IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG LOCAL DIVISION, JOHANNESBURG)

CASE NUMBERS: 42741/19, 44827/19 and 32083/19

1. Reportable: No
2. Of interest to other judges: No
3. Revised: Yes (03 September 2020)

DP de Villiers AJ

In case numbers 42741/19 and 44827/19:

In re:

AFRICAN GLOBAL HOLDINGS (PTY) LTD	First Applicant
SUN WORX (PTY) LTD	Second Applicant
KGWERANO FINANCIAL SERVICES (PTY) LTD	Third Applicant

and

RALPH FARREL LUTCHMAN N.O.	First Respondent
CLOETE MURRAY N.O.	Second Respondent
TANIA OOSTHUIZEN N.O.	Third Respondent

MARIANNE OELOFSEN N.O. Fourth Respondent

In their capacities as the joint provisional liquidators of **AFRICAN GLOBAL OPERATIONS (PTY) LTD** (in liquidation)

RALPH FARREL LUTCHMAN N.O. Fifth Respondent

CLOETE MURRAY N.O. Sixth Respondent

SELBY MUSAWENKOSI NTSIBANDE N.O. Seventh Respondent

ANDRE BOTHA OCTOBER N.O Eighth Respondent

In their capacities as the joint provisional liquidators of **BOSASA PROPERTIES (PTY) LTD** (in liquidation)

RALPH FARREL LUTCHMAN N.O. Ninth Respondent

CLOETE MURRAY N.O. Tenth Respondent

NURJEHAN ABDOOL GAFAAR OMAR N.O. Eleventh Respondent

In their capacities as the joint provisional liquidators of **GLOBAL TECHNOLOGY SYSTEMS (PTY) LTD** (in liquidation)

RALPH FARREL LUTCHMAN N.O. Twelfth Respondent

CLOETE MURRAY N.O. Thirteenth Respondent

ROYNATH PARBHOO N.O. Fourteenth Respondent

LIZETTE OPPERMAN N.O. Fifteenth Respondent

In their capacities as the joint provisional liquidators of **LEADING PROSPECT TRADING 111 (PTY) LTD** (in liquidation)

RALPH FARREL LUTCHMAN N.O. Sixteenth Respondent

CLOETE MURRAY N.O. Seventeenth Respondent

OFENTSE ANDREW NONG N.O. Eighteenth Respondent

TSHEPO HARRY NONYANE N.O. Nineteenth Respondent

In their capacities as the joint provisional liquidators of **BOSASA YOUTH DEVELOPMENT CENTRES (PTY) LTD** (in liquidation)

RALPH FARREL LUTCHMAN N.O. Twentieth Respondent

CLOETE MURRAY N.O. Twenty-First Respondent

TARYN VALERIE ODELL N.O. Twenty-Second Respondent

GORDON NOKHANDA N.O. Twenty-Third Respondent

In their capacities as the joint provisional liquidators of **BLACK ROX SECURITY INTELLIGENCE SERVICES (PTY) LTD** (in liquidation)

RALPH FARREL LUTCHMAN N.O. Twenty-Fourth Respondent

CLOETE MURRAY N.O. Twenty-Fifth Respondent

MILANI BECKER N.O. Twenty-Sixth Respondent

In their capacities as the joint provisional liquidators of **BOSASA SUPPLY CHAIN MANAGEMENT (PTY) LTD** (in liquidation)

RALPH FARREL LUTCHMAN N.O. Twenty-Seventh Respondent

CLOETE MURRAY N.O. Twenty-Eighth Respondent

MARC BRADLEY BEGINSEL N.O. Twenty-Ninth Respondent

In their capacities as the joint provisional liquidators of **BOSASA IT (PTY) LTD** (in liquidation)

RALPH FARREL LUTCHMAN N.O. Thirtieth Respondent

CLOETE MURRAY N.O. Thirty-First Respondent

MARIETTE BENADE N.O. Thirty-Second Respondent

In their capacities as the joint provisional liquidators of **RODCOR (PTY) LTD** (in liquidation)

RALPH FARREL LUTCHMAN N.O. Thirty-Third Respondent

CLOETE MURRAY N.O. Thirty-Fourth Respondent

JACOLIEN FRIEDA BARNARD N.O. Thirty-Fifth Respondent

In their capacities as the joint provisional liquidators of **WATSON CORPORATE ACADEMY (PTY) LTD** (in liquidation)

RALPH FARREL LUTCHMAN N.O. Thirty-Sixth Respondent

CLOETE MURRAY N.O. Thirty-Seventh Respondent

DEIDRE BASSON N.O. Thirty-Eighth Respondent

In their capacities as the joint provisional liquidators of ON-IT-1 (PTY) LTD (in liquidation)

PARK VILLAGE AUCTIONEERS AND

PROPERTY SALES (PTY) LTD Thirty-Ninth Respondent

(**A further 177 respondents set out in an order dated 11 March 2020 have been joined as the Fortieth Respondent to the Two-Hundred-and-Sixteenth Respondent, but none opposed the two applications)**

COMMISSIONER FOR THE SOUTH

AFRICAN REVENUE SERVICES First Intervening Party

FIDELITY SECURITY SERVICES

(PTY) LTD Second Intervening Party

In case number 32083/19:

FIDELITY SECURITY SERVICES

(PTY) LTD Applicant

and

AFRICAN GLOBAL HOLDINGS (PTY) LTD First Respondent

SUN WORX (PTY) LTD Second Respondent

KGWERANO FINANCIAL SERVICES (PTY) LTD Third Respondent

and

RALPH FARREL LUTCHMAN N.O. Fourth Respondent

CLOETE MURRAY N.O. Fifth Respondent

TANIA OOSTHUIZEN N.O. Sixth Respondent

MARIANNE OELOFSEN N.O. Seventh Respondent

In their capacities as the joint provisional liquidators of **AFRICAN GLOBAL OPERATIONS (PTY) LTD** (in liquidation)

RALPH FARREL LUTCHMAN N.O. Eighth Respondent

CLOETE MURRAY N.O. Ninth Respondent

SELBY MUSAWENKOSI NTSIBANDE N.O. Tenth Respondent

ANDRE BOTHA OCTOBER N.O Eleventh Respondent

In their capacities as the joint provisional liquidators of **BOSASA PROPERTIES (PTY) LTD** (in liquidation)

RALPH FARREL LUTCHMAN N.O. Twelfth Respondent

CLOETE MURRAY N.O. Thirteenth Respondent

NURJEHAN ABDOOL GAFAAR OMAR N.O. Fourteenth Respondent

In their capacities as the joint provisional liquidators of **GLOBAL TECHNOLOGY SYSTEMS (PTY) LTD** (in liquidation)

RALPH FARREL LUTCHMAN N.O. Fifteenth Respondent

CLOETE MURRAY N.O. Sixteenth Respondent

ROYNATH PARBHOO N.O. Seventeenth Respondent

LIZETTE OPPERMAN N.O. Eighteenth Respondent

In their capacities as the joint provisional liquidators of **LEADING PROSPECT TRADING 111 (PTY) LTD** (in liquidation)

RALPH FARREL LUTCHMAN N.O. Nineteenth Respondent

CLOETE MURRAY N.O. Twentieth Respondent

OFENTSE ANDREW NONG N.O. Twenty-First Respondent

TSHEPO HARRY NONYANE N.O. Twenty-Second Respondent

In their capacities as the joint provisional liquidators of **BOSASA YOUTH DEVELOPMENT CENTRES (PTY) LTD** (in liquidation)

RALPH FARREL LUTCHMAN N.O. Twenty-Third Respondent

CLOETE MURRAY N.O. Twenty-Fourth Respondent

TARYN VALERIE ODELL N.O. Twenty-Fifth Respondent

GORDON NOKHANDA N.O. Twenty-Sixth Respondent

In their capacities as the joint provisional liquidators of **BLACK ROX SECURITY INTELLIGENCE SERVICES (PTY) LTD** (in liquidation)

RALPH FARREL LUTCHMAN N.O. Twenty-Seventh Respondent

CLOETE MURRAY N.O. Twenty-Eighth Respondent

MILANI BECKER N.O. Twenty-Ninth Respondent

In their capacities as the joint provisional liquidators of **BOSASA SUPPLY CHAIN MANAGEMENT (PTY) LTD** (in liquidation)

RALPH FARREL LUTCHMAN N.O. Thirtieth Respondent

CLOETE MURRAY N.O. Thirty-First Respondent

MARC BRADLEY BEGINSEL N.O. Thirty-Second Respondent

In their capacities as the joint provisional liquidators of **BOSASA IT (PTY) LTD** (in liquidation)

RALPH FARREL LUTCHMAN N.O. Thirty-Third Respondent

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In their capacities as the joint provisional liquidators of **WATSON CORPORATE ACADEMY (PTY) LTD** (in liquidation)

RALPH FARREL LUTCHMAN N.O. Thirty-Ninth Respondent

CLOETE MURRAY N.O. Fortieth Respondent

DEIDRE BASSON N.O. Forty-First Respondent

In their capacities as the joint provisional liquidators of **ON-IT-1 (PTY) LTD** (in liquidation)

PARK VILLAGE AUCTIONEERS AND

PROPERTY SALES (PTY) LTD Forty-Second Respondent

COMMISSIONER FOR THE SOUTH

AFRICAN REVENUE SERVICES Forty-Third Respondent

JUDGMENT

De Villiers AJ:

Introduction

[1] The three applications before me are interrelated and were argued over two days as one hearing. This was done by video-conferencing during the Covid-19 lockdown. The papers were more than 7 000 pages and the heads of argument more than 700 pages.

[2] In issue are three applications:

[2.1] A business rescue application of six companies that are in liquidation[1] ("*the business rescue application*");

[1] Case No 42741/19.

[2.2] An application to set aside the sale of the assets of those companies[2] ("*the auction application*"). One of the sales in issue is of the sale of an immovable property that took place after the public auction by private treaty. The description "*auction application*" is accordingly a misnomer, as the application pertains to all sales by the provisional liquidators; and

[2.3] An application to vary a court order pertaining to the sale of an immovable property of one of the companies at the auction[3] ("*the Rule 42 application*").

[3] The matter first came before me on 11 March 2020 for a two-day hearing. It was not ready to proceed, amongst others due to late additions to the papers and unresolved *in limine* issues. Some progress was made:

[3.1] Two intervening parties that had brought three applications for leave to intervene, were allowed to intervene, and those costs were reserved. The first intervening party was the COMMISSIONER FOR THE SOUTH AFRICAN REVENUE SERVICES ("*SARS*"), and the second intervening party was FIDELITY SECURITY SERVICES (PTY) LTD ("*Fidelity*"). SARS sought leave to intervene in both the auction and business rescue applications, and Fidelity, in the auction application. SARS is the, or a major, creditor of the six companies seeking to be placed in business rescue. Fidelity would later bring the Rule 42 application as the purchaser of an immovable property, and it also purchased movable assets at the auction;

[3.2] The applicants in the auction and business rescue applications had not given notice of applications to purchasers at the auction, nor to creditors companies that are in liquidation. Initially they asked for relief in the form of a rule *nisi* in the auction application. In dispute was the assistance by the provisional liquidators[4] to identify purchasers at the auction and creditors. By the time that the matter

[2] Case No 44827/19.
[3] Case No 32083/19.
[4] Whom are identified later herein.

came before me, the provisional liquidators had provided the applicants with such information as they had. When requested, I made an order that potentially interested parties be joined as respondents and made orders as to the manner of service. Service on purchasers of immovable properties had to be done in the normal manner. Service on purchasers of movable assets could be done by e-mail and/or SMS (where such information was known) and by publication in newspapers. None of those respondents would later deliver answering affidavits; and

[3.3] I also directed that dates be agreed upon and determined the dates for the exchange of further affidavits and heads of argument.

[4] Two costs orders must be made still, the first is the costs of the postponement. In my view, the postponement was one of those inevitable developments in litigation, and the costs should be costs in the cause. The matter was huge and complex, difficult to manage to trial readiness.

[5] The second costs order pertains to the applications to intervene. It is linked to the non-joinder point taken by the provisional liquidators (and SARS). The standard formulation for the test to be applied, set out in *Erasmus*, is:[5]

> "*The rule is that any person is a necessary party and should be joined if such person has a direct and substantial interest in any order the court might make, or if such an order cannot be sustained or carried into effect without prejudicing that party, unless the court is satisfied that he has waived his right to be joined*."

[6] When does someone have a "*direct and substantial interest*" as opposed to a (mere) financial interest? Although every creditor does not have to be joined in every application for winding-up, a creditor is now accepted by the Supreme Court of Appeal ("the *SCA*") as a person with a "*direct and substantial interest*" in applications to declare an adopted business rescue plan invalid, and must be joined in those applications. In *Golden Dividend 339 (Pty) Ltd and Another v Absa Bank Limited*[6] and in *Absa Bank Limited v Naude N.O and Others,*[7] (both applications to declare adopted business rescue plans invalid) creditors

[5] *Erasmus, Superior Court Practice*, Volume 2, RS 13, 2020, D1-125.
[6] *Golden Dividend 339 (Pty) Ltd and Another v Absa Bank Limited* [2016] ZASCA 78.
[7] *Absa Bank Limited v Naude N.O and Others* 2016 (6) SA 540 (SCA).

were found to have had direct and substantial interests and not mere financial interests.

[7] The law to apply in the case of a business rescue application, is distinguishable on more than a conceptual basis (that it is only the beginning of a process that will involve creditors in its determination). The distinction is brought about in terms of section 131 of the Companies Act, 71 of 2008 ("*the 2008 Act*"). This section includes, without formal joinder, an automatic right to an "*affected person*" (a defined term that includes creditors) to participate in a hearing. Creditors therefore need not be joined formally in an application for business rescue under section 131 of the 2008 Act. See *Cape Point Vineyards (Pty) Ltd v Pinnacle Point Group Ltd and Another (Advantage Projects Managers (Pty) Ltd Intervening)* para 21,[8] a judgment by Rogers AJ. It was quoted with approval by Weiner J in *Mhlonipheni v Mezepoli Melrose Arch (Pty) Ltd and Others ; Lwazi v Mezepoli Nicolway (Pty) Ltd and Another; Moto v Plaka Eastgate Restaurant CC and Another; Mohsen and Another v Brand Kitchen Hospitality (Pty) Ltd and Another* para 49.[9] (Having defined the 2008 Act, I should add that I refer herein to the Companies Act 61 of 1973 as "*the 1973 Act*".) Joinder of SARS in the business rescue application was thus unnecessary.

[8] A debate was had in the papers whether the auction applicants ought to have joined more interested parties in the auction application, and whether their version of having had difficulties initially to ascertain identities and particulars of such parties, held water. Any point of non-joinder became moot as a result of the orders made on 11 March 2020. The initial rule *nisi* sought in the auction application, became unnecessary as a result. Notice of both the business rescue and auction applications has since been given to interested parties, who were joined as respondents. (I point out that none of the further 177 respondents delivered an answering affidavit.)

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[8] *Cape Point Vineyards (Pty) Ltd v Pinnacle Point Group Ltd and Another (Advantage Projects Managers (Pty) Ltd Intervening)* 2011 (5) SA 600 (WCC).
[9] *Mhlonipheni v Mezepoli Melrose Arch (Pty) Ltd and Others; Lwazi v Mezepoli Nicolway (Pty) Ltd and Another; Moto v Plaka Eastgate Restaurant CC and Another; Mohsen and Another v Brand Kitchen Hospitality (Pty) Ltd and Another* [2020] ZAGPJHC 136 para 49.

[9] In my view, this matter does not warrant more time to be spent on the need to intervene, or not, in the business rescue application as a result of the wording of the 2008 Act, what the Common Law is with regard to the joinder of purchasers (where the seller is already before the court) in the auction application, or on the dividing line between a mere financial interest as opposed to a real and substantial interest to creditors in the auction application.

[10] The non-joinder points do not warrant further costs orders. They took up little time and effort. The applications to intervene did not take up material time either. Fidelity and SARS would have been joined in the order that I made to join parties. On a pragmatic basis, and the costs of intervention being limited costs, the costs of the applications to intervene also should be costs in the cause. In my view, the applicants in the auction and business rescue applications could have taken the pragmatic route and allowed SARS and Fidelity to intervene. They wanted to be heard, and this judgment always would have had some impact on them. Accordingly, if their opposition to the applications to intervene caused wasted costs, they have to pay those costs.

[11] The matters were postponed to 4 and 5 May 2020. A further postponement became necessary due to the unavailability of counsel for the provisional liquidators. He became unavailable due to an unexpected commitment in the SCA. A postponement took some time to be agreed to, as there were seven counsel involved in the matter, and many attorneys too. During this process, the dates 21 and 22 May 2020 appeared to be the most suitable next available dates, but the junior counsel for the applicants in the business rescue and auction applications, had constraints. These constraints were resolved, and the matter was postponed on 22 April 2020 by agreement to 21 and 22 May 2020, and costs reserved. I was managing the hearing. From the start, I reflected the view that the legal representatives should seek to resolve procedural matters, but that I would, if required to do so, make rulings. No one could not have had the impression that I would not facilitate a fair date for the hearing.

[12] Again, in my view, the postponement was one of those inevitable unforeseen developments in litigation, and the costs of the postponement should be costs in the cause. The provisional liquidators still had launched an application for a postponement on 18 April 2020. It was an unnecessary step that was taken in accordance with the unduly aggressive manner in which the provisional liquidators conducted the litigation. The 38 applicants[10] to the application for a postponement dated 18 April 2020 must to pay their own costs in respect of the application.

[13] Next, I address the role players other than SARS and Fidelity, to whom I have referred already.

Broad overview of the role players

[14] The three applications relate to the affairs of a group of companies, commonly referred to as the BOSASA group of companies, now largely in liquidation. I refer to this group herein as "*the group of companies*", "*the group*", or "*the BOSASA/African Global group of companies*" (as the group was in a transition from BOSASA to a new identity, "*African Global*").

