(e) that in his opinion the liquidator is no longer suitable to be the liquidator of the company concerned.

(2) The Court may, on application by the Master or any interested person, remove a liquidator from office if the Master fails to do so in any of the circumstances mentioned in subsection (1) or for any other good cause."

[107] It is to be observed that the primary source for complaint of an "*interested party*"[24] seeking to remove a liquidator is the Master who is to be approached under ss(1)(a) – (e). In the event that the Master declines to so act the court may be approached on the same grounds upon which the Master was approached or the court may be approached directly "*for any other good cause."* That distinction suggests to me that such a direct complaint to court must be based on considerations other than those listed under ss(1)(a) – (e) but the decided cases appear have adopted a more generous interpretation.

[108] The point of departure is that it has been repeatedly held that the bar for removal of a liquidator is set high. So, in *Ma-Afrika* [25] Van Zyl J considered the relevant authorities in detail and summarized the approach as follows.

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[24] It is not in dispute that the Trust as shareholder and member of the Company is such a party.

[25] Ma-Afrika Groepbelange (Pty) Ltd v Millman and Powell NNO 1997 (1) SA 547 (C) at 566A -E

"*It goes without saying that the removal of a liquidator is a radical form of relief which will not be granted unless the Court is satisfied that a proper case is made out therefor. In this regard it will not be sufficient merely to show that there is an apprehension or perception of bias, partiality, lack of independence or unfairness on the part of the liquidator. Nor will it suffice to establish, even prima facie, that the liquidator has not performed satisfactorily, has made questionable decisions or committed errors of judgment. This may well point to a lack of confidence or experience, but will not necessarily be regarded as 'good cause' justifying the removal of the liquidator. The Court is obliged to assess the conduct of the liquidator in its full context with reference to all relevant facts and circumstances. And at the end of the day it is of cardinal importance that the Court must be satisfied that removal of the liquidator is to the general advantage and benefit of all persons concerned or otherwise interested in the winding-up of the company in liquidation. In this regard a relevant factor is the expense which will be incurred and inconvenience suffered to appoint a new liquidator for purposes of completing the work already done by his predecessor. A Court would hence be less inclined to remove a liquidator at a later stage in the winding-up process than it would be to replace him at an early stage."*

[109] In *Hudson* [26] Patel J, citing *Ma-Afrika* added that –

> "*The Court does not lightly remove a liquidator and will only do so by having due regard, amongst other considerations, to the impact of a removal on a liquidator's professional standing and reputation… It will only remove a liquidator from office if it is satisfied that a proper case is made out by tendering evidence that it is against the interests of the liquidation (that means all persons who are interested in the company being liquidated) that he remains in office,"*

It is important to note that in the instant case, as was the position in *Hudson*, neither the Master nor any of the other creditors have at any stage raised concern as to the manner in which the liquidators have gone about discharging their statutory duties.

[110] Lastly, there is the judgment of Navsa JA in *Standard Bank*[27] in which *Ma-Afrika* and *Hudson* are cited with approval and where the following passages by Prof Blackman in *LAWSA Vol 4 (Part3)*[28] were endorsed.

> "*The court will remove a liquidator if some unfitness, in the widest sense of that term, is shown in the liquidator, whether it be from personal character or from his connection with other parties or from circumstances in which he is involved. Thus, even though no bad faith was alleged, the court removed a liquidator where he had become so*

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[26] Hudson and others NNO v Wilkins NO and another 2003 (6) SA 234 (T) at [11]

[27] Standard Bank of South Africa v The Master of the High Court and others 2010 (4) SA 405 (SCA) at [127]

[28] The same passage appears in the 2nd ed. by Prof.R.C.Williams at p366 para 232

engrossed in his own view that he was unable to see the reasonableness of the proposals of those interested in the liquidation and threw obstacles in their way… Where it was prima facie established that the liquidator and two directors were liable to account to the company for certain sums and the liquidator refused to take proceedings against the directors…

Although there may be no individual characteristic in itself sufficient on which to base a conclusion that a liquidator is unfit, there may be a number of circumstances which combined might force the court to that conclusion. Also, the court must take into account some unfitness on the part of the liquidator together with what might be in the interests of those persons interested in the liquidation. A relevant factor is also the costs that would be incurred if another liquidator has to come in and complete the work that the present liquidator has already done. Thus, in the circumstances, the court will be less likely to discharge a liquidator towards the end of the winding-up, after he has become acquainted with the affairs of the company, than it would be early in the winding-up. Although each one of these considerations taken singly might not be sufficient to justify the removal of the liquidator, taken together they might be."

