IN THE HIGH COURT OF SOUTH AFRICA

(WITWATERSRAND LOCAL DIVISION)

CASE NO: 07/23990

In the matter between:

MORRISON, TERRENCE ANDREW	First Applicant
PELLOW, ALLAN DAVID, NO	Second Applicant
SANSOM, NATASHA AMANDA, NO	Third Applicant
MOTALA, ENVER MOHAMMED, NO	Fourth Applicant

and

VAUGHN, CORA	First Respondent
SCOTT, ROGER	Second Respondent
FIRSTRAND BANK LIMITED t/a RMB PRIVATE BANK	Third Respondent
THE STANDARD BANK OF SA LIMITED	Fourth Respondent
THE MASTER OF THE HIGH COURT, PRETORIA (MASTER'S REFERENCE NUMBER T1540/06)	Fifth Respondent

J U D G M E N T

BLIEDEN, J:

A. INTRODUCTION

[1] The four applicants are the duly appointed liquidators of Nordic Saga Investments 51 CC (Nordic Saga), a close corporation which was placed into voluntary liquidation on 19 September 2006. The assets of Nordic Saga consist of two immovable properties, one situated in Houghton (the Houghton property), and the other in Killarney, Johannesburg. The Houghton property has since the middle of 2004 been occupied by the first and second respondents. They have since 2005 remained on in the property rent free and they resist any attempt to evict them and to cause the Houghton property to be realised in the liquidation.

[2] The first and second respondents claim that the Houghton property be transferred to them in terms of a cancelled agreement concluded on 6 July 2004, in which they purchased it from Nordic Saga for a price consideration of

R3,4 million. They allege that they have proved claims in the estate of Nordic Saga in the aggregate of R6 400 000,00. According to the claim forms which are included in the papers in this matter the first respondent claimed R4 900 000,00 for "*monies paid*" and the second respondent claimed R1 500 000,00 for "*settlements claims*". There is a dispute between the applicants and the two respondents whether the claims were in fact proved. However, for the purposes of this application I shall accept that they were, as these disputes cannot be resolved on the papers.

[3] In their attempt to achieve the transfer of the Houghton property to them the two respondents allege that they passed resolutions in terms of Annexure "X" to the Notice of Motion ("X"), at a meeting of creditors of Nordic Saga held on 11 January 2007. This is also in dispute between the parties, but for the purposes of this application I shall accept that such resolutions were in fact passed.

[4] The third and fourth respondents are secured creditors of Nordic Saga (mortgagees of the Houghton and Killarney properties respectively). Their claims are in the amounts of R4 283 072,00 (third respondent) and R980 439,00 (fourth respondent). In aggregate their proved claims therefore are less than the aggregate value of the first and second respondents' proved claims. The first and second respondents claim that the liquidation and winding-up of the estate of Nordic Saga be conducted according to their

demands as appears from "X". It is the case of the applicants and the third and fourth respondents that the implementation of the first and second respondents' resolutions will prejudice the third and fourth respondents as secured creditors, and will result in a flawed distribution of the assets of Nordic Saga inconsistent with their legal entitlement. The fourth respondent was not represented in these proceedings and no affidavits were filed on its behalf. It made common cause with the third respondent. Nothing further need be said about it.

[5] It is further the case of the applicants that by passing, as majority creditors, their own resolutions, the first and second respondents have prevented them from obtaining the usual powers given to liquidators to perform their normal statutory functions in terms of, *inter alia*, section 391 of the Companies Act, namely to recover and reduce into their possession the assets of Nordic Saga (the Houghton and Killarney immovable properties) and to apply the proceeds thereof in satisfaction of the costs of the winding-up of Nordic Saga and the claims of creditors in accordance with the scheme of the insolvency legislation. The present application is brought by the four applicants to achieve a situation where they are given the right to act in terms of the relevant legislation and are not bound by the resolutions in "X".

[6] The first and second respondents oppose any attempt of the applicants by way of this application to procure the intervention of this Court to give

directions as to the status and validity of the first and second respondents' resolutions (as contained in "X") and to give further directions to enable the joint liquidators to carry out their statutory functions as set out in the Notice of Motion.

[7] The following paragraphs in "X" are of relevance in the present application:

> "*1. That none of the actions of the Joint Liquidators and their administrators of the estate prior to this date be approved, ratified, or confirmed.*
>
> *2. That the Joint Liquidators are not authorised to dispose of the movable or immovable assets of the estate except to the extent and in the manner such authority is specifically granted herein.*
>
> *3. That the Joint Liquidators may only act with the approval and consent of the co-liquidator, E.M. Motala, who was appointed by the creditors at the First Meeting of Creditors on the 19th of December 2006. If there is a dispute on any issue between the Joint Liquidators and the Co-Liquidators, such dispute shall be settled by the Master.*
>
> *4. That E.M. Motala is authorized to sign any and all necessary documentation on behalf of the estate and the liquidators in order to give effect to the transfer of any immovable property to the purchaser thereof.*
>
> *…*
>
> *9. That the Contract for Sale entered into between Cora Vaughn and Roger Scott and the Corporation for the purchase of the Houghton Property on the 6th day of July 2004 be ratified, confirmed and given full force and effect and that the Liquidators shall proceed to take whatever steps necessary to have said property transferred into their names.*
>
> *10. That, if necessary, the Liquidators are mandated and authorised*

to enter into an Agreement for Sale of the Houghton Property with Cora Vaughn and Roger Scott on the same terms and conditions of the 6 July 2004 agreement, giving Vaughn and Scott full credit for the deposit which they paid the Corporation.