[15] The holding company of the group is AFRICAN GLOBAL HOLDINGS (PTY) LTD ("*Holdings*"). It is not in liquidation and is the first applicant in the business rescue and auction applications, and the first respondent in the Rule 42 application. It held all the shares in AFRICAN GLOBAL OPERATIONS (PTY) LTD (in liquidation) ("*Operations*"). Operations in turn held shares in ten further companies that are in liquidation. I first deal with five of them:

[15.1] BOSASA PROPERTIES (PTY) LTD (in liquidation) ("*Properties*");

[15.2] GLOBAL TECHNOLOGY SYSTEMS (PTY) LTD (in liquidation) ("*Technology Systems*");

[15.3] LEADING PROSPECT TRADING 111 (PTY) LTD (in liquidation) ("*Leading Prospect*");

[15.4] BOSASA YOUTH DEVELOPMENT CENTRES (PTY) LTD (in liquidation) ("*Youth Development Centres*");

[10] Why they all joined in the fight, is not quite clear to me.

[15.5] BLACK ROX SECURITY INTELLIGENCE SERVICES (PTY) LTD (in liquidation) ("*Security Intelligence*").

[16] The six companies that are in liquidation, are the six companies in respect of which the business rescue application is brought ("*the six business rescue companies*").[11] No relief is sought in respect of five companies in the group that are in liquidation:

[16.1] BOSASA SUPPLY CHAIN MANAGEMENT (PTY) LTD (in liquidation) ("*Supply Change Management*");

[16.2] BOSASA IT (PTY) LTD (in liquidation) ("*BOSASA IT*");

[16.3] RODCOR (PTY) LTD (in liquidation) ("*RODCOR*");

[16.4] WATSON CORPORATE ACADEMY (PTY) LTD (in liquidation); and

[16.5] ON-IT-1 (PTY) LTD (in liquidation) ("*ON-IT-1*").

[17] The companies in liquidation are represented herein by their provisional liquidators; three or four provisional liquidators in each case. I refer to all of them as "*the provisional liquidators*". However, two of the provisional liquidators were not represented before me, each held a single appointment only.[12] I make no order against them as they did not oppose the relief sought. Two provisional liquidators led the provisional winding-up, Mr RF Lutchman and Mr C Murray. The other 11 provisional liquidators of the six business rescue companies played no active role in the proceedings before me.

[18] The other applicants in the business rescue and auction applications, other than Holdings, are SUN WORX (PTY) LTD ("*Sun Worx*") and KGWERANO FINANCIAL SERVICES (PTY) LTD ("*Kgwerano*"). These two companies are also the first and second respondents in the Rule 42 application. I refer to these three, Holdings, Sun Worx and Kgwerano, as "*the business rescue applicants*", or "*the auction applicants*", or "*the business rescue and auction applicants*", as the case may require. Operations held shares in Sun Worx,

[11] Operations, Properties, Technology Systems, Leading Prospect, Youth Development Centres, and Security Intelligence.

[12] Ms M Oelofsen and Ms JF Barnard (who was not appointed in any of the six business rescue companies).

and in Kgwerano, and the two entities were also in some instances, creditors of companies in liquidation, the details of which are not relevant to determine these matters.

[19] Apart from the 177 other respondents joined before me, the remaining party in the three matters, is PARK VILLAGE AUCTIONEERS AND PROPERTY SALES (PTY) LTD ("*Park Village Auctions*") that conducted the auction sales in issue, and played no active role before me.

[20] I next summarise the relief sought in the three applications.

Relief sought

[21] The auction applicants sought the following relief in the auction application:

[21.1] Prohibiting any auction of and any other sale, whether by private treaty or otherwise, of assets of the six business rescue companies-

[21.1.1] Before the second meeting of creditors; and/or

[21.1.2] Without the written consent by resolution of the board of directors of Holdings; and

[21.1.3] Before the final adjudication of the business rescue application;

[21.2] Declaring any auction of and any other sale, whether by private treaty or otherwise, of assets of the six business rescue companies-

[21.2.1] Before the second meeting of creditors; and/or

[21.2.2] Without the written consent by resolution of the board of directors of Holdings; and

[21.2.3] Before the final adjudication of the business rescue application,

to be null and void;

[21.3] Prohibiting delivery and registration, where applicable, of movable and the transfer and registration of immovable assets to any

prospective purchaser of the assets of the six business rescue companies whilst in liquidation and-

[21.3.1] Before the second meeting of creditors; and/or

[21.3.2] Without the written consent by resolution of the board of directors of Holdings; and

[21.3.3] Before the final adjudication of the business rescue application;

[21.4] Ordering the respondents to pay the costs of this application, on the attorney-and-client scale, the one to pay the others to be absolved from liability.

[22] The business rescue applicants in the business rescue application sought the following relief:

[22.1] Placing the six business rescue companies under supervision and that business rescue proceedings be commenced in terms of section 131(1) of 2008 Act;

[22.2] Appointing Daniel Terblanche as business rescue practitioner to conduct the business of the six business rescue companies with all powers and duties entrusted to him in terms of the 2008 Act;

[22.3] [Some relief regarding service of the papers not relevant at this stage];

[22.4] Ordering that the applicants' costs, taxed on the scale between attorney-and-client, to be paid by the six business rescue companies.

[23] Fidelity sought the following relief in the Rule 42 application:

[23.1] "*That paragraph 2 of the order granted by the Honourable Mr Justice Boohla dated 28 October 2019 be varied by the insertion of the words "and African Global Operations (Pty) Ltd (in liquidation)" after the words "Bosasa Properties (Pty) Ltd (in liquidation)";* and

[23.2] "*That there be no order as to costs in this application, unless opposed, in which event the party opposing the application be ordered to pay such costs, alternatively the costs occasioned by their opposition*".

Introduction (continued)

[24] If the auction application fails, the business rescue application probably also has to fail as the six business rescue companies would be divested of all assets. The auction application therefore needs to be determined before the business rescue application, despite the latter being the earlier application. The Rule 42 application pertains to the wording of a court order, an order that is one of the two main matters to be decided in the auction application. The Rule 42 application therefore has to be determined first.

[25] I have made findings under the heading "*introduction*" about reserved costs in certain instances. There were more *in limine* issues raised in the papers:

[25.1] Non-joinder (which was resolved on the first day of the hearing as set out above);

[25.2] An alleged failure by the applicants in the auction and business rescue applications to make out a case in the founding papers. In this matter, little benefit could be gained by taking a two-step approach. The parties agreed that regard should be had to all papers in the three applications. Any alleged defects in the founding affidavits have been sufficiently addressed to eliminate a peering at them on their own. It seems to me that *Valentino Globe BV v Phillips and Another*[13] permits a common sense handling of the matter on all the papers filed of record. None of the parties sought a referral to evidence, and I can address all factual disputes by applying *Plascon Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd.*[14] I therefore make no order in respect of this *in limine* defence. It added no material time to the argument and no separate costs order is required; and

[25.3] Two striking out applications aimed at affidavits by the provisional liquidators. In issue, in those applications, are primarily defamatory averments and inuendo. I deal later with penalising costs in this regard, but in the end, I did not order the striking out of paragraphs in the affidavits by the provisional liquidators. The reason is that it

[13] *Valentino Globe BV v Phillips and Another* 1998 (3) SA 775 (SCA).
[14] *Plascon Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) (SA) 623 (A) at 634 E - 635 D.

would add nothing to resolve the matter.[15] In my view, some of my reasoning is addressed later herein in a bit more detail, I would have struck some averments in the papers delivered by the provisional liquidators. Still, limited time was spent on this aspect, and I order that those costs be costs in the cause.

[26] Taxation in this matter will be difficult. It is caused by three interrelated matters being argued. Taxation will further be complicated by the additional affidavits delivered, of which almost all added little value.[16] I request the taxing master to carefully consider, in light of this judgment, any claim on taxation for preparing additional affidavits. A part of the disciplined approach to motion proceedings is that there are three sets of affidavits (founding, answering and replying). Where necessary, any new matter in reply should be dealt with by clearly objecting thereto, striking out, or by responding thereto. In this case additional affidavits were delivered. Any such affidavit should not re-argue the case, and only address the new matter.

[27] I next address the chronology of events.

Chronology

[28] To avoid later duplication, I make some remarks about factual matters in the chronology of events. The chronology of events in this matter is of particular importance in the following respects: (a) the interpretation of the court order that provided for consent to sales of assets of companies that are in winding-up, (b) if such consent was given, and (c) the probability of success in the business rescue application. In many ways, the answers to these questions would be self-evident at the end of the chronology of events.

[29] The BOSASA/African Global group of companies rendered services to government departments and state-owned enterprises. They typically submitted tenders pursuant to which fixed term contracts would be concluded

[15] Such an outcome in the striking-out applications, was almost predictable. When large matters serve before judges in this busy division, they invariably seek to address the real issues. Limited time does not allow for enforcing the required disciplined approach to pleading and proving cases in opposed motions, and the time spent normally will have no impact on the outcome. This opens the door to abuse, as seldomly will a sanction be imposed.

[16] The service affidavits were necessary.

with them, if their tenders were accepted. This is an important consideration in the business rescue application, as that business is no more, as will appear below.

[30] The companies had inter-company loans, and do not appear to have maintained strict separate corporate personalities. The business rescue application, at some stage, even contained an alternative prayer that the corporate personalities be disregarded. Evidence before the Zondo Commission of Enquiry into State Capture ("*the Zondo Commission*") caused the group to receive extensive negative publicity about the way in which business was conducted within the group. Mr Gavin Watson[17] was a central figure in the unfavourable evidence led at the Zondo Commission and had passed away before the present proceedings commenced. This is an important consideration in the business rescue application, as new business undertaking will face this legacy.

[31] A consequence of the evidence before the Zondo Commission was that first First National Bank ("*FNB*") in November 2018 and then later, ABSA Bank ("*ABSA*") in February 2019, advised that they would withdraw banking facilities from Operations (and thus from the whole group). This was so as payments in respect of these tenders were not made to the company concerned, but to Operations. The other companies did not have their own bank accounts.

[32] On 28 January 2019, an auditor, Ms Colleen Passano CA (SA) issued a letter contemplated by section 360.17 of the South African Institute of Chartered Accountants Code of Conduct recording numerous reportable irregularities in the affairs of the group.

[33] The writing was on the wall. During the first week of February 2019, the boards of Holdings and Operations met with attorney Danie Potgieter. He assisted and on 12 February 2019, special resolutions by their shareholders were adopted, placing Operations and the ten subsidiaries identified earlier herein, in voluntary winding-up in terms of sections 349 and 350 of 1973 Act. The simple truth is that the boards formed the view that the business conducted by

[17] I refer to him by name hereon to distinguish him from Mr J Watson and Ms L Watson also referred to herein.

the group was no longer viable. On 14 February 2019, the resolutions were filed with the CIPC and the companies were thus wound up.

[34] On 21 February 2019, the Master appointed Mr Lutchman and Mr Murray as the first two provisional liquidators for Operations, and on 27 February 2019 in respect of the ten subsidiaries identified earlier herein. From time-to-time the Master appointed further provisional liquidators for the eleven companies so placed in liquidation.

[35] On 22 February 2019, auditors D'Arcy & Co Inc placed on record that its services were engaged to perform an audit of the financial statements of the group, but that it could not do so because the annual financial statements for the year ending February 2018 (due by August 2018) in respect of Holdings and certain subsidiaries, had not been prepared. The unreliability of past annual financial statements was not resolved thereafter. No purpose would be served to re-do financial statements of companies in final winding-up. On 25 February 2019, D'Arcy & Co Inc issued Holdings and its subsidiaries with a notice in terms of section 45 of the Auditing Profession Act 26 of 2005, that the affairs of the companies have been conducted in a manner that does not impart confidence or trust, but anxiety and concern. This is an important consideration in the business rescue application, as the applicants relied on the financial statements.

[36] On 26 February 2019, Holdings took issue with the special resolutions and contended that the winding-ups were invalid. This dispute would continue until November 2019 when the SCA ruled on the matter. On 5 March 2019, Holdings launched an application to set aside *ab initio* the winding-up of all eleven companies placed in winding-up due to an alleged defective procedure followed in their winding-up.

[37] On 14 March 2019, Ameer AJ granted the relief ("*the Ameer order*") and set aside the winding-up of all eleven companies. On 14 March 2019, notice was given that leave to appeal the decision would be sought. On 20 March 2019 leave to appeal the Ameer order to the SCA was granted. At this stage, there was no doubt as to the position in law, all eleven companies remained in liquidation pending the appeal and the provisional liquidators had to fulfil their

functions as such. This is an important consideration in the auction application. I do not discount that a pragmatic person in the position of the provisional liquidators would have considered the impact of a potential dismissal of the appeal on steps taken in the interim, apart from the restrictions placed in law on the powers of provisional liquidators.

[38] On 20 March 2019, the Cabinet instructed all the government departments to terminate all contractual relationships and any association with the BOSASA/African Global group. This is an important consideration in the business rescue application. There is no indication that this position is likely to change, and such an eventuality is not relied upon in the business rescue application.

[39] On 29 March 2019, Fourie J ordered a tax inquiry as envisaged in section 50 of the Tax Administration Act 28 of 2011 into the affairs of the group.

[40] Before the chronology is further set out, a contextual point needs to be made:

[40.1] During the period February/March 2019 to about October/November 2019, the provisional liquidators did not only preserve the assets of the group, but traded it down, closed its operations. The contracts were terminated, employees left, and assets were sold. This was done based on powers given to them in two court orders referred to below, and in consultation with the boards of Holdings and Operations. An informal arrangement was reached between the provisional liquidators and the boards met monthly for a while. If one has regard to the minutes of these monthly meetings, they reflect a process where largely by consent, businesses were wound down. This resulted in redundant assets, which brought, in turn, holding costs. No one disputed that redundant assets had to be sold, but I found no proof of any agreement that every asset would be sold at an auction on terms and on a date determined by the provisional liquidators. Monthly meetings were held on the following dates (and some meetings are again referred to below)-

[40.1.1] 1 April 2019 (“*the first meeting*”);

[40.1.2] 8 April 2019 ("*the April meeting*");

[40.1.3] 3 May 2019 ("*the May meeting*");

[40.1.4] 20 June 2019 ("*the June meeting*")

[40.1.5] 12 August 2019 ("*the August meeting*");

[40.1.6] 7 October 2019 ("*the October meeting*");

[40.2] As will appear below, the meeting in November 2019 was not held, when disputes about the powers of the provisional liquidators had been raised;

[40.3] The winding down of the businesses and the like were discussed during these monthly meetings; and

[40.4] The court applications referred to above, and the third one in issue in the auction application, were obtained with the consent of the boards of Holdings and Operations. They were (are referred to again below)-

[40.4.1] On 2 April 2019, Tsoka J granted an order ("*the Tsoka order*");

[40.4.2] On 14 May 2019, Mudau J granted a further order ("*the Mudau order*"); and

[40.4.3] On 28 October 2019 Bhoola AJ granted the third order ("*the Boohla order*") already referred to in the relief sought in the Rule 42 Application.

[41] Reverting to the chronology and as referred to above, on 2 April 2019, the Tsoka order was issued. The order *inter alia* extended the provisional liquidators' powers under section 386 of the 1973 Act to conduct business and required them to exercise such powers "… *in <u>consultation with</u> the board(s) of directors of the specific company or companies involved in the transaction(s) and decisions*" (underlining added). This order was issued where there was a pending appeal against the Ameer decision.

[42] On 8 April 2019, the April meeting took place. At this meeting the sale of the assets to potential interested parties was discussed, and efforts to do so recorded. All attempts to find purchasers came to nought.

[43] On 3 May 2019, the May meeting took place. At this meeting the sale of surplus assets by the provisional liquidators was discussed, with "*offers*" agreed to have to be between "*retail and forced values*". I assume that was meant that assets should be sold between forced sale values and market values. Importantly, the discussion was not that the provisional liquidators could sell without reserve at an auction. A forced sale value is lower than market value.

[44] On 14 May 2019, the Mudau order was issued. The order had the same terms as the Tsoka order, save for stating that the order was only to remain in effect until such time as judgment was handed down in the SCA. Regarding consent, the order expressly required reasonable notice to the boards of the consultative process (underlining added):

> "6. *The powers in paragraphs 4 and 5 above shall be exercised by the Applicants <u>in consultation with</u> the board(s) of directors of the specific company or companies involved in the transaction(s) and decisions and <u>the Applicants shall at all times be obliged to give the directors in question reasonable notice of the meeting at which it is sought to consult and of the subject matter thereof</u>*."

[45] This order was issued where there was a pending appeal against the Ameer decision. Thereafter there was no notice of an auction, or on what terms the auction should be held.

[46] On 3 June 2019, the first session of the tax enquiry by SARS took place.

[47] On 20 June 2019, the June meeting took place.

[48] On 12 August 2019, the August meeting took place.

[49] On 26 August 2019, Mr Gavin Watson passed away.

[50] During about August/September 2019, the provisional liquidators sought to sell assets and prepared the founding papers in what would lead to the Boohla order. On 4 September 2019, Mr Gough of Rushmere Noach attorneys ("*Rushmere*"), who had sight of the draft application, consented thereto on behalf of all boards of the companies in the group in a letter addressed to Mr

Ferreira of VLV attorneys ("*VLV*") acting on behalf of the provisional liquidators and stated (underlining added):

> "*We also confirm that by virtue of your clients agreeing that they will not exercise their powers other than:*
>
> *1. in consultation with our clients; and*
>
> *2. without the consent of our clients,*
>
> *and as a matter of practicality (without conceding the legal position or rights) our clients consent to the relief claimed in the notice of motion."*

[51] On 7 October 2019, *the October meeting* took place. This was the last meeting and predated the Bhoola order.

[52] On 28 October 2019, the Boohla order followed, in express, agreed terms. It is addressed in more detail below, but I need to reflect the paragraph that is the main matter in issue before me (underlining added):

> "*The assets referred to in paragraphs 1 and 2 above shall be sold in consultation with and with the consent of the board of African Global Holdings (Pty) Ltd, African Global Operations (Pty) Ltd (in liquidation), and the respective boards of its subsidiaries referred to in paragraphs 1 and 2 above*."