THE FACTS RELIED UPON FOR REMOVAL

[111] As I have already noted, van der Merwe did not file heads of argument in the removal application, preferring to piggy-back the argument on the submissions

advanced in the application to reopen. The effect of this approach is that the basis for removal would then be linked solely to the allegations of fraud which I have already found did not justify the reopening of the first LDA, but that, in my view, would not necessarily imply that the liquidators are not liable to be removed since the approach is different. In argument, van der Merwe made it clear that he did not abandon the points raised in the founding affidavit in the removal application and so it is necessary to deal therewith.

[112] Dealing then with the allegations of fraud on the part of the liquidators as a factor warranting removal, it is important to note that the conduct complained of by the van der Merwe interests was not directly that of the liquidators. In relation to the stale cheques, these were issued by ENS and the cost of the witness fees and the attorneys' fees in relation to the drawing of the cheques and so forth was included in an invoice forwarded to the liquidators by ENS. The liquidators paid this invoice in the belief that it was due and payable and did not know that the cheques had gone stale. That fact would have been known to ENS at a later stage and ought to have resulted in a credit being passed to the insolvent estate.

[113] The failure of the liquidators to pick up that this credit had not been put through is understandable given the myriad transactions and attendances that a liquidation of this order would embrace, and in any event, is capable of being (and will be) corrected in the next LDA. In my view the liquidators' failure in this regard is to be categorized, at worst, as an understandable error of judgment and is certainly not serious enough to warrant their collective removal under s379(2).

[114] The second consideration for removal on the alleged basis of fraud relates to the payment of Murray's travel expenses. Once again, it was a party other than the liquidators who drew up the invoice and submitted it to them for payment. The liquidators' failure to pick up the allocation of the disbursements to the wrong insolvent estate is similarly understandable and at worst an error of judgment. The error is to be corrected in the next LDA and does not warrant their removal from office either.

[115] A number of the other grounds for removal raised in the papers have been taken over by subsequent events and rulings by the courts. So, for instance, the application before Davis J for the extension of powers (said by the van der Merwe interests to be impermissible) has been dealt with by Bozalek J in the eviction application and in this judgment above. So too, the contempt application which exonerated the liquidators all the way to the CC.

[116] An earlier argument that the powers of the liquidators were suspended during the four failed business rescue applications and that they behaved improperly and unlawfully during that period was also dismissed by Bozalek J. I agree with Mr. Goodman SC that it is significant that when the writing was clearly on the wall during the protracted course of argument in the eviction application, the van der Merwe interests changed tack and sought reconsideration of the s386(5) order more than 4 years after it had been granted. I have already found that this was demonstrative of an ulterior motive.

[117] Then it is suggested in the papers that the liquidators have behaved improperly in entertaining ENS' claim for fees in an amount of approximately R5.7m.

Van der Merwe makes the bold assertion that this has already been paid without having regard to the first LDA where neither the amount claimed nor the payment thereof has been reflected. It is an unsubstantiated allegation that is without any factual basis.

[118] Much is made in the papers of the liquidators' alleged failure to challenge the SARS assessments lodged as claims against the Company. The essence of the criticism is that the liquidators failed to consult with van der Merwe and his legal representatives to obtain instructions for a basis to challenge to the assessments of R41, 7m. These allegations are refuted by Moodliar in the answering affidavit where she says that her written requests to Dunn and van der Merwe for instructions were met with a response to challenge procedural non-compliance by SARS but that no basis was advanced regarding the merits of the claim. This explanation must stand in terms of *Plascon-Evans*.

[119] Aligned to this complaint is the suggestion by van der Merwe that the liquidators exhibited a "*blind adherence to SARS' attorneys and wishes"* presumably in an endeavour to demonstrate some sort of collusion between the parties. Apart from the fact that there is a dearth of evidence in support of this claim, van der Merwe ignores the reality that liquidators are obliged to act on the instructions of the Company's creditors (and the major creditors here are the Bank and SARS). In my view, this concern does not afford any basis for the removal of the liquidators given that there was nothing untoward in their conduct.

[120] Then, there is a very brief allegation that the joint liquidators were not working together, the suggestion being that Moodliar was "*running the entire matter*."

Van der Merwe relied in this regard on the fact that Nokhanda allegedly did not file a confirmatory affidavit in support of Moodliar's answering affidavit in the second contempt application. In her answering affidavit in the removal application, Moodliar disputes van der Merwe's claim and annexes a copy of Nokhanda's confirmatory affidavit in the second contempt application as well as proof of service and filing. She also points out that she is based in Cape Town and Nokhanda in Johannesburg and that it is often more practical for her to take steps in the winding-up process in Cape Town. Moodliar stresses that she and Nokhanda are regularly in contact with each other and that he has consented to all steps taken by her. This ground of complaint is similarly baseless in relation to the removal application.