11. That the purchasers of the Houghton Property are hereby recognised as caretakers of said property and shall maintain said property at their own expense in lieu of the occupational rental from the date of the signing of this resolution until said property is transferred into their names.

…

13. That the report submitted by the Joint Liquidators on the 14th day of December 2006 is hereby rejected as incomplete and inaccurate."

[8] It is therefore necessary for the applicants, in the first instance, to obtain the leave of this Court in terms of section 386(5) of the Companies Act (read with section 66 of the Close Corporations Act, 1984) to institute this application and, following thereupon, to obtain the necessary powers to fulfil their functions. The further relief sought in the Notice of Motion relates to the execution by them of their functions.

B. THE FACTS

[9] The following facts are either admitted by all the parties or are not seriously put in issue.

9.1 Nordic Saga is the registered owner of the Houghton property.

The first and second respondents reside in the dwelling. They pay nothing for their occupation of the property. In their answering papers they say that they have "*no contractual duty to pay occupational rent …*".

9.2 The liquidators consider the value of the Houghton property to be between R5 million and R6 million.

9.3 In 2003 the third respondent obtained judgment for an amount of approximately R3,2 million against Nordic Saga on the strength of its mortgage bond registered over the Houghton property.

9.4 On 6 July 2004 Nordic Saga sold the Houghton property to the first respondent for a purchase price of R3,4 million (the 6 July sale).

9.5 Subsequently the third respondent caused execution to be levied against the Houghton property on the strength of the judgment obtained by it. On 30 September 2005 and at the sale in execution, the first and second respondents' bid for the Houghton property was accepted by the sheriff, and an agreement was concluded with the first and second respondents for a sale price of R4 060 000,00 (the 30 September 2005 sale).

9.6 Thereafter litigation ensued between the first and second respondents as plaintiffs and the sole member of Nordic Saga, one Mohammed Iqabal Kajee (Kajee) for the repayment of a cash deposit of R600 000,00 that they had effected in terms of the 6 July sale. This litigation was settled in writing on 14 November 2005. In terms of clause 2.5 of the settlement agreement it was recorded that the 6 July sale had been cancelled.

9.7 The first and second respondents subsequently again sued Nordic Saga and its member because of a breach of the settlement agreement. That litigation was also settled in writing on 27 May 2006. Clause 4 of the second settlement agreement once again records that the 6 July sale had been cancelled.

9.8 Notwithstanding these repeated confirmations of the cancellation of the 6 July sale, the first and second respondents have, by way of the resolutions contained in "X", attempted to force the applicants to "*ratify*" the cancelled sale in order to enable them to take transfer of the Houghton property at the then agreed price of R3,4 million less the deposit paid by them to Kajee, which he had still not repaid to them. As has already

been mentioned the true value of the Houghton property, according to the assessment of the applicants, is between R5 million and R6 million. The prejudice that will be suffered by the secured creditors, being the third and fourth respondents, were the 6 July sale to be revived on the terms demanded by the first and second respondents is obvious. They clearly will not be able to recover the amount due to them in terms of their security.

9.9 The first two respondents obtained a "*ruling*" from the then assistant Master, Mr Mabasa, to the effect that the Houghton property was "*the asset of the majority creditors – Vaughn and Scott – and not an asset of the liquidated estate. Vaughn and Scott has a right to take transfer of the Houghton Property …*".

9.10 Mr Mabasa has deposed to an affidavit which is annexed to the first and second respondents' answering papers.

9.11 On behalf of the applicants it was submitted that the power which the former assistant Master arrogated to himself to pass judgment on the factual and legal issue as to Nordic Saga's ownership of the Houghton property was plainly *ultra vires* and beyond any powers which he had. This submission is clearly correct.

9.12 On 19 September 2006 Nordic Saga was put into voluntary liquidation. The four applicants were appointed as joint liquidators.

9.13 Pursuant to their appointment as joint liquidators, the applicants decided that the 30 September 2005 sale in execution was not to be proceeded with. The first and second respondents did not attempt to pursue or enforce that agreement of sale. They seek to reinstate the cancelled 6 July sale.

9.14 At the adjourned first meeting of creditors of Nordic Saga held on 14 December 2006 the various claims were proved and as a consequence the first and second respondents acquired a majority in terms of the aggregate value of their claims, thereby giving them a majority voting power at meetings of creditors.

9.15 At that meeting, the first applicant, as one of the joint liquidators of Nordic Saga, submitted a statutory report in terms of section 79 of the Close Corporations Act of 1984, together with a standard set of resolutions which was intended to afford the liquidators the power to perform their functions in terms of the Insolvency, Companies and Close Corporations Act as liquidators of Nordic Saga. The standard set of resolutions is at

pages 51 to 53 of the papers and contains resolutions which are ordinarily granted to liquidators of companies and close corporations at a meeting of creditors, in order to enable them to perform their statutory functions.

9.16 The first and second respondents, using their majority voting power, prevented these resolutions from being passed and they were, accordingly, not passed.

9.17 That left the joint liquidators in the position where they were deprived of their ordinary powers to fulfil their functions by, *inter alia*, realising the immovable properties of Nordic Saga by public auction, private treaty or public tender (clause 4 of the standard resolution at page 51 of the papers), to dispose of the secured assets, the two immovable properties (clause 14 of the standard resolution at page 52), to obtain legal assistance required in the interests of the estate (clause 17 of the standard resolution at pages 52-3) and to institute legal proceedings in the name of and on behalf of Nordic Saga (clause 18 of the standard resolution at page 53).