[53] The "*consultation*" provided for in the earlier orders, became "*consultation and consent*" in this order.

[54] Also, on 28 October 2019, Park Village Auctions already presented an auction proposal to the provisional liquidators. On 30 October 2019, the provisional liquidators appointed Park Village Auctions to attend to a sale of the assets of the group by auction. It is not clear to me, but the date arranged was 26 and 27 November 2020, before the hearing of the appeal against the Ameer decision.

[55] On 4 November 2019, Park Village Auctions advised the provisional liquidators that an auction in December is not advisable as "*we have found from past experiences, that the buying power declines as buyers are focused on closing for the holiday period*". They would later contend that the first week of December was the last opportunity.

[56] On 4 November 2019, Ms L Watson, Mr Joe Gumede ("*Mr Gumede*") and Ms Jacqui Leyds, in a meeting with Park Village Auctions, learnt of an imminent

sale of most movable assets of the group on 26 and 27 November 2019. They were surprised and objected to the sale. This is consistent with the version that there was no agreement of a sale of assets by public auction.

[57] On 4 November 2019, Rushmere recorded that the various boards had not consented to the sale and that they object to such a sale without their consent. I pause here, this too was consistent with the version that there was no agreement of a sale of assets by public auction. Rushmere's clients demanded that a process be followed that would ensure that informed consent was given. The procedure they proposed seems good in parts and unduly burdensome in others (as a large number of assets are involved, necessarily of a range values). The first part of the proposal is enough of an illustration:

> *"(a) compile a written proposal in respect of each intended sale with details of the asset, its estimated value, the form of sale, the anticipated sale price, tax consequences of the sale, the advantage of sale as opposed to retention of the asset, details of any encumbrance and the manner in which such encumbrance will be released, expected timeframe of the sale process and all detail which would be necessary for consideration by the Directors before consent can responsibly be given;*
>
> *b) …*"

[58] When this letter was written, the directors of Holdings were Mr Gumede, Ms Thandi Makoko ("*Ms Makoko*"), Mr Ismael Dikani ("*Mr Dikani*"), and Ms Munirah Oliveria ("*Ms Oliveria*").

[59] The issue of an unauthorised auction was firmly and clearly raised. The provisional liquidators blame Mr J Watson for this development. On 5 November 2019, Mr J Watson consented to his appointment as a director of Holdings.

[60] On 6 November 2019, VFV responded to Rushmere, stating that they would seek instructions and recorded that it seemed that some of the requirements in paragraph (a) of the letter, quoted above, "*may well be a bit over the top, but it is clear that we must agree on a pragmatic methodology as soon as possible*." Tellingly the letter did not record that consent had already been given. These attorneys had been involved in the obtaining of the Bhoola order and the consent thereto.

[61] In my view, once the issue of consent was raised, an appropriate response by a provisional liquidator would have been, not a belligerent one, but one in which the provisional liquidators would (a) undertake to comply with the Bhoola order and with the deal made, or (b) state that they hold a different view, and what that view was (and if need be, approach a court for a revised ruling). Provisional liquidators, acting in good faith, had to come clean, if they intended to arrange an auction without seeking consent as set out in the Bhoola order.

[62] On 7 November 2019, having taken instructions, VFV responded further and provided Rushmere with an auction proposal (and budget) for an auction to take place in the first week of December 2019 and stated that "*there has been already in principle agreement for the liquidators to proceed with the sale as reflected*" in the attachment. This is of course no answer to an interpretation of the Bhoola order that required consultation and consent and the provisional liquidators would have been advised accordingly.

[63] On 7 November 2019, Mr Gumede, Ms Makoko, and Mr Dikani resigned as directors of Holdings. The meant that Ms Munirah Oliveria was the sole remaining director.

[64] On 8 November 2019, Rushmere consented to the sale of the certain assets:

> "*a) firearms;*
>
> *b) equipment and furniture in respect of the repatriation and youth centres;*
>
> *c) equipment to the Department of Correctional Services; and*
>
> *d) shareholding in Ntsimbintle*."

[65] Rushmere recorded that in respect of the remaining assets, Rushmere's clients were advised by the auctioneers that it would be preferable to sell those assets the next year. They sought an alternate proposal on how to sell the remainder of the assets if their proposal was not acceptable.

[66] On 11 November 2019, Ms L Watson and Mr J Watson became directors of Holdings.

[67] On 12 November 2019, VLV recorded their instructions that (underlining added):

"*2. Having considered your letter, the liquidators instruct that:*

2.1 Your letter runs quite contrary to the discussions between them and the board members who in principle consented to the sale as proposed by the liquidators.

2.2 … [18]

2.3 The refusal to sell will obviously also indirectly impact on the position of the holding company.

2.4 There is no reason at all why the sale should not proceed and in the absence of compelling reasons they are proceeding with the proper advertisement and sale of the assets as previously planned in conjunction with the boards.

3. The above notwithstanding the liquidators will in the meantime set up an urgent meeting with all the board members so as to thrash out any specific issues that there may be."

[68] Clearly the provisional liquidators decided not to follow the suggested approach by their attorney of agreeing "*on a pragmatic methodology"* to sell assets. The letter quite clearly reflects that the provisional liquidators knew that they did not have actual consent to the proposed auction, only consent in principle (that assets may be sold?). There is no evidence of prior, joint planning of such an auction. Indeed, there is no evidence that the consent to the auction was ever even asked for. The alleged proposed meeting did not take place.

[69] When the above letter was received by Rushmere, the parties were travelling to Bloemfontein. On 15 November 2019, the Supreme Court of Appeal heard the appeal against the Ameer order. On 15 November 2019, Park Village Auction already published briefly an advertisement to hold the auctions on 4 December 2019. This could only mean that the provisional liquidators were busy in the background to proceed with the arrangements.

[70] On 20 November 2020, Rushmere recorded in a letter directed, *inter alia*, to VFV that (underlining added):

"*The liquidators have not consulted the directors of Holdings nor have those directors granted their consent to the intended sale. To the best of the*

[18] A motivation for the auction.

> *knowledge of the directors of Holdings there has not been proper consultation with the directors of Operations or the subsidiaries, whose assets are the subject matter of the intended sale, nor have those directors given their consent thereto. In the absence of such consultation and consent, the intended sale is in breach of the order. Moreover, in the absence of a proper explanation from the liquidators, their conduct (and possibly their agents in conducting any sale) will be in contempt of the order as well*";

and

> "... *With regard to the email from Mr. Ferreira of 12 November 2019, whilst certain directors may have agreed in principle to sell the assets, this is not to say that the requisite consent of the boards of Holdings, Operations and the applicable subsidiary was given. The liquidators are invited to produce such consent if they are in disagreement that it has not been obtained*."

[71] Such consent was not produced, despite a reminder referred to below.

[72] On 20 November 2019, Mr J Watson and Ms L Watson were appointed as directors of Holdings.

[73] On 21 November 2019 VFV placed the provisional liquidators' instructions on record (underlining added):

> "*3.2 There is on the part of the co-liquidators no doubt that the boards have consented to and participated in the decision-making process regarding the imminent auctions*";

and

> "*4. With the above in mind the liquidators are committed to the proper (well publicised) auctions of the assets advertised, on 4, 5 and 6 December 2019*."

[74] On 22 November 2019, the Supreme Court of Appeal reversed the Ameer order. According to the provisional liquidators' heads of argument, the appeal was upheld and the SCA "*scathingly dismissed and characterised the Ameer application as an abuse*". This is not how I read the judgment. I read nothing therein that would fairly be characterised as a scathing dismissal of an abusive application. The SCA accepted that the process was triggered by the provisional liquidators taking control of the companies that were in liquidation, and the SCA criticised the acting judge's reasoning, but those two findings do not reflect the application as an abuse.

[75] Also on 22 November 2019, Park Village Auctions started to give publicity to the auction to be held on 4 to 6 December 2019.

[76] On 25 November 2019, Holdings consulted a business rescue practitioner.

[77] On 27 November 2019, a new attorney Mr Goodes at Goodes & Seedat Attorneys ("*Goodes*"), acting on behalf of Holdings, recorded in a letter that (underlining added):

> "*4. Neither the board of directors of African Global Holdings (Pty) Ltd, nor the board of directors of the respective African Global Group companies in liquidation <u>were consulted in regard to the intended auction</u> and neither the board of directors of African Global Holdings (Pty) Ltd, nor the board of directors of the respective African Global Group companies in liquidation <u>have given their consent that the assets can be sold by this hastily convened auction</u>*."

[78] There is no doubt, on the proven facts, that this letter correctly reflects the factual position. Had there been an actual version to the contrary, it would have been produced. On 28 November 2019, followed this response from VFV:

> "2*, Unfortunately your clients <u>have not properly instructed you</u> alternatively you have not had the opportunity to fully <u>appraise yourself with the legal process</u> that has ensued since the voluntary winding up of the above-mentioned companies.*
>
> *3, <u>Simply out of courtesy</u>, the following*: …";

[79] The "*following*" is then an argument that:

[79.1] The order was meant to be in place pending the determination of the appeal;

[79.2] The SCA judgment rendered the Bhoola order ineffectual;

[79.3] Its clients were "*now singularly vested with the control and authority over the assets of the group of companies*";

[79.4] (In any event) "*there is on the part of the co-liquidators no doubt that the boards have consented to and participated in the decision-making process <u>regarding</u> the imminent auctions*", and

[79.5] "*The attempt by the newly constituted board of AGH to repudiate the decisions taken their predecessors is without merit*."

[80] One should pause here and reflect on this letter. The provisional liquidators were never more than provisional liquidators, in law with limited powers. The SCA judgment did not place them in a position where they had "*control and authority over the assets of the group of companies"* to do as they pleased. No one could have believed such an interpretation of the SCA judgment. Still no facts were alleged on which the provisional liquidators could rely for consent to the auction. Simply saying over and over that they had consent to the auction in principle, is meaningless, and does not raise a real and *bona fide* factual dispute, the actual facts of such consent had to be alleged. Factually further, the issue of consent to the auctions were raised by the previous board of Holdings. It was not a new board that repudiated alleged prior decisions. I also have referred to the reaction by the author of this letter when the issue of consent was raised with him. He too held the view that consent had to be obtained.

[81] On 29 November 2019, Mr J Watson and Mr R Watson consulted new counsel, who appeared before me.

[82] On 29 November 2019, SARS issued an Audit Findings letter pertaining to Supply Change Management, reflecting a tax liability of R500 Million.

[83] Between 30 November 2019 and 2 December 2019 the business rescue application was prepared, and settled. It is common cause that the application was prepared under pressure. The provisional liquidators go as far as to describe the application in their heads of argument as "*manifestly a rushed conflation of [conflicting] company law principles and provisions*".

[84] On 2 December 2019, Goodes recorded that VFV has not responded to their request for proof of the consent, and recorded that the Bhoola order would stand until set aside, and that the SCA judgment had no impact thereon. He demanded a cancellation of the auction.

[85] On 3 December 2019, a short response followed from VFV, to the effect that there was no reason not to proceed with the auction.

[86] On 3 December 2019 Goodes recorded that the business rescue application was issued, and would be served on that day. They referred VFV to section

131(6) of the 2008 Act, that such an application suspends the winding-up process. The application was issued on 3 December 2019.

[87] At 16H44 on 3 December 2019, the business rescue application was served by e-mail on Mr Ferreira and on seemingly other provisional liquidators. It is common cause that Mr Murray and Mr Lutchman received it. At 17H15, Mr Ferreira of VFV responded and stated that he does not hold instructions anymore, and that Ms Wessels of MacRobert Attorneys does.

[88] On 4 December 2019, Park Village commenced to hold an auction *inter alia* of the assets of the *six business rescue companies*, despite the business rescue application. The urgent application sought to enforce the Bhoola order in part, any sale had to be with the written consent of Holdings.

[89] On 4 December 2019, an urgent application was launched by Holdings, of the liquidated companies. The matter was stood down till the next day by Wright J. On 5 December 2019, the Wright J struck the urgent application from the roll for lack of urgency.

[90] On 5 to 6 December 2019, Park Village Auctions finalised the auction of the assets of the *six business rescue companies*.

[91] Park Village Auctions and Advanced Valuers, valued the assets to be sold at R95 Million.[19] The movable assets were sold for R30 Million.[20] A repeated assertion was that the sales were a great success. It is not clear to me if this was so, if relevant:

[91.1] Portion 222 (a Portion of Portion 212) of The Farm Luipaardsvlei was valued at a market value of R38 Million, and a forced sale value of R25 Million, and was sold to Fidelity for R14 Million. On those valuations, it was not a successful sale on any basis;

[91.2] Portion 210 (a Portion of Portion 136) of The Farm Luipaardsvlei was valued at a market value of R32 Million, and a forced sale value of

[19] R95 203 295.00.
[20] R30 048 407.50, including VAT

R23 Million, and was sold to the state for R69 Million. On those valuations, it was not a successful sale;

[91.3] Portion 214, 215 and 216 (Portions of Portion 212) of The Farm Luipaardsvlei were valued a market value of R5.4 Million, and a forced sale value of R2.7 Million and as sold for R6 Million. On those valuations, it was not a successful sale; and

[91.4] The values of the movable assets sold are not as clear. Only forced sale values were used in the valuation. These valuations appear on valuation sheets, and one of them does not have a final total, making easy addition difficult. The forced sale valuations excluded VAT. It seems from the figures used by the provisional liquidators, that the total assets to be sold were valued at R95 203 295,[21] (and from a quick perusal of the valuation sheets), that the movable assets had a forced sale value of about R20 Million[22] excluding VAT. The auction report reflects sales of movables to the value R26 Million[23] if VAT is excluded for consistency sake. A finding of a successful auction would depend on the value used for assessment.

[92] On 20 December 2019, the auction application was launched.

[93] On 7 February 2020, the provisional liquidators sold the remaining asset in the group, referred to above.

[94] In a supplementary affidavit dated 10 March 2020 in the auction application, they contend (a) that on a proper interpretation of the Bhoola order, they needed no consent after the SCA judgment, (b) in any event they had consent, and (c) in any event it was impossible to comply with the consent provision in the Bhoola order:

> "*75 As such and in law, the subject companies did not have any directors as at the date upon which the Boohla order was granted and the conditions imposed pursuant to paragraph 3 of the Boohla order was a non-event. It was, as such, impossible to fulfil from day one as not a*

[21] R89 803 295.00 is also used.
[22] R19 803 295.00.
[23] R26 129 050.00.

> *single one of the subject companies had any directors with effect from 14 February 2019*."

[95] The next day, on 11 March 2020, the first hearing commenced of the auction application and of the business rescue application. I have dealt with the rest of the hearings.

[96] This matter requires interpretation of the 2008 Act, the 1973 Act, the Insolvency Act 24 of 1936 ("*the Insolvency Act*"), and of the Bhoola order. Interpretation plays an important role in this matter.

The law on interpretation of legal instruments

[97] I apply *Natal Joint Municipal Pension Fund v Endumeni Municipality*,[24] and I was particularly influenced by the clarity of the drafting (where applicable) of the words to be interpreted (off course read in context), the decreased emphasis on context in such cases, the status of court orders, the line where this court's powers of interpretation ends, and the Constitutional right to equal protection and benefit of the law (section 9). Some of my findings give greater content to a purposive interpretation, especially where the right to equality plays out and technical hurdles are sought to be introduced to the application of the law. I sought to remain faithful to the fact that this court's role is to interpret; the exercise is one of interpretation. In some instances, my task is made easier by interpretation binding on me.

[98] I am guided by the fact that both the SCA and the Constitutional Court must be aware of the tension that I observe and encounter in practice. The law requires of me to follow the SCA where I observe tension, unless and until I can state that a judgment of the Constitutional Court is so inconsistent with the *ratio decidendi* of the SCA, that it implicitly has overruled it. In another context the Constitutional Court stated that (footnotes omitted):[25]

> "*The rule of law requires that the law be clear and ascertainable. As stated by this Court in Affordable Medicines: "The law must indicate with reasonable certainty to those who are bound by it what is required of them so that they may regulate their conduct accordingly." The application of the common law rules*

[24] *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA).

[25] *Beadica 231 CC and Others v Trustees for the time being of the Oregon Trust and Others* [2020] ZACC 13 para 83, a judgment by Theron J (Khampepe ADCJ, Jafta J, Majiedt J, Mathopo AJ, Mhlantla J and Tshiqi J concurring).

of contract should result in reasonably predictable outcomes, enabling individuals to enter into contractual relationships with the belief that they will be able to approach a court to enforce their bargain. It is therefore vital that, in developing the common law, courts develop clear and ascertainable rules and doctrines that ensure that our law of contract is substantively fair, whilst at the same time providing predictable outcomes for contracting parties. This is what the rule of law, a foundational constitutional value, requires. The enforcement of contractual terms does not depend on an individual judge's sense of what fairness, reasonableness and justice require. To hold otherwise would be to make the enforcement of contractual terms dependent on the "idiosyncratic inferences of a few judicial minds". This would introduce an unacceptable degree of uncertainty into our law of contract. The resultant uncertainty would be inimical to the rule of law."

[99] In my experience, often, paragraph 18 of *Endumeni* is relied upon for a contention that a court must use context to such an extent, that the argument is no longer about interpretation of the document. This is not what *Endumeni* has found. Perhaps the reason for the approach is that paragraph 18 of *Endumeni*, with respect, is just too short a formulation of the principles that I fully support.[26]

[100] The principle remains, where words are read in context, this does not mean that words can mean whatever a judge wants them to mean. Repeatedly the warning is sounded to judges: In interpreting legal instruments, do not cross

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[26] Para 18 reads (footnotes omitted):

"*Over the last century there have been significant developments in the law relating to the interpretation of documents, both in this country and in others that follow similar rules to our own. It is unnecessary to add unduly to the burden of annotations by trawling through the case law on the construction of documents in order to trace those developments. The relevant authorities are collected and summarised in Bastian Financial Services (Pty) Ltd v General Hendrik Schoeman Primary School. The present state of the law can be expressed as follows. Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation. In a contractual context it is to make a contract for the parties other than the one they in fact made. The 'inevitable point of departure is the language of the provision itself', read in context and having regard to the purpose of the provision and the background to the preparation and production of the document*."

the divide between the legislative and judicial powers; do not make an agreement for the parties that they did not make. By way of example see *Endumeni*[27] para 18, *Kubyana v Standard Bank of South Africa Ltd* para 18,[28] and *S v Zuma and Others* para 17 and 18.[29] Judges look at matters with the benefit of hindsight, often able to see what parties, parliament or litigants should have done (but in fact did not do/agree). The risk is high of interpreting documents without due regard to proper demarcation judicial powers.