[121] There are also the two complaints by the van der Merwe interests that the liquidators have disposed of certain of the company's assets at below market value. Firstly, there were two helicopters sold for R400 000,00 which van der Merwe alleges were worth at least R15m. Moodliar says in the first place that the claim is facetious because the helicopters were bought by another company controlled by van der Merwe, Wild Olive Enterprises (Pty) Ltd. She goes on to point out (with reference to photographs) that the aircraft were in a poor state of repair, that they really only had value as scrap metal and that the liquidators had received a valuation of R130 000.00 on this basis. Finally, she refers to a so-called CM 100 Form[29] completed by van der Merwe personally on 21 November 2014 in which he estimated the combined value of the helicopters to be R750 000.

[29] A statutory document entitled "*Statement of Affairs*" of the Company

[122] The second complaint by the van der Merwe interests on under-valued sales is that the Burmeister Circle properties were sold at R1,5m below market value. Van der Merwe says that an initial offer to purchase the properties was concluded by himself and a third party buyer for R8,5m but that they eventually only fetched R7m. He castigates the liquidators' acceptance of this lower offer as the "*fraudulent transfer*" of the properties, although the basis and extent of the fraud is not spelled out. The allegation is thus extremely vague.

[123] In answer to these allegations, Moodliar says that the selling price of the properties was reduced once the liquidators disclosed the true position of the properties to the prospective purchaser, and that the purchase price was in line with an independent valuation procured by the liquidators. Having considered the explanations offered by the liquidators in respect of both these impugned transactions, I am of the view that no complaint can be levelled against their conduct on this score either and that there is certainly no basis to consider their removal as liquidators.

CONCLUSIONS ON THE REMOVAL APPLICATION

[124] As I have said, van der Merwe did not actively advance argument on the removal application other than to repeat the allegations of fraud which were advanced in relation to the application to reopen. This might be attributable to his lack of genuine belief in the sustainability of the arguments. Be that as it may, I have considered all of the grounds of complaint advanced in the founding affidavit, both individually and collectively, and conclude that no basis whatsoever has been established for the removal of the liquidators.

[125] The removal application, too, was brought at an advanced stage of the liquidation and it would not be in the interests of the general body of creditors (none of whom have lodged any complaints about the liquidators' conduct) to order a removal and reappointment of new liquidators at this stage. The delay in bringing the application for removal suggests that it too is part of a grand scheme which amounts to an abuse of process. But that is not the only basis for considering a punitive costs order. The removal application has seen the integrity of the liquidators repeatedly assailed by the van der Merwe interests and it is proper to express the Court's displeasure with this attack on them by ordering punitive costs.

CONCLUDING REMARKS

[126] Each one of the latest wave of applications has been shown to be an abuse of process by the van der Merwe interests. They have been carefully planned and designed to interrupt the winding-up process and to cause as much collateral damage to the liquidators and creditors as possible. The applications collectively took up five days of valuable court time (let alone the time set aside for reading) during which other *bona fide* litigants were made to stand in the queue and were kept out of court. It is said that litigation is serious business and not a game. Van der Merwe and his interests have been afforded a fair opportunity to place their case before court and they have trifled with the Court. Such behaviour warrants appropriate punitive costs orders being made as an indication of the Court's displeasure with the Applicants' conduct.

THE ORDERS OF THE COURT ARE AS FOLLOWS:

A. CASE NO. 22282/2014 (Application for reconsideration of the order granted under s386(5) of the Companies Act, 1973)

1. The application is dismissed with costs on the scale as between attorney and client, such costs to be borne by the Eagles Trust and Gary Walter van der Merwe jointly and severally, the one paying the other to be absolved.

2. It is directed that the liquidators' costs will be costs in the administration of the winding-up.

B. CASE NO. 380/2019 (Application to reopen the first liquidation and distribution account)

1. The application is dismissed with costs on the scale as between attorney and client, such costs to be borne by the Eagles Trust and Gary Walter van der Merwe jointly and severally, the one paying the other to be absolved.

2. It is directed that the liquidators' costs will be costs in the administration of the winding-up.

C. <u>CASE NO. 21515/2018</u> (Application to remove the liquidators)

1. The application is dismissed with costs on the scale as between attorney and client, such costs to be borne by the Eagles Trust and Gary Walter van der Merwe jointly and severally, the one paying the other to be absolved.

2. It is directed that the liquidators' costs will be costs in the administration of the winding-up.

3. It is recorded *ex abundante cautela* that on 10 September 2019 the interlocutory application brought under Rule 30A was dismissed with costs on the scale as between attorney and client, such costs to be borne by the Eagles Trust and the Fourth Respondent (Gary Walter van der Merwe) jointly and severally, the one paying, the other to be absolved.

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GAMBLE, J