9.18 The third and fourth respondents, as secured creditors, have indicated that they require the joint liquidators to take steps to

realise the immovable properties in terms of the provisions of section 391 of the Companies Act and to perform their statutory obligations expeditiously.

9.19 In 2007, the third respondent launched an application against the applicants for orders, *inter alia*, to the effect that they be directed to recover and reduce the Houghton property into their possession, to cause it to be valued, to evict the first and second respondents therefrom, and to take immediate steps to sell and realise it by public auction or private treaty at the best possible price. That application was not pursued to its final conclusion. Rather the applicants as joint liquidators resolved to and did in fact institute the present application with the blessing of the third and fourth respondents.

9.20 On 8 February 2007 and by way of a letter addressed to the first applicant as joint liquidator of Nordic Saga, the first and second respondents made the following statement to him:

> "*Let us make it as clear to you as possible: The Houghton Property and all rights, title and interest in it – including the right of occupancy and the right to occupational rental belong to us. Our claim to the property is based on the 6th July 2004 contract which became an enforceable binding contract once the sheriff*

sale was cancelled. The estate only has the right to the balance of the purchase price of R2 800 000,00, which we are ready and willing to pay into the estate. You have no legal basis for attempting to evict us and any attempts on your part will be vigorously defended."

9.21 It is plain from this letter that the first and second respondents accept that the sale in execution on 30 September 2005 no longer exists.

9.22 As has already been stated there is a dispute on the papers as to the adoption of the resolutions as listed in "X", but this dispute is not relevant for the purposes of this judgment.

C. THE RELIEF CLAIMED IN THE PRESENT APPLICATION

[10] The relevant relief claimed by the applicants is set out in their Notice of Motion at pages 1 and 2 of the application. The prayers read as follows:

"*1. Granting leave to the applicants in terms of the provisions of section 386(5) of the Companies Act, No 61 of 1973, as amended, to institute this application for the relief set out below.*

2. Declaring that the resolutions set out on annexure X hereto were not adopted at a meeting of creditors of Nordic Saga Investments 51 CC (in liquidation) held on 11 January 2007 or any other meeting of creditors of the said close corporation.

3. Alternatively to paragraph 2 above, directing that paragraphs 1, 2, 3, 4, 9, 10, 11 and 13 of the resolutions set out on annexure X hereto be set aside.

4. *Directing the first and second respondents to afford any of the applicants or their duly authorised representative access during the hours 09h00 to 13h00 and 14h00 to 17h00 on any business day to the immovable property and residence situated at 8, 10th Avenue, Houghton, Johannesburg ('the Houghton property'), upon three days' written notice having been given to the first and second respondents at the said address of such intended access, for the purpose of enabling any one or more of the applicants or their duly authorised representative to inspect and perform a valuation of the said premises and residence.*

5. *Authorising and directing the sheriff of this Honourable Court or his deputy to eject the first and second respondents from the Houghton property.*

6. *Authorising and empowering the applicants in terms of the provisions of section 386(5) of the Companies Act, No 61 of 1973, as amended, to sell and realise the Houghton property and the immovable property described as Section 20, Cranwell Hall, Killarney, Johannesburg, by public auction or private treaty at the highest possible price and to deal with the proceeds thereof in terms of the provisions of section 391 of the said Act.*"

D. THE APPLICATION FOR LEAVE TO INSTITUTE THE PRESENT APPLICATION

[11] As is apparent from the above "*facts*" the applicants have not been authorised at a meeting of creditors of Nordic Saga to conduct any litigation in the name of that close corporation. On behalf of the applicants it was submitted that to enable them to perform their statutory functions, they require the leave of this Court to do so.

Reference was made to the relevant part of section 386(5) of the Companies Act which provides:

> "*In a winding-up by the court, the court may, if it deems fit, grant leave to a liquidator … to do any other thing which the court may consider necessary for winding-up the affairs of the company and distributing its assets.*"

[12] This statutory provision is rendered applicable to the winding-up of close corporations by virtue of the provisions of section 66 of the Close Corporations Act. The reference in section 386(5) to "*any other thing*", is a reference to section 386(3) and 386(4).

[13] As submitted by counsel for the applicants, the legal position seems to be that the power in the hands of liquidators of a company or close corporation to launch or defend legal proceedings in the name of the company or close corporation derives from section 386(3)(b) read with sub-section (4)(a). A necessary consequence of these provisions is that if the liquidators are not able to obtain any of the powers set out in section 386(4) by way of an authority granted at a meeting of creditors in terms of section 386(3)(b), such as is the case here, the only procedure available to such liquidators, is to approach the court for its leave in terms of section 386(5) to take the appropriate action.

[14] While section 386(5) only applies in the case of a winding-up by the court, section 388(1) provides that where a company is being wound-up voluntarily, the liquidator may apply to the court, *inter alia*, for him "*to exercise*

any of the powers which a court might exercise if the company were being wound-up by the court". Plainly, the powers of the court under section 386(5) are such powers.