[101] The use of context in interpretation is without doubt in the SCA. *Novartis SA (Pty) Ltd v Maphil Trading (Pty) Ltd* para 29[30] adopts with approval the statement in *Bothma-Batho Transport (Edms) Bpk v S Bothma & Seun Transport (Edms) Bpk* para 12[31] that the approach that a court only looks at surrounding circumstances (context) when there is an ambiguity in language, is "*no longer consistent with the approach to interpretation now adopted by South African courts in relation to contracts or other documents, such as statutory instruments or patents*". A point made in *Bothma-Batho* para 12 is made again in Novartis para 29, namely that interpretation is one unitary exercise. See too the statement in *Novartis* para 28:[32]

> "… *A court must examine all the facts - the context - in order to determine what the parties intended. And it must do that whether or not the words of the contract are ambiguous or lack clarity. Words without context mean nothing*."

[102] The move in approaches to interpretation now reflected in *Endumeni*, is part of a history with long roots in this country. Many judgments that predate *Endumeni* emphasised the role of context in interpretation. As Gamble J states in *Quest Petroleum (Pty) Ltd v Walters and Another*[33] para 44, "*the authorities go back a century or more*" before he refers to judgments by Wessels CJ, Greenberg JA, Innes CJ, Diemont JA, Conradie JA, FH Grosskopf JA, and others. A further useful selection of such judgments is to be found in an article

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[27] Supra, *Natal Joint Municipal Pension Fund v Endumeni Municipality 2012 (4) SA 593 (SCA)* para 18.
[28] *Kubyana v Standard Bank of South Africa Ltd* 2014 (3) SA 56 (CC) para 18.
[29] *S v Zuma and Others* 1995 (2) SA 642 (CC) para 17 and 18.
[30] *Novartis SA (Pty) Ltd v Maphil Trading (Pty) Ltd* 2016 (1) SA 518 (SCA) para 29.
[31] *Bothma-Batho Transport (Edms) Bpk v S Bothma & Seun Transport (Edms) Bpk* 2014 (2) SA 494 (SCA) para 12.
[32] Supra, *Novartis SA (Pty) Ltd v Maphil Trading (Pty) Ltd* 2016 (1) SA 518 (SCA) para 28.
[33] *Quest Petroleum (Pty) Ltd v Walters and Another* [2019] 1 All SA 547 (WCC).

The Life and Times of Textualism in South Africa[34], where the author refers to judgments by de Villiers JA, Schreiner JA, Joubert AJA, Wessels JA, Malan AJA, and others.

[103] *Endumeni* was part of our law that moved towards a contextual, objective assessment of language used in legal instruments, based on text, factual context, and purpose. The change that *Endumeni* brought, was to cement an approach that gives effect to the truism that sometimes text goes wrong. There is another, equally valid truism, often people write what they mean to say.

[104] I must make one more point: *Endumeni* did not do away with the concepts of variation of court orders, rectification of contracts, findings of implied and tacit terms in contracts, parol evidence and the like. It simply reflects an approach to interpretation where context and text merge.

[105] In this case, some findings that I am asked to make may well not be findings of interpretation, but of tacit terms. There is a clear distinction between interpreting express words, and reading a tacit term into a document. The clear distinction we draw between implied and tacit terms is drawn in English law too, but without our distinctive use of the terminology of tacit versus implied (by law).[35] In *Marks and Spencer plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd and Another*[36] Lord Neuberger P[37] after *inter alia* referring to the two types of unexpressed terms in a contract in para 15,[38] makes a clear distinction between the process of interpretation versus finding (in our terms), a tacit term in para 28 - 29:

> "*[28] In most, possibly all, disputes about whether a term should be implied into a contract, it is only after the process of construing the express words is complete that the issue of an implied term falls to be considered. Until one has*

[34] Perumalsamy K "*The Life and Times of Textualism in South Africa*" PER / PELJ 2019 (22).
[35] See *Alfred McAlpine & Son (Pty) Ltd v Transvaal Provincial Administration* 1974 (3) SA 506 (A) at 526E and *Wilkins NO v Voges* 1994 (3) SA 130 (A) at 136I-137D.
[36] *Marks and Spencer plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd and Another* [2016] 4 All ER 441.
[37] With whom Lord Sumption and Lord Hodge SCJJ agreed.
[38] "*As Lady Hale pointed out in Geys v Socieìteì Geìneìrale, London Branch [2012] UKSC 63, [2013] 1 All ER 1061, [2013] 1 AC 523 (at [55]), there are two types of contractual implied term. The first, with which this case is concerned, is a term which is implied into a particular contract, in the light of the express terms, commercial common sense, and the facts known to both parties at the time the contract was made. The second type of implied terms arises because, unless such a term is expressly excluded, the law (sometimes by statute, sometimes through the common law) effectively imposes certain terms into certain classes of relationship*."

> *decided what the parties have expressly agreed, it is difficult to see how one can set about deciding whether a term should be implied and if so what term. This appeal is just such a case. Further, given that it is a cardinal rule that no term can be implied into a contract if it contradicts an express term, it would seem logically to follow that, until the express terms of a contract have been construed, it is, at least normally, not sensibly possible to decide whether a further term should be implied. Having said that, I accept Lord Carnwath's point in para [71] to the extent that in some cases it could conceivably be appropriate to reconsider the interpretation of the express terms of a contract once one has decided whether to imply a term, but, even if that is right, it does not alter the fact that the express terms of a contract must be interpreted before one can consider any question of implication.*
>
> *[29] In any event, the process of implication involves a rather different exercise from that of construction. As Sir Thomas Bingham trenchantly explained in Philips [1995] EMLR 472 at 481:*
>
> > *'The courts' usual role in contractual interpretation is, by resolving ambiguities or reconciling apparent inconsistencies, to attribute the true meaning to the language in which the parties themselves have expressed their contract. The implication of contract terms involves a different and altogether more ambitious undertaking: the interpolation of terms to deal with matters for which, ex hypothesi, the parties themselves have made no provision. It is because the implication of terms is so potentially intrusive that the law imposes strict constraints on the exercise of this extraordinary power*.'"

[106] *Endumeni* is generally seen as a step in breaking from the past, when our courts for the most part, followed a literal or textual approach to the interpretation of legal documents. In the past, if (what seemed to be) the ordinary meaning was clear, that meaning was given effect to. Only if that meaning was absurd, could the ordinary meaning be departed from and another meaning given to the word (and certain contextual matter be considered). Our law largely based on English law in this regard. It was no doubt influenced by the view then that the will of Parliament was supreme.

[107] With respect, our law has not yet reached its interpretation destination. The question remains the extent of the use of context, especially when words read in context have a clear meaning. Those words often were agreed upon, and often those words form part of a well-written product. It is useful in this regard to consider an article by the author of *Endumeni,* Wallis JA.[39] This judgment

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[39] *Interpretation Before and after Natal Joint Municipal Pension Fund v Endumeni Municipality 2012 (4) SA 593 (SCA)* PER / PELJ 2019 (22) by M Wallis.

does not call for a fuller discussion of the article, but the article reflects nuances to interpretation that I too believe should be part of our law (as it is in current English law) about when context should carry more weight, as opposed to text, and when not. Perhaps ironically, such a move close to English law, could relieve the tension that I observe.

[108] As is clear from *Endumeni* itself, the break from the past as evidenced in *Endumeni*, in a large part followed not old Roman Dutch authorities, but development in English law itself. I believe that it is fair to say that modern day English law on interpretation changed the approached in many countries outside the United Kingdom, including Australia, New Zealand, Canada, Hong Kong, Singapore, and countries in Southern Africa. This is addressed in the two articles already referred to. It is a journey. In *City of Tshwane Metropolitan Municipality v Blair Atholl Homeowners Association,*[40] a judgment by Navsa ADP and Mothle AJA,[41] the court held at para 60 (footnotes omitted):

> "*[60] It is unrealistic to expect of this court or, indeed, of any court, pronouncements that will end theoretical debates that have raged over many decades and settle for all time, terminology that will obviate confusion. No practical purpose is served by promoting one of the aforesaid approaches above the other, nor is any purpose served by considering whether this court has more recently adopted a revolutionary approach to interpretation, as compared to its prior practice."*

[109] English law on this topic too developed (will develop), and is nuanced, applying rules and principles that give a judge the tools to apply those tools with flexibility as determined by the circumstances of the case. I only refer briefly thereto. It falls outside a judgment such as the present to discuss the current English law and to compare them with *Endumeni* especially regarding the boundaries between context and text (and possible future development of our law) and/or the impact of the Constitution on interpretation.

[110] Lord Hoffman's formulation of five principles followed on *Prenn v Simmonds*[42] and *Reardon Smith Line Ltd. v Yngvar Hansen-Tangen.*[43] Lord Hoffman[44]

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[40] *The City of Tshwane Metropolitan Municipality v Blair Atholl Homeowners Association* 2019 (3) SA 398 (SCA) para 52.
[41] Swain and Dambuza JJA and Mokgohloa AJA concurring.
[42] *Prenn v Simmonds* [1971] 3 All ER 237.
[43] *Reardon Smith Line Ltd. v Yngvar Hansen-Tangen* [1976] 3 All ER 570.
[44] With whom Lord Goff of Chieveley, Lord Hope of Craighead and Lord Clyde agreed.

formulated the first principle in *Investors Compensation Scheme v West Bromwich Building Society*[45]:

> "*Interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract.*[46]

[111] This formulation fits *Endumeni*, but adds that the assessment is objective, not subjective. The flexibility in applying *Investors Compensation Scheme* (and as set out in especially three cases that followed it) are described as follows by Lord Hodge JSC[47] in *Barnardo's v Buckinghamshire and Others*[48] at para 13:

> "*In the trilogy of cases, Rainy Sky SA v Kookmin Bank [2011] UKSC 50, [2012] 1 All ER 1137, [2011] 1 WLR 2900, Arnold v Britton [2015] UKSC 36, [2016] 1 All ER 1, [2015] AC 1619 and Wood v Capita Insurance Services Ltd [2017] UKSC 24, [2017] 4 All ER 615, [2017] AC 1173, this court has given guidance on the general approach to the construction of contracts and other instruments, drawing on modern case law of the House of Lords since Prenn v Simmonds [1971] 3 All ER 237, [1971] 1 WLR 1381. That guidance, which the parties did not contest in this appeal, does not need to be repeated. In deciding which interpretative tools will best assist in ascertaining the meaning of an instrument, and the weight to be given to each of the relevant interpretative tools, the court must have regard to the nature and circumstances of the particular instrument*."

[112] It is a reference to the flexibility referred to above. The current position in English law, if a summary would suffice, is set out in *Wood*[49] as quoted in *Blair Atholl Homeowners Association* para 59:

> "*The court's task is to ascertain the objective meaning of the language which the parties have chosen to express their agreement. It has long been accepted that this is not a literalist exercise focused solely on a parsing of the wording of the particular clause but that the court must consider the contract as a whole and, depending on the nature, formality and quality of drafting of the contract, give more or less weight to elements of the wider context in reaching its view as to that objective meaning. In Prenn v Simmonds [1971] 1 WLR 1381 (1383H-1385D) and in Reardon Smith Line Ltd v Yngvar Hansen-Tangen [1976] 1 WLR 989 (997), Lord Wilberforce affirmed the potential relevance to the task of interpreting the parties' contract of the factual background known to the parties*

[45] *Investors Compensation Scheme v West Bromwich Building Society* [1998] 1 All ER 98.
[46] Perumalsamy K "*The Life and Times of Textualism in South Africa*" PER / PELJ 2019(22) makes the interesting point that Endumeni omits to state that the standard is that of the reasonable reader.
[47] With whom Lady Hale P, Lord Wilson, Lord Sumption and Lord Briggs JJSC agreed.
[48] *Barnardo's v Buckinghamshire and Others* [2019] 2 All ER 175.
[49] *Wood v Capita Insurance Ltd* [2017] 4 All ER 615 para 10.

at or before the date of the contract, excluding evidence of the prior negotiations."

[113] This approach is reflected in *Endumeni*, in my view. Hence Wallis JA (in his capacity as an academic author) states with reference to *inter alia Wood* that:[50]

"*On this approach, the process of interpretation is no longer, assuming it once was, a war between textualism and contextualism. I venture to suggest that this does not differ materially from Endumeni. Both text and context have a role to play, and which will predominate will depend on the circumstances of each case*."

[114] Endumeni paragraph 18 was expressly approved and quoted in *Airports Company South Africa v Big Five Duty Free (Pty) Limited and Others* para 29,[51] a judgment by Froneman J.[52] Based thereon I apply it too.

[115] However, this acceptance of *Endumeni* in the Constitutional Court did not address another decision by the Constitutional Court: *Cool Ideas 1186 CC v Hubbard and Another,*[53] a judgment by Majiedt AJ.[54] In that case the Constitutional Court held in para 28 (underlining added):

"*A fundamental tenet of statutory interpretation is that the words in a statute must be given their ordinary grammatical meaning, unless to do so would result in an absurdity.*[55] *There are three important interrelated riders to this general principle, namely:*

(a) that statutory provisions should always be interpreted purposively;[56]

(b) the relevant statutory provision must be properly contextualised;[57] *and*

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[50] *Interpretation Before and after Natal Joint Municipal Pension Fund v Endumeni Municipality 2012 (4) SA 593 (SCA) PER / PELJ 2019(22)* page 13.

[51] *Airports Company South Africa v Big Five Duty Free (Pty) Limited and Others* 2019 (5) SA 1 (CC) para 29.

[52] Dlodlo AJ, Goliath AJ, Khampepe J, Madlanga J, Petse AJ and Theron J concurring.

[53] *Cool Ideas 1186 CC v Hubbard and Another* 2014 (4) SA 474 (CC) para 28.

[54] Moseneke ACJ, Skweyiya ADCJ, Khampepe J and Madlanga J concurring.

[55] "*[18] See SATAWU and Another v Garvas and Others [2012] ZACC 13; 2013 (1) SA 83 (CC); 2012 (8) BCLR 840 (CC) (Garvas) at para 37; S v Zuma and Others [1995] ZACC 1; 1995 (2) SA 642 (CC); 1995 (4) BCLR 401 (CC) (S v Zuma) at paras 13-4; and Dadoo Ltd and Others v Krugersdorp Municipal Council 1920 AD 530 at 543*."

[56] "*[19] Dengetenge Holdings (Pty) Ltd v Southern Sphere Mining and Development Company Ltd and Others [2013] ZACC 48; 2014 (3) BCLR 265 (CC) at paras 84-6 and Department of Land Affairs and Others v Goedgelegen Tropical Fruits (Pty) Ltd [2007] ZACC 12; 2007 (6) SA 199 (CC); 2007 (10) BCLR 1027 (CC) at para 5*."

[57] "*[20] North East Finance (Pty) Ltd v Standard Bank of South Africa Ltd [2013] ZASCA 76; 2013 (5) SA 1 (SCA) at para 24; KPMG Chartered Accountants (SA) v Securefin Ltd and Another [2009] ZASCA 7; 2009 (4) SA 399 (SCA) at para 39; and Bhana v Dőnges NO and Another 1950 (4) SA 653 (A) at 664E-H*."

> *(c) all statutes must be construed consistently with the Constitution, that is, where reasonably possible, legislative provisions ought to be interpreted to preserve their constitutional validity. This proviso to the general principle is closely related to the purposive approach referred to in (a).*"[58]

[116] *Cool Ideas* followed two years after *Endumeni*. The reminder therein about the role of the Constitution in interpretation is undoubtedly necessary. Still, the phrase that "*the words in a statute must be given their ordinary grammatical meaning, unless to do so would result in an absurdity*" in *Cool Ideas*, with respect cannot be reconciled with *Endumeni*. Wallis JA in his capacity as an author, remarked that he does not believe *Cool Ideas* correctly reflects the Constitutional Court's intention.[59] Still, *Cool Ideas* is often quoted with approval by the Constitutional Court, and in a slightly reduced version, has found its way into the SCA too. In *Smyth and Others v Investec Bank Limited and Another*[60] in a judgment by Petse JA[61] the court held (underlining added):

> *"[28] I revert to the crux of the dispute between the parties, the interpretation of s 252 of the Act. Principles of interpretation dictate that a court should pay due regard to the overall scheme of the Act. During an interpretative process, it is as well to remember that a fundamental principle of statutory interpretation is that words in a statute must be given their ordinary meaning, unless to do so would result in an absurdity. (See South African Transport and Allied Workers Union & another v Garvas & others [2012] ZACC 13; 2013 (1) SA 83 (CC) para 37; S v Zuma & others [1995] ZACC 1; 1995 (2) SA 642 (CC) paras 13-14; Dadoo Ltd v Krugersdorp Municipal Council 1920 AD 530 at 543.) This general principle is, however, subject to three interrelated qualifications. First, the statutory provision should be interpreted purposively. (See Department of Land Affairs & others v Goedegelegen Tropical Fruits (Pty) Ltd [2007] ZACC 12; 2007 (6) SA 199 (CC) para 5; Dengetenge Holdings (Pty) Ltd v Southern Sphere Mining Development Company Ltd & others [2013] ZACC 48; 2014 (5) SA 138 (CC) paras 84-86.) Second, the relevant statutory provision must be contextualised. (See North East Finance (Pty) Ltd v Standard Bank of South Africa Ltd [2013] ZASCA 76; 2013 (5) SA 1 (SCA) para 24; KPMG Chartered Accountants (SA) v Securefin Ltd & another [2009] ZASCA 7; 2009 (4) SA 399 SCA para 39.) Third, closely related to the purposive approach is the*

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[58] "[21] Garvas above n 18 at para 37."

[59] *Interpretation Before and after Natal Joint Municipal Pension Fund v Endumeni Municipality 2012 (4) SA 593 (SCA) PER / PELJ 2019(22)*. After referring to cases in which the Constitutional Court encouraged a new approach to interpretation (*Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs* 2004 (4) SA 490 (CC) para 90; *Department of Land Affairs v Goedgelegen Tropical Fruits (Pty) Ltd* 2007 (6) SA 199 (CC) para 52) the author at page 8 footnote 19 stated the following:

> "*On its face the summary in Cool Ideas para 28 appears to be a retrograde step from this perspective, but I doubt that this was intended*."

[60] *Smyth and Others v Investec Bank Limited and Another* 2018 (1) SA 494 (SCA) para 28 - 29.

[61] Navsa, Lewis and Mathopo JJA and Schippers AJA concurring.

> *requirement that statutes must be interpreted consistently with the Constitution so as to preserve their constitutional validity, where it is reasonably possible to do so. As Wallis JA put it in Natal Joint Municipal Pension Fund v Endumeni Municipality [2012] ZASCA 13; 2012 (4) SA 581 para 18:*
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> > *'[T]he "inevitable point of departure is the language of the provision itself", read in the context and having regard to the purpose of the provision and the background to the preparation and production of the document. ... A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document.'*
>
> *[29] Accordingly, as endorsed in a long line of cases, the logical point of departure is the language of the provision itself read in the context of the overall scheme of the Act, having regard to the purpose of the provision and against the background to the production of the relevant statute. (See in this regard South African Airways (Pty) Ltd v Aviation Union of South Africa & others [2011] ZASCA 1; 2011 (3) SA 148 (SCA) paras 25-30; Bothma-Batho Transport (Edms) Bpk v S Bothma & Seun Transport (Edms) Bpk [2013] ZASCA 176; 2014 (2) SA 494 (SCA) paras 10-12; Novartis SA v Maphil Trading [2015] ZASCA 111; 2016 (1) SA 518 (SA) paras 24-31.)*"

[117] *Smyth* thus held that as a starting point "*that words in a statute must be given their ordinary meaning unless to do so would result in an absurdity*", whilst *Cool Ideas* formulated it as "*that the words in a statute must be given their ordinary grammatical meaning, unless to do so would result in an absurdity*".

[118] In the most recent judgment in the Constitutional Court, stating the principles of interpretation, *Chisuse and Others v Director-General, Department of Home Affairs and Another,*[62] the Constitutional Court relies on *Endumeni* (to a limited extent) and on *Cool Ideas*. Khampepe J[63] held:

> "*[47] In interpreting statutory provisions, recourse is first had to the plain, ordinary, grammatical meaning of the words in question.*[64] *Poetry and philosophical discourses may point to the malleability of words and the nebulousness of meaning,*[65] *but, in legal interpretation, the ordinary*

[62] *Chisuse and Others v Director-General, Department of Home Affairs and Another* [2020] ZACC 20 para 46-59.
[63] Jafta J, Madlanga J, Majiedt J, Mathopo AJ, Mhlantla J, Theron J, Tshiqi J and Victor AJ concurring.
[64] "*[45] See Diener N.O. v Minister of Justice and Correctional Services [2018] ZACC 48; 2019 (4) SA 374 (CC); 2019 (2) BCLR 214 (CC) at para 37; Mankayi v AngloGold Ashanti Ltd [2011] ZACC 3; 2011 (3) SA 237 (CC); 2011 (5) BCLR 453 (CC) at para 70; and Commissioner, South African Revenue Service v Executor, Frith's Estate [2000] ZASCA 94; 2001 (2) SA 261 (SCA) at para 2 of Plewman JA's judgment*."
[65] "*[46] As TS Elliot has eloquently stated, "[w]ords strain, crack and sometimes break, . . . slip, slide, perish, [d]ecay with imprecision . . .". Elliot Burnt Notion (No. 1 of Four Quarters) at Part V*."

understanding of the words should serve as a vital constraint on the interpretative exercise, unless this interpretation would result in an absurdity.[66] *As this Court has previously noted in Cool Ideas, this principle has three broad riders, namely:*

"(a) that statutory provisions should always be interpreted purposively;

(b) the relevant statutory provision must be properly contextualised; and

(c) all statutes must be construed consistently with the Constitution, that is, where reasonably possible, legislative provisions ought to be interpreted to preserve their constitutional validity. This proviso to the general principle is closely related to the purposive approach referred to in (a)."[67]

[48] Judges must hesitate "to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation".[68]

[49] …

[52] The purposive or contextual interpretation of legislation must, however, still remain faithful to the literal wording of the statute.[69] *This means that if no reasonable interpretation may be given to the statute at hand, then courts are required to declare the statute unconstitutional and invalid.*[70] *It is now settled that this approach to interpretation is a unitary exercise.*[71] **"**

[119] I decline to apply the part of the law as contended for by the provisional liquidators in the heads of argument in the auction application as not consistent with *Endumeni* (underlining not added):

"*154 Where the language of a document is clear and unambiguous, a court must give effect to the intention of the parties as expressed in the contract, however harsh or unreasonable that may appear to be.*[72]

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[66] "*[47] See Cool Ideas 1186 CC v Hubbard [2014] ZACC 16; 2014 (4) SA 474 (CC); 2014 (8) BCLR 869 (CC) (Cool Ideas) at para 28; SATAWU v Garvas [2012] ZACC 13; 2013 (1) SA 83 (CC); 2012 (8) BCLR 840 (CC) (Garvas) at para 37; and Dadoo Ltd v Krugersdorp Municipal Council 1920 AD 530 at 543. See further Bishop and Brickhill, "'In The Beginning Was The Word': The Role of Text in the Interpretation of Statutes" (2012) 129 SALJ 681 at 697 8."*

[67] "*[48] Cool Ideas id at para 28*."

[68] "*[49] Natal Joint Municipal Pension Fund v Endumeni Municipality [2012] ZASCA 13; 2012 (4) SA 593 (SCA) (Endumeni) at para 18*."

[69] "*[55] Bertie Van Zyl above n 53 at para 22*."

[70] "*[56] National Coalition for Gay and Lesbian Equality v Minister of Home Affairs [1999] ZACC 17; 2000 (2) SA 1 (CC); 2000 (1) BCLR 39 (CC) at paras 23-4*."

[71] "*[57] See Endumeni above n 49 at para 19*."

[72] "*34 See Anchor Secunda (Pty) Ltd v Sasol Synthetic Fules (Pty) Ltd (624/10) [2011] ZASCA 158 (28 September 2011) at par 5*."

155 The golden rule of interpretation dictates that the language in a document is to be given its grammatical and ordinary meaning unless this would result in some absurdity or repugnancy or inconsistency with the rest of the instrument.[73]"

[120] Next, I address the major matters for decision.

First matter for decision: The Rule 42 application

[121] Fidelity is of the view that the Bhoola order, in error, did not include the power to sell the immovable property it purchased at the auction, and it seeks a variation of the order to expressly refer thereto. The relief sought has been quoted already. The chronology also already refers to one of the paragraphs in the order, but I need to expand a bit on the facts set out in the chronology.

[122] Paragraph 1 of the Bhoola order specifically dealt with the power of the provisional liquidators to sell movable assets of the six companies in liquidation, being asses of:

[122.1] Five of the six business rescue companies (excluding only Properties)-

[122.1.1] Operations;

[122.1.2] Technology Systems;

[122.1.3] Leading Prospect;

[122.1.4] Youth Development Centres; and

[122.1.5] Security Intelligence; and

[122.2] One other company in liquidation, BOSASA IT.

[123] Paragraph 1 of the order extended the powers of the provisional liquidators "*in terms of section 386(5), read with section 388*" of the 1973 Act to sell all of the movable assets *"belonging to*" the companies listed above "*by way of public auction, public tender or private contract, as contemplated in section 386(4)(h)*" of the 1973 Act.

[73] "See Coopers and Lybrand & Others v Bryant 1995 (3) SA 761 (A) at 767."

[124] It is common cause that none of the other companies in liquidation had movable assets.

[125] The Bhoola order also dealt with immovable assets. Paragraph 2 of the order refers to the same sections of the 1973 Act referred to above, and extends the powers of the provisional liquidators to sell the immovable properties belonging to Properties by way of public auction, public tender or private contract. No other company in liquidation was mentioned. It would later transpire that Operations, not Properties, owned an immovable property sold at the public auction to Fidelity.

[126] In context, the undoubted purpose of the relief sought before Bhoola AJ was the interim power to be able to sell all the assets of the group, movable and immovable. This appears from the founding affidavit in that application. The group's assets have become redundant due to the cancelled agreements with the state, and the winding down of all business conducted by the group. This outcome was enabled by the other two court orders referred to.

[127] The movable assets of Operations could be sold too. The immovable property owned by Operations was no different to the immovable property owned by Properties.. In fact, it is clear that the consent sought from Bhoola AJ was intended to include the property owned by Operations. The founding affidavit includes a reference to that property, and its likely forced sale value. It was referred to as the "*BOSASA Campus*", and "*African Global Operations' headquarters*" in the affidavit, the need for which has fallen away. It was not intended to be retained until the final liquidators were appointed.

[128] Unsurprisingly, the Bhoola order was implemented as if consent to the sale of the immovable property of Operations was given and Fidelity bought the immovable property at the public auction. Everybody worked from the wrong assumption when the property was sold at the auction and the first disputes arose.

[129] Accordingly, the point that the sale to Fidelity was unauthorised (not provided for in the Bhoola order), was not taken in the founding papers in the auction application.[74] That point was only taken after Fidelity discovered the omission.

[130] The later explanation by the provisional liquidators was that the omission of Operations in paragraph 2 of the Bhoola order, was an error. It seems to be undoubtedly correct. When the provisional liquidators did not bring an application in terms of Rule 42, Fidelity approached the court. Fidelity argued that the omission to refer to immovable property owned by Operations in the Bhoola order, was a mere and innocent mistake.

[131] The main defences raised against the Rule 42 order were:

[131.1] A lack of locus standi. Clearly Fidelity is a party affected by the order as contemplated in Uniform Rule 42(c) and had *locus standi*;[75]

[131.2] It was a unilateral mistake by the provisional liquidators, not a mistake common to the parties as contemplated in Uniform Rule 42(c). I disagree, the order was by consent;

[131.3] Fidelity unduly delayed bringing the application for two months. I disagree, there was no improper delay.

[132] Fidelity argued that it was opportunistic to seek to exploit the error, and not to consent to the rectification. I agree. The answering affidavit further unnecessarily takes issue with the conduct of Fidelity and of the provisional liquidators, irrelevant to the relief sought. It also impermissibly includes

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[74] The founding affidavit in the business rescue application states that the property is owned by Properties.

[75] "***42 Variation and rescission of orders***
(1) The court may, in addition to any other powers it may have, mero motu or upon the application of any party affected, rescind or vary:
(a) An order or judgment erroneously sought or erroneously granted in the absence of any party affected thereby;
(b) an order or judgment in which there is an ambiguity, or a patent error or omission, but only to the extent of such ambiguity, error or omission;
(c) an order or judgment granted as the result of a mistake common to the parties.
(2) Any party desiring any relief under this rule shall make application therefor upon notice to all parties whose interests may be affected by any variation sought.
(3) The court shall not make any order rescinding or varying any order or judgment unless satisfied that all parties whose interests may be affected have notice of the order proposed."

references to case law. It was properly dealt with in reply by Fidelity as irrelevant responses.

[133] Fidelity is entitled to the variation sought and I grant it. Fidelity sought costs from the parties opposing the relief sought, alternatively the costs occasioned by opposition. In my view this application should not have been opposed. A short application by consent became impossible as a result of the stance taken by the auction applicants. Thereafter mere technical defences followed. The three parties that opposed the application, Holdings, Sun Worx and Kgwerano must pay Fidelity's costs of the Rule 42 application.

[134] When Fidelity brought the application, there was no reason thereafter for the provisional liquidators to join the fray, not having brought the application themselves. They applied to join the Fidelity application as co-applicants and served papers on 20 May 2020 shortly before the hearing on 21 May 2020. By then it was too late properly deal with the application. In the end, I strike the application by the provisional liquidators from the roll and deliberately make no order as to costs. The same applies with regard to the heads of argument delivered by the provisional liquidators as a "note".

Second matter for decision: Has the business application been "made"?

[135] The provisional liquidators (SARS and Fidelity) took the point that the business rescue application could not be considered as it had not been "*made*" as contemplated in section 131 of the 2008 Act. The bigger point was that the auction could have continued until it was "*made*". The argument was that an application for business rescue was not made until it is served and given notice of in a prescribed manner, including as prescribed by regulation 124 of the Companies Regulations, 2011 ("*the Regulations*").

[136] I have referred to the unique notice provisions to affected parties in section 131 of the 2008 Act. Sections 131(1) to 131(3) read (underlining added):

> "*(1) Unless a company has adopted a resolution contemplated in section 129, an affected person may apply to a court at any time for an order placing the company under supervision and commencing business rescue proceedings.*
>
> *(2) An applicant in terms of subsection (1) must-*

> *(a) serve a copy of the application on the company and the Commission; and*
>
> *(b) notify each affected person of the application in the prescribed manner*.
>
> *(3) Each affected person has a right to participate in the hearing of an application in terms of this section*."

[137] The act therefore draws a distinction between those who need to be served[76] and those who need to be notified.[77] The two places where "*the application*" has to be "*served*" (even in this case where the companies have been wound up) in terms of section 131(2)(a) are "*on the company*" and on the CIPC. Keywords in sections 131(1) and (2) are "*apply to a court*", "*a copy of the application*", "*of the application*" and off course, "*the application*".

[138] In as far as the prescribed service on the CIPC is concerned, the CIPC only plays a formalistic role in the present application, and indeed in practice note 9 of 2017 of 3 July 2017 it provided an e-mail address for service of court papers as a valid method of service.

[139] The other instance of service, "*service*" of the application on the company, no doubt had as its purpose a method to bring the application to the persons in control thereof. The SCA held that where reference is made to the service on the company, service on (in this case) the provisional liquidators is meant. In *Van Staden NO and Others v Pro-Wiz Group (Pty) Ltd*[78] Wallis JA[79] held in para 10 (footnote omitted):

> "*[10] Starting with basic principles, in terms of s 131(2)(a) of the Act an application for business rescue must be served on the company or close corporation. Where it is already being wound up, whether provisionally or finally, that means that the persons on whom it must be served, as representing the company, are its liquidators. That necessarily follows from the fact that, upon the compulsory winding-up of a company, its directors (read members in the case of a close corporation) are deprived of their control of the company, which is then deemed to be in the custody or control of the Master until the appointment of liquidators. Thereafter it is in the custody or control of the liquidators*."

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[76] Section 131(2)(a).
[77] Section 131 (2)(b).
[78] *Van Staden NO and Others v Pro-Wiz Group (Pty) Ltd* 2019 (4) SA 532 (SCA) para 10.
[79] Makgoka JA, Schippers JA, Mokgohloa AJA and Rogers AJA concurring.

[140] In argument before, service on the provisional liquidators was not seen as sufficient compliance with section 131(2)(a) of the 2008 Act. I respectfully disagree. Notice also had to be given in terms of section 131(2)(b) to "*affected persons*". "*Affected persons*", as alluded to above, are defined in the 2008 Act as creditors, shareholders, employees not represented by trade unions, and trade unions.[80] As reflected earlier, they may participate as of right in the proceedings.

[141] I pause to make another point raised in the quotation from *Van Staden*, in the chronology, the stance by the provisional liquidators that it was impossible after the SCA judgment to consult and obtain the consent of the boards of the companies in winding-up as if they had ceased to exist. In law, the companies and their boards still existed, although the companies were in liquidation and under the control of the provisional liquidators. See *Imperial Bank Ltd v Barnard and Others NNO.*[81]

[142] I revert to an argument on what is meant with "*serve*" too. Section 131(6) of the 2008 Act reads (underlining added):

> "*If liquidation proceedings have already been commenced by or against the company at the time an application is made in terms of subsection (1), the application will suspend those liquidation proceedings until-*
>
> *(a) the court has adjudicated upon the application; or*
>
> *(b) the business rescue proceedings end, if the court makes the order applied for."*

[143] The argued issue was when is the application "*made*", and if this finding is linked to the application being served?

[144] The 2008 Act does not specify when an application is made. Instead, it simply states in section 132(1)(b) (underlining added):

> "*Business rescue proceedings begin when-*
>
> *(a) …*
>
> *(b) an affected person applies to the court for an order placing the company under supervision in terms of section 131(1)*".

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[80] See section 128(1)(a) of the 2008 Act.
[81] *Imperial Bank Ltd v Barnard and Others NNO* 2013 (5) SA 612 (SCA) para 14.

[145] The keywords in section 131(6) are "*at the time an application is made in terms of subsection (1), the application will suspend* …" They must be read with the words "(b)*usiness rescue proceedings begin when … an affected person applies to the court*" in section 132(1)(b) and "*apply to court*" in section 131(1).

[146] On the facts of this matter, the applications were served by e-mail, and when the matter proceeded before Wright J, the provisional liquidators already had the business rescue application. The provisional liquidators knew that the application was launched, no matter whether on a proper interpretation it is made (a) when issued, (b) when served on some affected persons (or some notified), (c) when served on all affected persons (including where relevant, notified), or (d) when argued in court. These are the four possible meanings of "*apply to court*" and "*when the application is made*", if those words were to be pasted on paper. Pasting words on paper is not the correct method to interpret legislation.

[147] Gamble J in *Blue Star Holdings (Pty) Ltd v West Coast Oyster Growers CC*[82] dealt with an application to wind up a company when an application in terms of section 131(1) of the 2008 was produced in court (and provided to the other side). The learned judge formulated the question[83] as:

> "… *whether presentation of the application for business rescue to the registrar of the court for the issue thereof did not in fact constitute the requisite application to court sufficient to interrupt the pending application for winding-up*."