[15] The words "*or to do any other thing which the court may consider necessary for winding-up the affairs of the company and distributing its assets*" as used in section 386(5) of the Companies Act, confer a very wide power to the court (see *Lok v Venter NO* 1982 (1) SA 53 (W) at 57; *Millman NO and Steube NO v Koetter* 1993 (2) SA 749 (C) at 756). The court's discretion under section 386(5) is an unfettered judicial discretion (*Cohen v Ruskin and Smith* 1981 (1) SA 421 (W) at 425). Consequently, when an application is made to the court by a liquidator for leave to sell property in the estate of a company or close corporation, the court has a complete discretion (see *Re Chicory Ltd* 1924 CPD 275 at 277; *Kanderssen (Pty) Ltd v Bowman* 1980 (3) SA 1142 (T) at 1147).

[16] The court may authorise a liquidator finally appointed to bring legal proceedings. This proposition is supported by a number of authorities such as *Western Bank Ltd v Thorne NO* 1973 (3) SA 661 (C) at 665; *Lok v Venter NO (supra)* at 57; *Venter and Spain NNO v Povey* 1982 (2) SA 94 (D) at 102; *Millman NO and Steube NO (supra)* at 756; *Gainsford and Others NNO v HIAB* 2000 (3) SA 635 (W) at 641. In the latter case it was held that in a voluntary winding-up of a company, the liquidator may approach the court

under section 386(5) read with section 388(1) for authority to bring proceedings.

[17] As counsel for the applicants correctly submitted the joint liquidators, such as the applicants, are obliged to fulfil the obligations imposed upon them by the provisions of section 391 of the Companies Act (read with section 66 of the Close Corporations Act). In terms of section 391:

> "*A liquidator in any winding-up shall proceed forthwith to recover and reduce into possession all the assets and property of the company, movable and immovable, shall apply the same insofar as they extend to the satisfaction of the costs of the winding-up and the claims of creditors, and shall distribute the balance amongst those who are entitled thereto.*"

[18] In my view the argument of the applicants' counsel as set out below correctly describes the legal position regarding the duties of liquidators. These are:

18.1 In performing the general duties and functions imposed on him by section 391 and the particular duties and functions in regard to them required of him by other sections of the Companies Act, the liquidator owes a duty to the company to see to it that its assets are realised and its liabilities are minimised to the best possible advantage. *Commissioner SARS v Stand 290*

Wynberg (Pty) Ltd 2005 (5) SA 583 (SCA). He has a duty to see that the creditors suffer the least possible loss and receive the most advantageous dividend. *Concorde Leasing Corporation Rhodesia Ltd v Pringle-Wood* 1975 (4) SA 231 (R) at 235, and he must do everything he can to augment the disposable assets of the company (*Re Taverstock Ironworks Co* 1871 24 LT 605). Thus, he must protect the property of the company by all means in his power (*Cleave v Financial Corp* [1873] 16 LR 363 at 381). Generally he must administer the estate strictly in accordance with the duties and obligations specifically imposed on him by the Companies Act (*Re Timberland Ltd (in liquidation) and Equitable Forestry Services (Pty) Ltd (in liquidation)* [1979] 4 ACLR 259 at 281 SC (VIC)).

18.2 The liquidator has no discretion about the performance of his duties (*Re Contract Corp (Gooch's* case) [1872] 7 Ch App 207 at 211). He must act with care and skill in the performance of his duties and he has a duty to exercise particular professional skill, care and diligence in the performance of his duties. He will incur liability if he fails to display that degree of care and skill which, by accepting office, he holds himself out as possessing (*Sackwell West v Nourse* 1925 AD 516 at 533-6; *Clarkson v Gelb* 1981 (1) SA 288 (W) at 293-5). He must act reasonably in

the circumstances (*Concorde Leasing (supra)* at 235). In cases of uncertainty or doubt, the liquidator has the opportunity of safeguarding himself by, *inter alia*, obtaining directions from the court.

18.3 Although the general rule is that the liquidator owes his duties to the company, he may in the circumstances owe a direct duty to creditors (*James Smith and Sons (Norwood) Ltd v Goodman* [1936] CH 216 (CA), such as the third and fourth respondents, being secured creditors. Just as a liquidator can be liable to creditors for a breach of duty in the way he distributes money, so too, can he be liable to creditors for failure to collect money (*A J Fabrications Ltd v Grant Thornton* [1998] 2 BCLC 277).

18.4 As an officer of the court, the liquidator must maintain an even and impartial approach between all the individuals whose interests are involved in the liquidation (*Re Contract Corp (supra)* at 211). He should therefore, have no leaning for or against any individual and he must adopt a position of detachment (*Goode Durant and Murray SA Ltd v Stephenson (2)* 1961 (1) SA 657 (SR) at 659). He must not make a decision

which would prejudice one creditor and be of no advantage to any of the other creditors or the company (*Concorde Leasing (supra)* at 235).

[19] In the present case there is uncertainty as to the status of the "*resolutions*" procured by the first and second respondents and even if they were passed as alleged at the meeting of creditors, there is further uncertainty as to the validity of these resolutions.

[20] In my judgment, against this background, it is appropriate for the joint liquidators, such as the applicants, to approach this Court for leave to institute this application for the relief sought in prayers 3 to 7 of the Notice of Motion. Such relief is, in the circumstances, necessary for the winding-up of the affairs of Nordic Saga and the distribution of its assets (*Ex Parte Provisional Liquidators Pharmacy Holdings Ltd* 1962 (2) SA 12 (W) at 17; *Kanderssen (Pty) Ltd v Bowman NO* 1980 (3) SA 1142 (T) at 1147; *Cohen (supra)* at 425).