[148] The learned judge considered the position in earlier compulsory motor vehicle insurance legislation with regard to an application made for condonation.[84] Such an analogy is only helpful in part, as in those cases one deals with a single defendant, a defendant that obviously must be joined in the proceedings. In a business rescue application, one potentially has complications of service on and notice to possibly a large group of people.

[149] The court in *Blue Star Holdings* reasoned as follows (underlining added):

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[82] *Blue Star Holdings (Pty) Ltd v West Coast Oyster Growers CC* 2013 (6) SA 540 (WCC)
[83] Para 17.
[84] One distinguishing factor is that in those cases, one deals with one respondent.

"*[29] Applying this functional approach to s 131(6), it is obvious that in this case the lodging of the application with the registrar for the issue thereof constituted the 'making' of the application and the commencement of proceedings to place the company under business rescue (as opposed to the commencement of business rescue per se). It was fortuitously brought to the intention of the creditor's legal representatives an hour or so later when a copy was handed to them at court. Service therefore occurred almost instantaneously and the application then fell within the purview of the Rules of Court, read with the new Act and the regulations issued thereunder.*[85]

[30] To suggest that the application for business rescue only commences when it is called some day in open court will lead to impractical and even absurd consequences. It would mean that the court seized with the winding-up application could continue with its work and notionally even grant a final order of liquidation before the business rescue application is heard.

[31] Our courts are enjoined to interpret statutes purposively.[86] *This requires the court to examine the objects and purport of an Act and to interpret legislation in conformity with the Constitution to the extent that this is reasonably possible. If one has regard to the various purposes of the new Act set out in s 7 one finds under s 7(k) that the new Act is intended to:*

'(k) provide for the efficient rescue and recovery of financially distressed companies, in a manner that balances the rights and interests of all relevant stakeholders; …'

Such a purpose is likely to be thwarted if the application for business rescue only commences when it is called in open court sometime in the uncertain future when a winding-up order could already have been granted.

[32] In the circumstances, I am satisfied that the provisions of s 131(6) of the new Act apply to this case and that the application for winding-up is therefore automatically suspended."

[150] I fully agree. This finding is in accordance with long-established principles in our law that an application is made when it is issued. In some cases, service is required for the application to take effect, but such provisions are expressly legislated for, as is the case of prescription. I only refer to the findings in a few cases:

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[85] "*10. Regulation 124, for example, prescribes the method of service on parties affected by the lodging of the business rescue application*."

[86] "*11. Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others: In re Hyundai Motor Distributors (Pty) Ltd and Others v Smit NO and Others 2001 (1) SA 545 (CC) (2000 (2) SACR 349; 2000 (10) BCLR 1079; [2000] ZACC 12) at 558 para 22 to 559 para 24.*"

[150.1] *Republikeinse Publikasies (Edms) Bpk v Afrikaanse Pers Publikasies (Edms) Bpk* at 780F-G[87] held that a party is only involved in the litigation after service on her/him, but that the proceeding commences with the issuing of the process-

> *"… Die doel van 'n dagvaarding en kennisgewing van mosie is natuurlik om die verweerder of respondent by 'n geding te betrek, en wat hom betref, word hy eers dan betrek wanneer 'n betekening van die dagvaarding of kennisgewing van mosie plaasgevind het. So word in Marine and Trade Insurance Co. Ltd. v Reddinger, 1966 (2) SA 407, deur hierdie Hof op bl. 413 verklaar:[88]*
>
> > *'Although an action is commenced when the summons is issued the defendant is not involved in litigation until service has been effected, because it is only at that stage that a formal claim is made upon him*.'"

[150.2] In *Marine and Trade,* Wessels JA[89] dealt with the Motor Vehicle Insurance Act, 29 of 1942 and the court held at 413D:

> "… *Although an action is commenced when the summons is issued the defendant is not involved in litigation until service has been effected, because it is only at that stage that a formal claim is made upon him. (Nxumalo v Minister of Justice and Others, 1961 (3) SA 663 (W))*. …";

[150.3] In *Labuschagne v Labuschagne; Labuschagne v Minister Van Justisie*[90] Wessels JA[91] came to the same conclusion (that the issue of the summons, and not the service thereof, constituted the commencement of the action);

[150.4] *Nxumalo v Minister of Justice and Others*[92] is a decision of this division by Kuper J and the learned judge dealt with the question when legal proceedings commence at 667A-668F and concluded:

> "… *Now, the commencement of the proceedings is the institution of the action. It seems to me that no other meaning can be given to those words, and assuming that a summons was served and the action later heard and the question was asked: When did this action commence?*

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[87] *Republikeinse Publikasies (Edms) Bpk v Afrikaanse Pers Publikasies (Edms) Bpk* 1972 (1) SA 773 (A) at 780F-G.
[88] Due to the quotation that follows, a translation is unnecessary, the same point is made.
[89] Beyers ACJ, Van Blerk JA, Ogilvie Thompson JA, and Rumpff JA concurring.
[90] *Labuschagne v Labuschagne; Labuschagne v Minister Van Justisie* 1967 (2) SA 575 (A) at 586D-E.
[91] Steyn CJ, Botha JA, Van Wyk JA and Potgieter JA concurring.
[92] *Nxumalo v Minister of Justice and Others*, 1961 (3) SA 663 (W).

inevitably the answer would be: The day when the summons was issued.…"

[151] I agree with the formulation of the purpose of the legislation in *Blue Star Holdings* and the finding that the application was made when it was issued. It is without doubt that in our law, an application is made when it is issued. Such an interpretation gives effect too to the purpose of the 2008 Act,[93] set out in section 7(k), to *inter alia*:

> "… *provide for the efficient rescue and recovery of financially distressed companies, in a manner that balances the rights and interests of all relevant stakeholders*".

[152] Suspending winding-up proceedings immediately gives effect to such purpose and prevents the response raised in this matter; that the horse has bolted. However, such an approach (that an application is made when issued) troubled other judges. Before I address those decisions, I need to reflect more background.

[153] Sections 6(9) and 6(10) of the 2008 Act reflect an approach that one should consider the substance of the notice, not the form:

> "*(9) If a manner of delivery of a document, record, statement or notice is prescribed in terms of this Act for any purpose-*
>
> *(a) it is sufficient if the person required to deliver such a document, record, statement or notice does so in a manner that satisfies all of the substantive requirements as prescribed; and*
>
> *(b) any deviation from the prescribed manner does not invalidate the action taken by the person delivering that document, record, statement or notice, unless the deviation-*
>
> *(i) materially reduces the probability that the intended recipient will receive the document, record, statement or notice; or*
>
> *(ii) is such as would reasonably mislead a person to whom the document, record, statement or notice is, or is to be, delivered.*
>
> *(10) If, in terms of this Act, a notice is required or permitted to be given or published to any person, it is sufficient if the notice is transmitted electronically directly to that person in a manner and form such that the*

[93] Expressly required by section 5(1) of the 2008 Act.

> *notice can conveniently be printed by the recipient within a reasonable time and at a reasonable cost*."

[154] Regulation 124 of the Companies Regulations, 2011 prescribes the manner of notice as follows (underlining added):

> "*An applicant in court proceedings who is required, in terms of either section 130(3)(b) or 131(2)(b), to notify affected persons that an application has been made to a court,*[94] *must deliver a copy of the court application, in accordance with regulation 7, to each affected person known to the applicant*."

[155] The exact detail set out in Regulation 7 is not relevant to the argument advanced by the provisional liquidators, SARS and Fidelity.

[156] The provisional liquidators relied on *Standard Bank of South Africa Limited v Gas 2 Liquids (Pty) Ltd*,[95] a decision that came to a contrary finding to the one made in *Blue Star Holdings*. It is a judgment of this division and would ordinarily be binding on me, unless clearly wrong.[96] As will appear below, I decline to follow it.

[157] In that case, Satchwell J dealt with the meaning of section 131(6) of the 2008 Act. The learned judge found that as the application was not served on the registered office of the company or on the provisional liquidator[97] (but only on the CIPC),[98] no application had been made. I respectfully disagree.

[158] The learned judge held that she was dealing with case where an obstructive debtor seeks to avoid an inevitable liquidation as part of an on-going strategy to hinder a creditor.[99] This finding, with respect, seems to have influenced her interpretation as to when the application was made. The finding by the learned judge was made in circumstances where an opposed application for final liquidation was argued, and the respondent produced the business rescue

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[94] I find it interesting that the regulation refers an application that already has been made, but cannot use it to interpret the 2008 Act. The Minister of Trade and Industry, in consultation with CIPC and the Chairperson of the Takeover Regulation Panel, made the regulations. They knew how that phrase is applied in our law.

[95] *Standard Bank of South Africa Limited v Gas 2 Liquids (Pty) Ltd* 2017 (2) SA 56 (GJ).

[96] Our authorities have not caught up with the fact of a single judiciary for the whole country, where there is no logical reason for a division-based rule or precedent. In case of conflict in judgments, I should be able to follow the decision I believe to be correct, with respect, wherever that judge sat in this country.

[97] Para 8.

[98] Para 7.

[99] Para 5.

application in court (similar to what occurred *Blue Star Holdings*). The learned judge held:[100]

> "*I am thus of the same mind (although for different reasons) as my brothers, Makgoba J, in Summer Lodge*[101] *supra and Hartzenberg AJ in Taboo Trading*[102] *supra that there must be service and notification as required in terms of section 131 of the Act before it can be said that the business rescue application has been 'made' and that the liquidation proceedings have been suspended*.

[159] The learned judge interpreted "*service*" to mean service in accordance with Rule 4(1)(a) of the Uniform Rules being service by the Sheriff and relied, in this regard, on *Engen Petroleum Ltd v Multi Waste (Pty) Ltd and Others.*[103] The "*notification*" to which she referred, must have been notice to affected parties in terms of section 131(2)(b) of the 2008 Act.

[160] I respectfully disagree. There are two matters for consideration, when is the business rescue application made for it to suspend winding-up, and whether the application is properly before a court when the business rescue application is argued on its merits. In my view, sections 131(2)(a) and 131(2)(b) of the 2008 Act, were not intended to transgress into procedural law to lay down procedural requirements for an application before it could be said that the application was made. A court hearing the matter on its merits, will apply procedural law, and make certain that service complied with the rules of court on the absent respondents, and even where necessary condone forms of service.

[161] In addition, the non-technical use of "*serve*" is evident from the omission to use "*file*" (meaning serve at court), or "*deliver*" (meaning serve on the person and filed at court) in section 131(2) of the 2008 Act. See the definition of "*deliver*" in Uniform Rule 1. It would make no sense to make "*service*" the line in the sand, and not "*filing*". In my view, the word "*serve*" in section 131(2)(a) means no more than "*to provide*", "*to deliver*", a complete copy.

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[100] Para 26.
[101] A reference to *ABSA Bank Ltd v Summer Lodge (Pty) Ltd* 2013 (5) SA 444 GNP.
[102] A reference to *Taboo Trading 232 (Pty) Ltd v Pro Wreck Scrap Metal CC and Others* 2013 (6) SA 141 KZP.
[103] *Engen Petroleum Ltd v Multi Waste (Pty) Ltd and Others* 2012 (5) SA 596 GSJ.

[162] It does not appear to me, with respect, that *ABSA Bank Ltd v Summer Lodge (Pty) Ltd*[104] relied upon by the learned judge, assists. It dealt with an argument that section 131(6) of the 2008 Act does not apply before a winding-up order has been made. *Taboo Trading 232 (Pty) Ltd v Pro Wreck Scrap Metal CC and Others*[105] also does support the finding by the learned judge:

> "*[11.3] The purpose of the notification required by s 131(2)(b) is to facilitate participation, in terms of s 131(3), by affected persons in the hearing of the business-rescue application. Creditors, being affected persons in the business-rescue application, also have a material interest in the liquidation proceedings. In my view, it is implicit in ss 131(2)(b) and 131(3) that reasonable notification be given to affected persons. Short notice rendering participation in the hearing impossible cannot be regarded as due compliance with s 131(2)(b). There is a strong policy justification for interpreting these provisions in a way which would not facilitate a dilatory or supine approach by an applicant in business-rescue proceedings. Service of a copy of the application on the Commission and notification to each affected person are not merely procedural steps. They are substantive requirements, compliance with which is an integral part of the making of an application for an order in terms of s 131(1) of the Companies Act.*
>
> *[11.4] A business-rescue application is thus only to be regarded as having been made once the application has been lodged with the registrar, has been duly issued, a copy thereof served on the Commission,*[106] *and each affected person has been properly notified of the application."*[107]

[163] The learned judge was concerned about a provisional liquidator not knowing of the application. *Republikeinse Publikasies* provides the answer, he/she will act innocently in breach of her/his duties. I think is a remote risk. The one purpose of an application such as the one before me is to suspend the winding-up process for a court to consider the business rescue application. Who would follow it secretively and not inform the provisional liquidators of the application?

[164] I agree with the reasoning that there must be substantial compliance before a hearing with section 131(2) of the 2008 Act, but with respect, this does not mean that no application has been made whilst such service and notice are

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[104] *ABSA Bank Ltd v Summer Lodge (Pty) Ltd* 2013 (5) SA 444 GNP.
[105] *Taboo Trading 232 (Pty) Ltd v Pro Wreck Scrap Metal CC and Others* 2013 (6) SA 141 KZP para 11.3 and 11.4.
[106] "*23 Section 131(2)(a) of the Companies Act.*"
[107] "*24 Section 131(2)(b), read with ss 6(9), 6(10) and 6(11) of the Companies Act, together with regs 7 and 124, and table CR3*."

being effected on all affected parties. This view accords with the judgment by Coppin J in *Kalahari Resources (Pty) Ltd v ArcelorMittal SA and Others.*[108]

[165] In my view, with respect, the application for business rescue was made on 3 December 2019. By the time that I had to adjudicate it, there was substantial compliance with section 131(2) of the 2008 Act, and I could determine the business rescue application. As such I do not have to address further *Engen Petroleum Ltd v Multi Waste (Pty) Ltd and Others* para 18,[109] a judgment by Boruchowitz J.

[166] With respect, in my view *Gas 2 Liquids* is clearly wrong, with respect, and I am not bound by it. The words used in the 2008 Act have to be interpreted. What meaning would the words used in section 131(6) in grammar and syntax convey to (a reasonable person)[110] having all contextual knowledge, considering the purpose of the legislation, namely to suspend the winding-up process? This process would have required, in part, a contextual analysis of sections 131(1), 131(2), 131(4), and 131(6), including of the words "*at the time an application is made*" and of "*the application will suspend those liquidation proceedings*" in section 131(6). Part of context is that in our law an application is made when issued, and no express conditions have been built into the legislation before the application would have the legislative effect. With respect, the wording of section 131(6) of the 2008 is clear, and leaves no room for adding conditions thereto in an interpretative exercise. In addition, the date of issuing of an application is easily and objectively determinable; it is a line in the sand that has logic to it. It leaves no room for a provisional liquidator to refuse to comply with the application until proven to him/her that formal service has taken place and that he/she has been satisfied that notice has been given to every affected party, the identity possibly only known to the provisional liquidator. A provisional liquidator is not meant to be a judge of his/her powers.

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[108] *Kalahari Resources (Pty) Ltd v ArcelorMittal SA and Others* [2012] ZAGPJHC 130 para 66.
[109] *Engen Petroleum Ltd v Multi Waste (Pty) Ltd and Others* 2012 (5) SA 596 (GSJ) para 18.
[110] I know that it is questioned if this is expressly part of our law.

Third matter for decision: Did the provisional liquidators have the power to continue to sell the assets of the six subsidiaries in issue?

[167] I have found that it was made on 3 December 2019. My finding brings into effect another inevitable finding, the provisional liquidators had no authority to continue with the sale of the assets of the six business rescue companies from that day by operation of law. This appears from section 131(6) of the 2008 Act. I have already addressed its wording.[111]

[168] The provisional liquidators took the stance that *Richter v Absa Bank Limited*[112] opened the prospect of an abuse of process, namely that "*opportunistic business rescue applications*" are brought "*only to have the effect of the section 131(6) suspension triggered, with the ulterior motive to stagnate liquidation proceedings*". In my view, the SCA did no more than to give effect to the clear wording of section 131(6) of the 2008 Act, the effect of the business rescue application is to suspend winding-up. Whether the provisional liquidators agree or not, the SCA judgment binds them (and me).

[169] Dambuza AJA[113] held in *Richter* para 18 that section 131(6) of the 2008 Act applies even where there is a final order for liquidation. Not only is the judgment correct, with respect, but the court dealt with the alleged error it made in para 16 (underlining added):

> "*[16] Counsel for Absa expressed concern that a liberal interpretation of s 131(1) may have negative results for the liquidation process. These include repetitive disruptions and uncertainty that may result from various affected parties making applications for business rescue at different times during the winding-up process, reversion of business control to the same directors who may have been the cause of the financial distress experienced by the company, and the capacity of a company under final liquidation to conduct effective business, including concluding contracts, during the implementation of the rescue plan. All these concerns are valid and appear to have been uppermost in the mind of Bam J when he considered the issues. Indeed implementation of the Act may produce some seemingly awkward results in the initial stages. However, that does not justify an unduly restrictive approach in the*

[111] "*If liquidation proceedings have already been commenced by or against the company at the time an application is made in terms of subsection (1), the application will suspend those liquidation proceedings until-*
(a) the court has adjudicated upon the application; or
(b) the business rescue proceedings end, if the court makes the order applied for."

[112] *Richter v Absa Bank Limited* 2015 (5) SA 57 (SCA).

[113] Mhlantla JA, Leach JA, Pillay JA and Fourie AJA concurring.

> *interpretation of the provisions of the Act*.[114] *The simple answer is that a court can dismiss any application for business rescue that is not genuine and bona fide or which does not establish that the benefits of a successful business rescue will be achieved*."

[170] In *GCC Engineering (Pty) Ltd and Others v Maroos and Others* 2019 (2) SA 379 (SCA)[115] Seriti JA[116] dealt with the effect of a business rescue application on the powers of provisional liquidators. The court made the point in para 11 that "*the functions of a provisional liquidator are essentially to take physical control and to manage the administration of the property and affairs of the company pending the appointment of a liquidator*" and in para 13 that "*it is not the responsibility of the provisional liquidators to wind up the company.*" The effect of the business rescue application is to suspend "*the process of continuing with the realisation of the assets of the company in liquidation*" (para 17) and stated in para 17:

> "*[17] In terms of s 131(6) of the Act, it is liquidation proceedings, not the winding-up order, that is suspended. What is suspended is the process of continuing with the realisation of the assets of the company in liquidation with the aim of ultimately distributing them to the various creditors. The winding-up order is still in place; and prior to the granting or refusal of the business rescue application, the provisional liquidators secure the assets of the company in liquidation for the benefit of the body of creditors*."

[171] I fully agree with *Richter* and *Maroos* (which are off course binding on me too) that a business rescue application suspends the process of continuing with the realisation of the assets of the company in liquidation. I add, a business rescue application suspends the process of continuing with the realisation of the assets of the company in liquidation from the moment the application is made (issued).

[172] I pause to reflect that *Maroos* made the point very clear, the overturning of the Ameer decision or not, the function of the provisional liquidators remained a holding and preservation function. They did not become final liquidators who had to wind up the companies in liquidation.

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[114] "8 Section 5 of the Act provides that the Act must be interpreted in a manner that gives effect to its purposes".
[115] *GCC Engineering (Pty) Ltd and Others v Maroos and Others* 2019 (2) SA 379 (SCA).
[116] Cachalia JA, Molemela JA, Schippers JA and Mothle AJA concurring.

Fourth matter for decision: Did the provisional liquidators ever have the power to sell the assets of the six subsidiaries in issue?

[173] In case I am wrong about when the application was made (3 December 2019) and the consequent lack of authority by the provisional liquidators to sell the group's assets by auction, I reach the same conclusion along another route, the interpretation and application of the Bhoola order.

[174] I have already referred to the holding function of provisional liquidators, as set out in *Maroos*. They are not meant to wind a company up. Any powers that they may receive must be seen in terms of a court order, in this context. In law, a liquidator (both final and provisional) may only sell the assets of a company in liquidation:

[174.1] One, if such authority is granted by a meeting of creditors.[117] In this matter, a first meeting of creditors has not been arranged as yet. Section 82(1) of the Insolvency Act, 24 of 1936 ("*the Insolvency Act*"), sets this procedure out as the usual position in sequestrations too;

[174.2] Two, before the first meeting of creditors, the liquidator may recommend and motivate to the Master that the assets be sold, and the Master may authorise such sale (subject to consent by the holder of a preferential right to the property in issue).[118] I point out that section 82(1) of the Insolvency Act also sets out a procedure to involve to a limited extent the Master in sequestrations too;

[174.3] Third, if such authority is granted by a court.[119] In this regard it is an important contextual fact that the court has a wide discretion. Section 388(2) of the 1973 Act reads (underlining added):

> "*The Court may, if satisfied that the determination of any such question or the exercise of any such power <u>will be just and beneficial</u>, accede wholly or partly to the application <u>on such terms and conditions as it may determine, or make such other order on the application as it thinks fit</u>*."

[117] Sections 386(1)(d) and 386(3)(b) of the 1973 Act.
[118] Sections 386(2A) and (2B) of the 1973 Act.
[119] Section 388(1) of the 1973 Act.

The Insolvency Act does not contain such a section to be applied in sequestrations. This distinction between the two Acts is of importance later herein when one considers the effect of an unauthorised sale.

[175] The Bhoola order inter alia provided that the boards of Holdings and Operations had to consent to the sale of assets of companies in liquidation. Paragraph 3 of the Bhoola order reads:

> "*The assets referred to in paragraphs 1 and 2 above shall be sold in consultation with and with the consent of the board of African Global Holdings (Pty) Ltd, African Global Operations (Pty) Ltd (in liquidation), and the respective boards of its subsidiaries referred to in paragraphs 1 and 2 above*."

[176] The first defence by the provisional liquidators is that they had such consent. In argument, they argued that *Plascon Evans* prevented me from deciding the matter. I disagree. Without seeking to be unkind, their version is that I must find that they had consent because they say that they had consent. The chronology clearly illustrates their version not to be a *bona fide* factual version. They could not refer me to any request for consent to the auction and its terms, who consented, when this happened, where this happened, or what the terms of the consent were given. Their attorney's spontaneous reaction when the issue of consent was raised, was not to dispute the need for consent. An averment in the supplementary affidavit delivered the day before the first hearing was:

> "*57 The fact that their consent to sell Bosasa assets was obtained is beyond doubt. However, if any doubt whatsoever existed, the fact that they consented to an order being granted in terms of paragraphs 1 and 2 of the Boohla order, puts any doubt to rest*."

[177] The Bhoola order required consent. It is finally dispositive of the matter, but on reasoning that is quite different. Had consent been given already, the order would not have required consent. For completeness sake, I also do not read the e-mail exchanges with two former directors to mean that they distanced themselves from the challenge of the consent to the auction (as if they imply that they had consented thereto). I read their response to mean no more than to say that they are no longer directors.

[178] The bald version by the provisional liquidators, with respect, can and should be rejected. See *Fakie NO v CCII Systems (Pty) Ltd* para 55-56[120] and *Wightman t/a J W Construction v Headfour (Pty) Ltd and Another* para 12-13.[121]

[179] The simple fact of the matter is that the provisional liquidators must have known that they were acting without the consent of Holdings and Operations when they arranged the auction. They ignored the Bhoola order.

[180] The second defence by the provisional liquidators is an argument that the Bhoola order, on a proper interpretation, was only meant to be in place pending the SCA judgment. The provisional liquidators argued that paragraph 3 of the Boohla order was, "*logically and obviously, never intended to operate after the outcome of the appeal and that everyone understood it as such*". Fidelity supports them herein. I disagree, with respect. It is not a finding that could be made on any principle of interpretation.

[181] The clearer the text (read in context), the less room there is to depart from the wording actually used in interpreting the words. In my view, applying *Endumeni* I cannot find that, in context, paragraph 3 meant anything but what its simple words convey. I cannot, based on a contextual interpretation, interpret paragraph 3 of the Bhoola order to mean that the provisional liquidators could arrange a sale by auction of the assets of the liquidated companies as they pleased, once the pending appeal was resolved. Neither the text nor the context could justify such an interpretation.

[182] The structure of the 1973 Act is that such control preferably should be by creditors, and in rare cases, by the Master, and in rarer cases by the Court. The structure of the 1973 Act is that the powers of liquidators are regulated. Provisional liquidators have an interim role only. In setting up controls in a court order over the powers of provisional liquidators, a court should exercise its wide discretion, in my respectful view, not in such a manner that the provisional liquidators become a law onto themselves. It is necessary to

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[120] *Fakie NO v CCII Systems (Pty) Ltd* 2006 (4) SA 326 (SCA) para 55-56.
[121] *Wightman t/a J W Construction v Headfour (Pty) Ltd and Another* 2008 (3) SA 371 (SCA) para 12-13.

control their interim actions from the perspective that the creditors are meant to exercise control over the finally appointed liquidators (with the function wind-up the company), and if creditors cannot do so, someone else should. In the case of disruptive conduct, the provisional liquidator may always approach the court again for permission to sell assets. The mere fact of a sale by public auction could be an insufficient controlling mechanism on the power to sell of a liquidator, as it would depend on factors such as the timing of the auction, the marketing of the auction, locality of the auction, and the like. In this instance, the timing of the auction is criticised by the applicants for the interdict, as well as the notice period. Their case is that it was an unnecessarily rushed affair, at a time of the year when the economy starts closing for the December holiday period and that optimum prices could not be obtained.

[183] Another contextual fact in interpreting the Bhoola order, is the background. In context the Tsoka order authorised the provisional liquidators to continue to conduct business in the name of the eleven companies in liquidation, defend proceedings and the like. Those companies were listed in the order and defined as "*the companies*". Paragraph 5 reads (underlining added):

> "*The powers in paragraphs 3 and 4 above shall be exercised by the applicants in consultation with the board(s) of directors of the specific company or companies involved in the transaction(s) and decisions.*"

[184] The Mudau order, to some degree, overlapped with the Tsoka order. The eleven companies in liquidation were listed in the order and were again defined as "*the companies*". Paragraph 5 (again) reads (underlining added):

> "*The powers in paragraphs 3 and 4 above shall be exercised by the applicants in consultation with the board(s) of directors of the specific company or companies involved in the transaction(s) and decisions*."

[185] The Mudau order was not a final order. Paragraph 6 reads (underlining added):

> "*The orders in paragraphs 1 to 5 above shall, by agreement between the applicants on the one hand and African Global Holdings (Pty) Ltd and the directors of the companies listed in paragraphs 4.1 to 4.11, above on the other, and solely to facilitate urgent interim relief, operate as interim orders with immediate effect, and shall remain operative only pending final outcome of this application in the ordinary course. It being noted that African Global Holdings (Pty) Ltd and the board of directors of the companies referred to in 2. above*

intend to apply for leave to intervene in and oppose the relief detailed in paragraphs 1 to 4 above …"

[186] Paragraph 3 of the Bhoola order then reads (underlining added):

"*The assets referred to in paragraphs 1 and 2 above shall be sold in consultation with and with the consent of the board of African Global Holdings (Pty) Ltd, African Global Operations (Pty) Ltd (in liquidation), and the respective boards of its subsidiaries referred to in paragraphs 1 and 2 above*."

[187] The progression from 2 April 2019 (the Tsoka order) and from 14 May 2019 (the Mudau order) until 28 October 2019 (the Boohla order) must not be lost sight of. The first two orders provided for consultation in the exercise of the powers, the last one (with irreversible consequences) for consent to the public auction. The earlier powers were in effect holding powers, the last, a disposition power. A control in a court order that a provisional liquidator may sell an asset with the consent of a board, seems to me to be a proper mechanism to control provisional liquidators. It is also material that the paragraph in the Mudau order that would bring involvement of the boards to an end upon finalisation of the appeal against the Ameer decision, was not repeated in the Bhoola order.

[188] A further contextual fact is that Boohla AJ, and every lawyer involved in the process, would have known that:

[188.1] The control of a company in liquidation no longer vests in the board of directors of that company.[122] (I can see no reason why such boards, although no longer in control of the companies in liquidation, would not be ideally placed to consent to the sale of assets in the absence of controls by the creditors. They are best placed, as they know the companies and their assets);

[188.2] Bhoola AJ had the power to impose conditions to the extension of the provisional liquidators' powers;[123] and

[122] See section 353(2) of the 1973 Act.
[123] See Section 388(2) of the 1973 Act.

[188.3] In law, despite any appeal against the Ameer judgment, the companies remained in liquidation pending the appeal. In this regard *Richter* para 10 made a point (footnote omitted):

> "*The reasoning of the court a quo was motivated by an erroneous premise that upon liquidation Bloempro ceased to exist, that it was 'stripped of its original legal status'. The correct position is that upon the final order of liquidation being granted the company continues to exist, but control of its affairs is transferred from the directors to the liquidator who exercises his or her authority on behalf of the company. As to when liquidation commences, in terms of s 348 of the Companies Act 61 of 1973 (the 1973 Act) liquidation of a company by the court is deemed to commence on presentation to the court of the application for the winding-up and continues until the affairs of the company have been finally wound up and the master's certificate to that effect is published in the Government Gazette, thus dissolving the company. Similarly s 82 of the Act provides for existence of a company until deregistered by the Commission*.

[189] Taking it all into account, I am not convinced that the context, being the facts known to the parties, the purpose of the order read as a whole, the legislative context of control over provisional liquidators, the formality of a court order, the progression from consultation to consent in the court orders, would justify in effect a change to textual meaning of the order, read in that context. On trite interpretation principles, I cannot take into account in interpretation, what the provisional liquidators say were their subjective intent.

[190] In any event, paragraphs 37 to 39 of the founding affidavit that served before Bhoola AJ made no mention of powers that would become unlimited after the SCA appeal. Those paragraphs set out the purpose of the application, to obtain the power to sell assets, whilst acknowledging, *inter alia*, the interests of Holdings "*in the outcome of the sale of the assets*".

[191] Any outcome as sought by the provisional liquidators would have required that a case be made out for such a tacit term in the court order, a process distinct from interpretation. As this was not argued, I need not consider the limits to tacit court orders (which could be a problematic concept.)

[192] The third defence raised by the provisional liquidators is that a condition in the Bhoola order could not be fulfilled once the SCA overruled the Ameer Order (bold not added):

> "*68 However, on 22 November 2019 as aforesaid, the SCA handed down its judgment in respect of the appeal against the Ameer application, which judgment:*
> *68.1 …*
> *68.4* ***had the effect of forthwith removing each individual that was appointed as a director of Operations and the subsidiaries from office by operation of law***."

[193] Put differently, they argued:

> "*75 As such and in law, the subject companies did not have any directors as at the date upon which the Boohla order was granted and the conditions imposed pursuant to paragraph 3 of the Boohla order was a non-event. It was, as such, impossible to fulfil from day one as not a single one of the subject companies had any directors with effect from 14 February 2019*."

[194] The point has been raised belatedly, and does not provide an answer why they pressed ahead with the auction sale despite the obligation placed on them in the Bhoola order to get consent. With respect, the point is without merit.

[194.1] As was held in *Richter* para 10,[124] the companies in liquidation (and thus their boards) continued to exist after liquidation, only control is removed from the board. The SCA judgment did not remove them from office, they had lost their control months earlier. Thus the fulfilment of any pure condition was possible. I disagree with the argument in the provisional liquidators heads of argument in the auction application:

> "*197 As such and in law, the subject companies did not have any directors as at the date upon which the Boohla order was granted and the conditions imposed pursuant to paragraph 3 of the Boohla order was a legal nonsense and non-event*."

[194.2] In any event, the alleged condition (if it is a condition at all) is in fact a mixed condition, in part dependent on the will of the provisional liquidators. The provisional liquidators had to seek the consent. By failing to seek the consent, they breached an obligation to seek consent. In this sense, the condition is potestative and non-fulfilment due to the breach of their obligation is not an excuse for non-

[124] See too *Secretary for Customs and Excise v Millman, NO* 1975 (3) SA 544 (A) para 552H.

compliance with the Bhoola order. Any condition is deemed to have been fulfilled. See *Scott and Another v Poupard and Another* at 578G-579H,[125] *MV Snow Crystal Transnet Ltd t/a National Ports Authority v Owner of MV Snow Crystal* 2008 (4) SA 111 (SCA) para 28,[126] and *Du Plessis NO and Another v Goldco Motor & Cycle Supplies (Pty) Ltd* para 22-29.[127]

[195] I do not believe, as contended for by the provisional liquidators, that my interpretation nullifies any court order, is not in accordance with a principle that a court order stands until set aside. My view is that my judgment fully complies with both principles.

[196] The extremely disquieting aspect of this matter is that the provisional liquidators knew that they had not sought consent to the auction or the terms of the auction. They were challenged and they pressed ahead as if they were a law onto themselves. If they had *bona fide* difficulties with the wording of the court order, they should have approached a court to vary the order, to give them the power to sell on any terms they may decide to use. I doubt that any court would have given them carte blanche to do as they please. It is difficult not to view their conduct as contemptuous of a court order.

[197] In this regard, I fully agree with the submission in the heads of argument of the provisional liquidators, relying on *Eke v Parsons* para 64[128] that "*disobedience of a court order constitutes a violation of the Constitution."*

[198] On both grounds, the application of the 2008 Act regarding the effect of a business rescue application being made, and the interpretation of the Bhoola order, the provisional liquidators had no authority to proceed with sale of the assets of the group on 4 December 2019 and thereafter.

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[125] *Scott and Another v Poupard and Another* 1971 (2) SA 373 (A) at 578G-579H.
[126] *MV Snow Crystal Transnet Ltd t/a National Ports Authority v Owner of MV Snow Crystal* 2008 (4) SA 111 (SCA) para 28.
[127] *Du Plessis NO and Another v Goldco Motor & Cycle Supplies (Pty) Ltd* 2009 (6) SA 617 (SCA) para 22-29.
[128] *Eke v Parsons* 2016 (3) SA 37 (CC) para 64.

Fifth matter for decision: The effect of the unauthorised auction

[199] Having found that the sales of the assets of business rescue companies were unauthorised and indeed unlawful on two alternate grounds, the next hard question is what the effect of the sales by the provisional liquidators was. These findings would impact on the business rescue application.

[200] Fidelity requested me to use my powers under section 388 of the 1973 Act to order that despite the provisional liquidators' lack of authority to sell the assets bought by Fidelity, to validate all sales on the basis that it would be "*just and beneficial*" to do so. I cannot do so. They ignored the impact of section 131(6) of the 2008 Act on an untenable version. If there was some room for legal sophistry for ignoring the business rescue application,[129] none exists with regard to the deliberate contravention of the Bhoola order. Their conduct to proceed with the sale was unlawful. I am not prepared to condone their unlawful conduct, even if I could. The illegality would taint whatever I could do.

[201] This creates a huge practical problem. First principles in law is that the *rei vindicatio* of the owner trumps other later rights of *bona fide* possessors (*ubi rem meam invenio ibi vindico*), and that no one could transfer more rights than what she or he has (*nemo dat quod non habet*).

[202] There is one possible way forward. Section 339 of the 1973 Act reads (underlining added):

> "*In the winding-up of a company unable to pay its debts the provisions of the law relating to insolvency shall, in so far as they are applicable, be applied mutatis mutandis in respect of any matter not specially provided for by this Act*."

[203] One interpretation of the section is that it excludes application where the 1973 Act provides expressly for a situation. For instance, section 20 of the Insolvency Act (*inter alia* that the effect of the sequestration of the estate of an insolvent is to divest the insolvent of his/her estate and to vest it in first the Master, and, upon the appointment of a trustee, in the trustee), does not apply

[129] It is not alleged that they received such advice and from who they received such advice.

to the winding up of companies. See section 361 of the 1973 Act read with *Secretary for Customs and Excise v Millman*, NO at 502G.[130]

[204] On the other hand, the phrase "*mutatis mutandis*" read with "***in respect of any matter not specially provided for by this Act***" could allow for changes beyond mere changes of nomenclature (such as to swop "*insolvent*" for "*company*") in the application of the Insolvency Act to unchartered waters in the winding up of a company under the 1973 Act.