[21] In my view the first and second respondents' opposition to the granting of this relief is ill-conceived for the following reasons:

21.1 The defence of *lis pendens* raised in paragraphs 8 and 9 of their Answering Affidavit relates to different proceedings between the

third respondent and the applicants where substantially different relief is sought by the third respondent. It is the application referred to in para 9.19 above. The applicants in the present application decided not to oppose those proceedings, but rather, to take the necessary and appropriate steps to obtain directions from this Court as to the course of the action to be taken by them. In this they are supported by the third respondent who was represented at this hearing by counsel, who confirmed this.

21.2 Having regard to the complete impasse which has been reached between the applicants and the first and second respondents, as is clear from the papers in this matter, this is an appropriate case for this Court to exercise its discretion to hear and determine this application, despite the allusion to *lis pendens* (*LAWSA,* Vol 3 Part 1, 2nd edition paras 228 and 229, page 141).

21.3 The first and second respondents' next defence is that the applicants are without legal authority and that they lack the *locus standi* to bring this application. The basis of this defence is that they did not seek the authority of the creditors to do so. I agree with the submissions of applicants' counsel that the

> simple answer to this proposition is that it is the obstructive behaviour of the first and second respondents in thwarting the applicants' attempts to obtain the necessary power to institute litigation by using their voting power, that has prevented them from having the necessary power to launch the appropriate proceedings. Section 386(5) of the Companies Act was designed *inter alia*, to be relied upon by liquidators in cases where they are unable to obtain the authority in terms of section 386(3) to take appropriate steps in order to fulfil their statutory functions (*Waisbrod v Potgieter and Others* 1953 (4) SA 502 (W) at 507G-H).

[22] In the circumstances I find that the relief sought in prayer 1 of the Notice of Motion is justified and should be granted.

E. THE STATUS OF THE "*RESOLUTIONS*" OF THE FIRST AND SECOND RESPONDENTS, ANNEXURE "X" TO THE NOTICE OF MOTION

[23] The first applicant, as one of the joint liquidators of Nordic Saga, testified in the applicants' founding affidavit that he was present at the meeting of 11 January 2007, and that no resolutions were tabled at that meeting, nor was prior notice given of any resolutions that were to be tabled

at the meeting and that no voting took place. In the circumstances, so he testified, there was no adoption of any resolutions.

[24] The first and second respondents, and the assistant Master who presided at this meeting, Mr Mabasa, in their affidavits stated that the resolutions were in fact tabled and passed before Mr Mabasa. There is plainly a dispute of fact on the papers in this regard. This cannot be decided in this Court without evidence being led. In the circumstances I shall for the purposes of this judgment, accept that the resolutions were tabled and passed at the meeting concerned (see *Plascon-Evans Paints v Van Riebeeck Paints* 1984 (3) SA 623 at pages 634 and 635).

[25] It was submitted on behalf of the applicants however that on a reading of clauses 1 to 4, 9 to 11 and 13 of "X", which has been quoted above, they conflict with and are contrary to the purposes and spirit of the insolvency laws in this country for the following reasons:

25.1 The first and second respondents as majority creditors in value, attempt, by their resolution, to subvert the statutorily decreed liquidation processes set out in section 391 of the Companies Act, as interpreted by the authorities which I have already

quoted.

25.2 Adopting these resolutions will result in the applicants being deprived of their powers to administer the winding-up of the insolvent estate of Nordic Saga to the best interests of the corporation and its creditors, in an even-handed way, as they are obliged to do.

25.3 There can be no dispute that the 6 July sale was validly cancelled and the first and second respondents' bald denial of this proposition can be rejected on the papers before the court. On the first and second respondents' own version this is precisely what occurred. This conclusion is further endorsed by the fact that the first and second respondents concluded the 30 September 2005 sale some 18 months after the 6 July sale for the purchase of the same property. There can, therefore, be no doubt that the 6 July sale is unenforceable. The "*resolutions*" which the first and second respondents seek to impose upon the joint liquidators and the remaining (secured) creditors purport to revive that sale, a power which the liquidators do not have.

25.4 In the circumstances the liquidators can, with the authority of a meeting of creditors or the power granted to them by this Court,

> sell immovable property belonging to the corporation in liquidation. If they are allowed to sell the Houghton property to the first and second respondents, their duties require them to do so, at the very least, at the ruling market price and not at a price fixed some four years ago, so as to favour only the first and second respondents.

[26] In my view there is substance in these submissions. Other cogent reasons justifying this approach are stated in the next three paragraphs.

[27] It has been held in a number of cases, in my view correctly, that a resolution of creditors containing a direction to the liquidator which, if obeyed, would result in a breach of the letter or spirit of the Insolvency Act, is not binding on the trustee and may be set aside by the court (*Marshall Bros Trustee v Transvaalsche Bank* 1907 TS 1060; *Pine Village Homeowners Association Ltd and Others v The Master and Others* 2001 (2) SA SECLD at 582; *Hewlett v Adie NO and Registrar of Deeds* 1976 (1) SA 166 (R)).

[28] In addition to its power under section 53(4) of the Insolvency Act the court may set aside a resolution *prima facie* regularly adopted as being one which is not *bona fide*. "*If it has been passed not in the honest belief that it was in the interest of the estate and for the benefit of the creditors, but for some collateral object, no matter whether that object is a fraudulent one or*

not." (*Paruk and Others v Parker Wood and Co Ltd* 1917 AD 163 at 168; followed in *Zulman and Others v Schultz* 1924 TPD 24; *In re Estate Wilkinson* 1936 NPD 566; *Kanderssen (supra)* at 1146-7; *Jordaan v Richter en Andere* 1981 (1) SA 490 (O) at 496-7.)

[29] Having regard to the ulterior purpose of the first and second respondents to obtain transfer of the Houghton property into their names without paying the current market-related price for it, and purporting to rely on the cancelled agreement of 6 July, it is plain that the abovementioned clauses of the "*resolutions*" are not *bona fide*, nor in the interest of Nordic Saga or its general body of creditors. The enforcement thereof will result in the distribution of the assets of the corporation in a manner which is irreconcilable with the prescripts of the insolvency legislation.

[30] In my view, therefore, the relief claimed in paragraph 3 of the Notice of Motion should be granted.

F. ACCESS TO THE HOUGHTON PROPERTY

[31] It was submitted on behalf of the applicants that in order for them to be

able to advertise a sale of the Houghton property by public auction or otherwise, it is necessary for them to inspect it so as to procure a proper description and to get a valuation thereof. This is so because the advertisement is required to contain a sufficiently full and accurate description of the property to be offered for sale.

[32] The unchallenged evidence on the papers is to the effect that the first and second respondents have persistently refused the applicants the opportunity to have access to the Houghton property for these purposes.

[33] I agree with counsel for the applicants that the relief set out in prayer 4 of the Notice of Motion, is necessary for the proper winding-up of the affairs of Nordic Saga and the distribution of its assets, and should therefore be granted.

G. AUTHORITY TO SELL THE HOUGHTON PROPERTY

[34] As the relief claimed in prayer 3 of the Notice of Motion was found by me to be appropriate, counsel for the applicants submitted that it is necessary for the applicants, in the exercise of their powers arising from the provisions of section 391 of the Companies Act, to realise, *inter alia*, the Houghton property for these purposes. I agree.

[35] Without the power granted to the applicants in terms of the provisions

of section 386(4)(h) of the Companies Act the joint liquidators are powerless to act and they therefore require the intervention of this Court to enable them to perform their duties. It is accordingly appropriate that the relief sought in prayer 6 of the Notice of Motion be granted.

H. EJECTMENT

[36] The applicants' claim that it cannot be challenged that Nordic Saga is the registered owner of the Houghton property. This is plainly correct.

[37] As I have already found, the two previous sales of the property referred to by the first and second respondents have been cancelled. The first and second respondents have attempted in their affidavits to justify their opposition to the applicants' claim for the ejectment.

[38] I shall deal with the contentions of the first and second respondents as follows:

38.1 The first contention is that the applicants are not acting for the benefit of all creditors, but rather for the benefit of the third respondent and the former member of Nordic Saga, Mr Kajee. They are alleged to be the only two creditors with an interest in the Houghton property. This submission is unsustainable. It is

the duty and obligation of the applicants, as has already been demonstrated above, to realise and dispose of the Houghton property in the interests of Nordic Saga and all its creditors. Their best interests require that the purchaser thereof be given vacant possession, instead of a residential property occupied by two persons who are not prepared to pay for their occupation of it.

38.2 The next contention raised by the first and second respondents is that it is not in the interests of the estate that the Houghton property be sold to satisfy the third respondent's claim only. This contention is also not sustainable. The Houghton property will not be sold to satisfy the third respondent's claim only. It will be sold in the execution and implementation of the applicants' duty and obligation to realise and dispose of all the assets of Nordic Saga for the benefit of Nordic Saga and its creditors as a whole. As was submitted by counsel for the applicants, in any event, the valuation informally placed by the applicants on the Houghton property exceeds the proved secured claim of the third respondent.

38.3 The first and second respondents next suggest that were they to be ejected from the Houghton property, they would be left

without a home. This can hardly be an answer in the circumstances of the present case. The first and second respondents do not suggest that they find themselves in such a state of penury that they are unable to purchase another residence. On their own version, they are able to offer to pay the remaining purchase price of R2,8 million in respect of the Houghton property. They are obviously people of means who would have no difficulty in purchasing a suitable alternative property.

38.4 The next suggestion made by the first and second respondents in their papers is that the applicants are without authority to have them evicted from the Houghton property. This has already been dealt with in this judgment and the contention is without merit.

38.5 They further suggest that they have a right of retention and that the applicants have not offered to provide any security to them. On a reading of the papers it is apparent that the respondents have not provided any evidence supporting their alleged right of retention so as to justify such an assertion. In particular, there is no evidence or indication that the suggested improvements allegedly effected by them were useful or necessary, nor was

there any attempt to quantify a claim on this basis. It is also significant that in the documents relied upon by them to prove their claims before the Master no mention was made of any claim on this basis. Finally, this defence is legally untenable against liquidators, who are the applicants in this case. The law in this regard has been finally settled by the Supreme Court of Appeal in *Roux en Andere v Van Rensburg* 1996 (4) SA 271 (SCA) at 276F-278E which confirms the correctness of the judgment in *Kahan NO v Hydro Holdings (Pty) Ltd* 1980 (3) SA 511 (T) at 514E.

[39] There is accordingly, at common law no defence to the applicants' claim for ejectment of the first and second respondents from the Houghton property.

I. THE PREVENTION OF ILLEGAL EVICTION FROM AND UNLAWFUL OCCUPATION OF LAND ACT, NO. 19 OF 1998 (PIE)

[40] It is not in dispute that the first and second respondents were given notice that the applicants wish to proceed for their eviction. This notice was given in terms of section 4 of PIE.

[41] Initially the point was taken by the first and second respondents that

they had not been given sufficient time in terms of the PIE Act to deal with the applicants' application for their eviction. An application was launched to set aside the notice sent by the applicants in terms of the PIE Act. At the hearing of the present application counsel for the first and second respondents informed the court that his clients were no longer persisting in that application or in this defence to the application based on the PIE Act. However, the first and second respondents were now bringing a counter-application which relied on the provisions of the PIE Act. A Notice of Motion to this effect, together with affidavits in support thereof was filed two days before the present hearing. The Notice of Motion which is to be found at pages 316 to 319 of the papers reads as follows:

> "*… the abovementioned applicants* [first two respondents in the main application] *will apply for an order that –*_
>
> *1* *the main application instituted by the first to fourth respondents* [the liquidators] *under the above case number in which they seek, amongst others, an eviction order, be stayed pending the final determination of this interlocutory application;*
>
> *2* *the first to sixth and eighth respondents be and are hereby ordered to engage with each other and with the applicants meaningfully and in good faith within sixty (60) days from the date on which this order is granted in order to resolve the differences and difficulties which led to the first to fourth respondents seeking an order for the eviction of the applicants from the immovable property situated at No. 8, 10th Avenue, Houghton, Johannesburg ('**the Houghton Property**') in light of the values of the Constitution of the Republic of South Africa Act 108 of 1996;*
>
> *3* *the applicants and the respondents must file affidavits before this Court on or before 31 October 2008 reporting on the results of the aforesaid engagement between them as at 10 October*

2008;

4 in the alternative to paragraphs 2 and 3 above -

4.1 the eighth respondent [the Johannesburg City Council] *is directed in terms of section 7 of Act 19 of 1998 to appoint, on the conditions that it may determine, a senior advocate of the Johannesburg Bar who has been a senior counsel for not less than five (5) years to facilitate meetings between the applicants and the first to fourth respondents and to mediate and settle the dispute which led to the first to the fourth respondents seeking an order to evict the applicants from the Houghton Property;*

4.2 the senior counsel referred to in subparagraph 4.1 above must file a report before this Court on or before 4 September 2008 reporting on the results of the facilitation and mediation referred to in subparagraph 4.1 above as at 29 August 2008;

5 in the alternative to paragraphs 2, 3 and 4 above -

5.1 the first to the fourth respondents are ordered to accept an amount of R2 800 000,00, alternatively, R3 222 222 plus interest to October 2004 from the applicants in full and final settlement of the debt owed by Nordic Investments 51 CC (in liquidation) to the fifth respondent;

5.2 upon receipt of either of the aforesaid amount, the Sheriff of the High Court for the district of Johannesburg be directed to sign all documents and to take such steps as are necessary to effect registration of transfer of the Houghton Property into the applicants' names;

5.3 the first to the fourth respondents be directed to sell Unit 302 Cranwell Hall, Killarney, Johannesburg by public auction and apply the proceeds thereof in satisfaction of the debt owed to the sixth respondent by Nordic Investments 51 CC (in liquidation);

6 the applicants' obligation to file opposing papers to oppose the granting of an eviction order be suspended pending the final determination of this interlocutory application;

7 the application in which the first to fourth respondents seek an eviction order be postponed sine die;

8 the first respondent be removed as a liquidator of the insolvent estate of Nordic Investments 51 CC (in liquidation);

9 unless they file affidavits distancing themselves from the first respondent, the second through to the fourth respondents be removed as liquidators of the insolvent estate of Nordic Investments 51 CC (in liquidation);

10 the costs of this interlocutory application be costs in the main application in which the first to fourth respondents seek, amongst others, an order to evict the applicants from the Houghton Property;

11 that anyone who opposes the relief sought herein be ordered to pay the costs of such opposition;

12 the applicants be granted such further or alternative relief as the Court may deem appropriate."

[42] In the affidavits in support of the above relief the dispute with the applicants is to a large measure regurgitated and it is also alleged that the third respondent acted in bad faith in not allowing the first and second respondents to purchase the Houghton property on the terms which they said they were entitled to. In addition as can be seen from the cover page of the application, which is at page 316 of the papers they have joined the City of Johannesburg and Mohammed Iqabal Kajee, the former as an eighth respondent and the latter as "*party of interest*". As has already been mentioned Kajee was the original member of Nordic Saga before its liquidation. He is the person who signed the 6 July sale agreement on behalf of Nordic Saga.

[43] The counter-application appears to be based on the provisions of

section 7 of the PIE Act. Section 7(1) provides that if the municipality in whose area of jurisdiction the land in question is situated is not the owner of the land, it may on conditions it may determine appoint one or more persons with expertise in dispute resolution to facilitate meetings of interested parties and to attempt to mediate and settle any dispute in terms of the PIE Act.

[44] The reasons for this type of relief have been fully discussed in two Constitutional Court judgments which the first and second respondents rely upon to a large measure for the relief claimed by them. These judgments are *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) and *Occupiers of 51 Olivia Road, Berea Township, and 197 Main Street, Johannesburg v City of Johannesburg and Others* 2008 (3) SA 208 (CC).

[45] Both of these judgments deal with the plight of homeless people who did not own the land which they occupied. The Constitutional Court in both of these cases analysed the PIE Act in the light of the Constitution. The purpose of the Act and the part that courts are to play in applying it is spelt out by Sachs J at paras [12] and [13] in the *Port Elizabeth Municipality* case *(supra)* as follows:

> "*[12] … Squatting was decriminalised and the eviction process was made subject to a number of requirements, some necessary to comply with certain demands of the Bill of Rights. The overlay between public and private law continued, but in reverse fashion, with the name, character, tone and context of the statute being turned around. Thus, the first part of the title of the new law emphasised a shift in thrust from prevention of illegal squatting to prevention of illegal eviction. The former objective of reinforcing common-law remedies, while reducing*

common-law protections, was reversed so as to temper common-law remedies with strong procedural and substantive protections; and the overall objective of facilitating the displacement and relocation of poor and landless black people for ideological purposes was replaced by acknowledgment of the necessitous quest for homes of victims of past racist policies. While awaiting access to new housing development programmes, such homeless people had to be treated with dignity and respect.

[13] Thus, the former depersonalised processes that took no account of the life circumstances of those being expelled were replaced by humanised procedures that focused on fairness to all. People once regarded as anonymous squatters now became entitled to dignified and individualised treatment with special consideration for the most vulnerable. At the same time, the second part of the title established that unlawful occupation was also to be prevented. The courts now had a new role to play, namely to hold the balance between illegal eviction and unlawful occupation. Rescuing the courts from their invidious role as instruments directed by statute to effect callous removals, the new law guided them as to how they should fulfil their new complex, and constitutionally ordained, function: When evictions were being sought, the courts were to ensure that justice and equity prevailed in relation to all concerned."

The PIE Act directs local authorities and other parties having a civic duty to ensure that steps are taken to see to it that homeless persons have a roof over their heads, and are treated with respect and dignity. It is for this reason that mediation and negotiation procedures are prescribed.

[46] The position of the first and second respondents in the present case is far removed from that of the persons who are protected by the provisions of the PIE Act. As already mentioned they are anything but poverty-stricken homeless folk. They are involved in a dispute in which they rely on certain claims. I have already found that these claims do not entitle them to dispute the rights of the applicants to pursue their duties in terms of the relevant

company and insolvency legislation. Mediation of any sort as prayed for in the Notice of Motion to the counter-application as set out above, is not appropriate and cannot make any difference in the present litigation. One has but to read the papers filed by the respective litigants in this matter to be convinced of futility of such proposed mediation.

[47] This approach to PIE has been confirmed by this Court in *Andries van der Schyff en Seuns (Pty) Ltd t/a Complete Construction v Webstrate Investments No. 45 (Pty) Ltd and Others* 2006 (5) SA 327 (W), which approach was in turn confirmed by the Supreme Court of Appeal in the as yet unreported case of *Webstrate Investments No. 45 (Pty) Ltd and Another v Andries van der Schyff en Seuns (Pty) Ltd t/a Complete Construction*. This judgment was delivered on 17 September 2007.

[48] As has already been intimated I agree with counsel for the applicants, that having regard to the papers in this matter there is no prospect whatsoever of the process contemplated by section 7(1) yielding any beneficial results. In any event it is plain from all the circumstances which apply in this case that this is not a case where mediation can be of any effect at all. The present counterclaim appears to be little but a stratagem by the first and second respondents to stave off for as long as possible the justified relief to which the applicants are entitled. In the circumstances the counter-

application by the first and second respondents is dismissed with costs.

J. COSTS AND DATE OF EJECTMENT

[49] Both the applicants as well as the third respondent were represented at the hearing of this application and counter-application. The first and second respondents are jointly and severally liable for the costs of the applicants as well as those of the third respondent.

[50] Prayer 5 of the main application is a prayer for the eviction of the two respondents from the Houghton property. It would be just and equitable that they be ordered to vacate the Houghton property within one month after this eviction order is made.

[51] In the circumstances the following order is made:

51.1 The applicants are granted leave in terms of the provisions of section 386(5) of the Companies Act, No. 61 of 1973, as amended, to institute the application for the relief set out below.

51.2 It is directed that paras 1, 2, 3, 4 and 9 of the resolutions set out in Annexure “X” to the applicants’ Notice of Motion are set aside.

51.3 The first and second respondents are directed to afford any of the applicants or their duly authorised representatives access during the hours 09h00 to 13h00 and 14h00 to 17h00 on any business day to the immovable property and residence situated at 8, 10th Avenue, Houghton, Johannesburg (the Houghton property) upon three days' written notice having been given to the first and second respondents at the said address of such intended access, for the purpose of enabling anyone or more of the applicants or their duly authorised representatives to inspect and perform a valuation of the said premises and residence.

51.4

51.4.1 The first and second respondents are ordered to vacate the property situate at 8, 10th Avenue, Houghton, Johannesburg on or before a date one month after this order is made.

51.4.2 In the event of the first and second respondents failing to vacate the property concerned in terms of 5.4.1 above the Sheriff of this Court or his deputy is authorised and directed to evict the first and second respondents from the Houghton property.

51.5 The applicants are authorised and empowered in terms of the provisions of section 386(5) of the Companies Act, to sell and realise the Houghton property and the immovable property described as Section 20, Cranwell Hall, Killarney, Johannesburg, by public auction or private treaty at the highest possible price and to deal with the proceeds thereof in terms of the provisions of section 391 of the said Act.

51.6 The first and second respondents' counter-application dated 12 May is dismissed with costs.

51.7 The first and second respondents jointly and severally are ordered to pay the applicants' costs as well as those of the third respondent.

_____

P BLIEDEN
JUDGE OF THE HIGH COURT

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DATE OF HEARING	22 MAY 2008
DATE OF JUDGMENT	13 JUNE 2008