[205] The 1973 Act does not specifically provide for (to use the terminology in section 339) what would happen if a liquidator sells assets of the company in liquidation without authorisation. One could formulate different scenarios:

[205.1] The liquidator may ignore the directions given to him by a meeting of creditors, the Master or the court. Those are three different acts of non-compliance, dependent on different facts. In this matter the second scenario is at play. I ask later herein if it matters;

[205.2] The liquidator may sell the assets before or after a meeting of creditors. In this matter the second scenario is at play. I ask later herein if it matters;

[205.3] The lack of authority of the liquidator may be the result of the operation of law (for instance the effect of an application for business rescue being made on the winding-up process) or simply because of a lack of authority. I ask later herein if it matters; and

[205.4] The liquidator may be finally or provisionally appointed. I ask later herein if it matters.

[206] Only some of these scenarios are expressly dealt with in the Insolvency Act, in this case, section 82(8) reads (underlining added):

> "*If any person other than a person mentioned in subsection (7)*[131] *<u>has purchased in good faith from an insolvent estate any property which was sold to him in contravention of this section</u>, or if any person in good faith and for*

[130] *Secretary for Customs and Excise v Millman, NO* 1975 (3) SA 544 (A) at 502G.

[131] It is not relevant here:

> "*(7) The trustee or an auctioneer employed to sell property of the estate in question, or the trustee's or the auctioneer's spouse, partner, employer, employee or agent shall not acquire any property of the estate unless the acquisition is confirmed by an order of the court*."

> *value acquired from a person mentioned in subsection (7) any property which the last mentioned person acquired from an insolvent estate in contravention of that subsection, the purchase or other acquisition shall nevertheless be valid, but the person who sold or otherwise disposed of the property shall be liable to make good to the estate twice the amount of the loss which the estate may have sustained as a result of the dealing with the property in contravention of this section*."

[207] "*In contravention of this section*", and relevant to the present case, refers to the following permissible sales by a trustee in terms of insolvency law:

[207.1] A trustee who sells assets as he/she "*is authorized to do so at the second meeting of the creditors of that estate, … in such manner and upon such conditions as the creditors may direct*";[132]

[207.2] A trustee who sells assets, but where "*the creditors have not prior to the final closing of the second meeting of creditors of that estate given any directions the trustee*". In such a case he/she "*shall sell the property by public auction or public tender*", "*after notice in the Gazette*" and "*after such other notices as the Master may direct and in the absence of directions from creditors as to the conditions of sale, upon such conditions as the Master may direct*". [133]

[208] There are other limitations in the section on the powers of the trustee to sell that could be contravened regarding tenders,[134] rights acquired from the state, or the sale of certain prohibited items.[135]These are not relevant here.

[209] Section 82(8) only applies to one scenario, a sale in terms of insolvency law after the second meeting of creditors "*in such manner and upon such conditions as the creditors may direct*". No mention is made of prior sales, contravention of legislation, contravention of court orders, and indeed sales by a provisional trustee. This is a sale by the finally appointed trustee after the second meeting of creditors.

[210] The question then is if section 339 of the 1973 Act should be applied in such a way that section 82(8) is interpreted only to apply in winding-up of companies

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[132] Section 82(1).
[133] Section 82(1).
[134] Sections 82(2) and (5).
[135] Section 82(6).

to sales by the final liquidator after the second meeting of creditors, and leave all other purchasers to deal with the effect of the Common Law.

[211] In *Chater Developments (Pty) Ltd (In Liquidation) v Waterkloof Marina Estates (Pty) Ltd and Another*[136] an immovable property of a company was sold by a final liquidator after the second meeting of creditors. He complied with section 82(8) as set out in the previous paragraph, but did not obtain a resolution to authorise a sale in terms of section 386(3)(a) of the 1973 Act read with section 386(4)(h). Theron JA[137] held at para 17:

> "*[17] The provisions of s 387(4) do not detract from the applicability of s 82(8) of the Insolvency Act. The right in s 82(8) is a substantive right that offers protection to an innocent third party such as the first respondent, from the consequences of an unenforceable transaction. It validates a purchase in good faith. By contrast, the provisions of s 387(4) provide for a situation where the relief sought is dependent upon the exercise of a discretion by the court. Waterkloof Marina should not be obliged to rely on a discretionary remedy in circumstances where it is able to assert a valid purchase by virtue of the provisions of s 82(8) of the Insolvency Act. It was common cause that Chater Developments was a company unable to pay its debts as envisaged in s 339. There is no provision in the 1973 Companies Act that validates a purchase in good faith from a liquidator who is not authorised to sell. Such a situation is not 'specifically provided for in this Act' and it follows that s 82(8) is applicable*."

[212] This reasoning is binding on me. It expands the application of section 82(8) in winding-up situations to beyond the strict wording of section 82(8) where mere terminology is swapped around. With respect, this interpretation complies with the principles set out in *Endumeni*.

[213] The purpose of section 82(8) is to protect *bona fide* purchasers of assets against harsh consequences of invalidity in terms of the Common Law. Winding-up sales, unlike sales in execution, are special types of sales, where there is room to consider the position of the innocent purchaser. I can see no reason why the line in the sand should be the second meeting of creditors. It seemed to me to be irrelevant if the innocent purchaser faces an invalid sale as:

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[136] *Chater Developments (Pty) Ltd (In Liquidation) v Waterkloof Marina Estates (Pty) Ltd and Another* 2015 (5) SA 138 (SCA).
[137] Navsa ADP, Wallis JA, Mbha JA and Dambuza AJA concurring.

[213.1] A final liquidator or a provisional liquidator went rogue; or

[213.2] A liquidator made a *bona fide* error in interpreting the consent by creditors, or in interpreting the consent by the Master, or in interpreting the consent by a court; or

[213.3] A liquidator exceeded his powers and the innocent purchaser faces an invalid sale as liquidation proceedings were suspended due to section 131(6) of the 2008 Act.

[214] The applicants for an interdict sought to rely on *Oertel and Others NNO v Director of Local Government and Others.*[138] It does not assist, with respect. In that matter, the contract in issue contravened an ordinance, and as such, section 82(8) of the Insolvency Act could not provide relief to the innocent purchaser of land. It is in that sense that remark at 508F is made that relief under section 82(8) "*obviously presuppose that the sale of estate property is not unlawful or prohibited*".

[215] I can see no reason, once protection to one *bona fide* purchaser is given (and the Common Law is thus overruled), not to use section 339 of the 1973 Act and interpret section 82(8) to cover a wide range of unauthorised sales in the winding-up of companies. It seems to me to have, as a purpose, to be a tool to achieve justice. I can see no reason for the anomalies that would flow from a restrictive interpretation of "*mutatis mutandis*". Such extended classes of *bona fide* purchasers are protected due to the right to equal protection and benefit of the law (section 9(1) of the Constitution), in the context that I have addressed, and in the purpose of such protection

[216] I accordingly find that properly interpreted, section 82(8) of the Insolvency Act also applies to a sale by a provisional liquidator where such a power is sought to be exercised in terms of a court order, and the provisional liquidator fails to adhere to the terms of the court order, or fails to give effect to the effect of the business rescue application on the winding-up process.

[217] In my understanding, the auction took place in December 2019, the purchase price in each case has been paid, and delivery of movable assets has taken

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[138] *Oertel and Others NNO v Director of Local Government and Others* 1981 (4) SA 491 (T).

place in each case. I do not know which of the purchasers of movable assets purchased the assets *bona fide.* That aspect will have to be dealt with on a case by case basis.

[218] In the circumstances, I have to make no finding on applying section 388 of the 1973 Act to validate *bona fide* purchases on the basis that it would be "*just and beneficial*" to do so (despite my view that a blanket ruling to ignore unlawful conduct by the provisional liquidators would not be appropriate).

[219] The case before me dealt with one aspect of section 82(8) of the Insolvency Act, its application on *bona fide* purchasers. The other part of the section, the liability of the trustee for unauthorised sales, did not serve before me. That second aspect may have been decided already in favour of the provisional liquidators. See *Swart v Starbuck and Others,*[139] para 26-27 of the judgment by Khampepe J[140] is of some importance.

> "*[26] The High Court and the Supreme Court of Appeal judgments regarding this claim are well reasoned and cannot be faulted. It cannot be put more plainly: Mr Swart's claim was based on s 82(1) read with s 82(8) of the Act. The application of this section depends on, among other things, the absence of a valid authorisation by the Master for the sale of the properties. The Master authorised the sale of the properties in terms of s 80bis. This authorisation has legally valid consequences until it is set aside. This authorisation has not been set aside. Section 82 can find no application in the present matter.*
>
> *[27] In the circumstances, there is no damages claim to be proved in terms of s 82(8) of the Act. In any event, even if there were a damages claim to be proved under any other branch of the law, the conclusion is inescapable that Mr Swart has not been able to prove any damages.* …"

[220] The matter before me is not if the provisional liquidators are liable for damages, but if by applying section 82(8) of the Insolvency Act in a winding-up, only some *bona fide* purchasers should be protected, or all of them.

[221] This leaves the rights of *bona fide* purchasers of immovable property. Transfer of the immovable assets has been interdicted. It does seem to me that section 82(8) of the Insolvency Act had a shield in mind for *bona fide* purchasers, not a sword. It also seems to me that where transfer has not yet taken place, a

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[139] *Swart v Starbuck and Others* 2017 (5) SA 370 (CC) para 26-27.
[140] Mogoeng CJ, Nkabinde ADCJ, Cameron J, Froneman J, Madlanga J, Mhlantla J and Pretorius AJ concurring.

purchaser cannot contend that she/he/it "*has purchased*" the property is thus entitled to protection under section 82(8). I interpret "*has purchased*" in section 82(8) to mean that delivery also had to have taken place.

[222] In as far as Fidelity sought to rely on section 82(8) to demand transfer, I find that they are no longer *bona fide* purchasers and have no cause of action to demand transfer. I am aware of the decision in *Naude v Serfontein, NO, en 'n Ander*[141] where Klopper JP held that a purchaser need not have been in obtaining transfer for section 82(8) to apply, but not only are the facts distinguishable, but the decision is also not binding on me.

[223] Fidelity also relied on *Legator McKenna Inc and Another v Shea and Others* 2010 (1) SA 35 (SCA),[142] but that decision does not assist were (a) transfer has not taken place, and (b) the real ("saaklike") agreement fails for authority.

[224] I therefore do not apply section 82(8) of the Insolvency Act with regard to purchased, but not transferred, immovable property. Under those circumstances too, section 388 of the 1973 Act remains, in my view, inapplicable where the provisional liquidators deliberately acted unlawfully.

Sixth matter for decision: Bad faith/abusive proceedings

[225] In considering the many averments of bad faith made by and on behalf of the provisional liquidators, I point out that I have already found that they acted unlawfully in proceeding with the sales.

[226] It is true, in limited instances, a court may regulate its proceedings to avoid an abuse. This does not mean that a judge sits in judgment of motive and on a case by case basis decides to hear a case, or not. In any event, I am unpersuaded that the applications before me, were an abuse. I do dismiss the business rescue application, but as will appear below, it was perfectly arguable in accordance with the test to be applied. Had I found that it was inarguable, and thus brought in bad faith, I would have dismissed it. The SCA has ruled what the remedy is of an application for business recue brought in bad faith, a court must dismiss an application without merit. See *Richter* para 16:

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[141] *Naude v Serfontein, NO, en 'n Ander* 1978 (1) SA 633 (O).
[142] *Legator McKenna Inc and Another v Shea and Others* 2010 (1) SA 35 (SCA).

> "… *The simple answer is that a court can dismiss any application for business rescue that is not genuine and bona fide or which does not establish that the benefits of a successful business rescue will be achieved*."

[227] The provisional liquidators relied on *Van Staden*.[143] In that case Wallis JA[144] held that the provisional liquidators were entitled to oppose an application for business rescue on the basis that it was an abuse of the process of court. In *Van Staden*, two days before the hearing, the applicant delivered a notice of withdrawal of the application and tendered to pay the costs of the intervening creditor, SARS, but did not tender to pay the provisional liquidators' costs. The court in *Van Staden* agreed with the submission that the business rescue application was brought for reasons ulterior to any genuine belief that the close corporation in issue would benefit from being placed under business rescue, The court held that penalising costs was appropriate in that the withdrawn application ought to have been dismissed as it had no merit at all and clearly was brought for ulterior motives:

> *"[21] It is apparent that Pro-Wiz could never have thought that a viable business rescue could be instituted in relation to Oljaco. Its failure to engage with the liquidators or the principal creditor on that subject prior to launching its application speaks volumes in that regard. The timing of the application suggested that its true purpose was to stultify the interrogation of Mr Smith. The failure to deal with any of the issues raised by the liquidators and Sars in this regard indicates that no response was possible. Finally, the withdrawal at the very last minute, without explanation, when confronted with the reality of having to argue the application in court, conveyed the impression of an absence of any bona fide belief in the merits of the case and a lack of intention genuinely to pursue it. I conclude that it was brought to provide a reason for avoiding Mr Smith's interrogation and with a view to delaying the liquidators in their enquiries as to the squirrelling away of assets.*
>
> *[22] All of that constituted an abuse of the process of the court and an abuse of the business rescue procedure. It has repeatedly been stressed that business rescue exists for the sake of rehabilitating companies that have fallen on hard times but are capable of being restored to profitability or, if that is impossible, to be employed where it will lead to creditors receiving an enhanced dividend. Its use to delay a winding-up, or to afford an opportunity to those who were behind its business operations not to account for their stewardship, should not be permitted. When a court is confronted with a case where it is satisfied*

[143] Supra, *Van Staden NO and Others v Pro-Wiz Group (Pty) Ltd* 2019 (4) SA 532 (SCA).
[144] Makgoka JA, Schippers JA, Mokgohloa AJA and Rogers AJA concurring.

that the purpose behind a business rescue application was not to achieve either of these goals, a punitive costs order is appropriate."

[228] On those facts, I fully agree. They are not the facts in this matter. The bad faith case argued by the provisional liquidators is largely based on inferences based on the timing of the business rescue application. The chronology reflects exasperation at provisional liquidators proceeding as if they were not bound by the Bhoola order. The business rescue application may have been rushed when new lawyers were appointed to bring it before the auction started. That fact on its own does not make the application *mala fide*. It could have been a supplementary purpose with a completely *bona fide* application. Similarly, if the application for business rescue is dismissed for lack of merit on the viability of rescuing the business rescue companies, it also does not mean that the application was brought in bad faith. It is an assessment that I must make on the facts of the case. As I read *Van Staden*, it only reflects that upon dismissal of the application, an application brought in bad faith will result in penalising costs. I do not read that judgment as providing the provisional liquidators with a bad faith ground for a dismissal of the application, distinct from the merits of the business rescue application. A distinguishing fact is the unlawful conduct by the provisional liquidators in this matter, as opposed to *Van Staden*.

Seventh matter for decision: Merits of the business rescue application

[229] In the matter before me, there was in the end, substantial compliance with the service of the business rescue application when I was asked to make a finding on the merits thereof.

[230] In dealing with a business rescue application, one needs to start with what is set out as a definition of "*business rescue*" in section 128(1)(b) of the 2008 Act (underlining added):

> "*(1) In this Chapter-*
>
> *…*
>
> *(b) 'business rescue' means proceedings to facilitate the rehabilitation of a company that is financially distressed by providing for-*
>
> *(i) the temporary supervision of the company, and of the management of its affairs, business and property;*

(ii) a temporary moratorium on the rights of claimants against the company or in respect of property in its possession; and

(iii) the development and implementation, if approved, of a plan to rescue the company by restructuring its affairs, business, property, debt and other liabilities, and equity in a manner that maximises the likelihood of the company continuing in existence on a solvent basis or, if it is not possible for the company to so continue in existence, results in a better return for the company's creditors or shareholders than would result from the immediate liquidation of the company".

[231] This definition is intended to give effect to section 7(k) of the 2008 Act:

"*The purposes of this Act are to-*

(a) ...

(k) provide for the efficient rescue and recovery of financially distressed companies, in a manner that balances the rights and interests of all relevant stakeholders; and

(l) … "

[232] The purpose of business rescue proceedings is therefore "*the rescue and recovery of financially distressed companies*", or put differently in the same act, "*the rehabilitation of a company that is financially distressed*". The rights and interests of all stakeholders need to be balanced. As already pointed out, in the same Act, the defined term is one of "*affected person*" and not "*stakeholder*". A creditor is defined in section 128 to be an affected person. It is no doubt a stakeholder too.

[233] When an application is made to court in terms of section 131 of the 2008 Act, to place a company under supervision and to commence business rescue proceedings, the powers of a court are set out in section 131(4) (underlining added:

"*After considering an application in terms of subsection (1), the court may-*

(a) make an order placing the company under supervision and commencing business rescue proceedings, if the court is satisfied that-

(i) the company is financially distressed;

(ii) the company has failed to pay over any amount in terms of an obligation under or in terms of a public regulation,

or contract, with respect to employment-related matters; or

(iii) it is otherwise just and equitable to do so for financial reasons,

and there is a reasonable prospect for rescuing the company; or

(b) dismissing the application, together with any further necessary and appropriate order, including an order placing the company under liquidation."

[234] It was common cause that all six business rescue companies are financially distressed. On one reading, in exercising the "*discretion*" section 131(4) gives me, I also need to be satisfied that (an onus must be met) that "*there is a reasonable prospect for rescuing the company*". I need to address two issues pertaining to such a reading of the section:

[234.1] *Oakdene Square Properties (Pty) Ltd and Others v Farm Bothasfontein (Kyalami) (Pty) Ltd and Others* para 21[145] by Brand JA[146] held that my discretion is not a discretion in the strict sense (I agree):

> "…*In a case such as this, the court's discretion is bound up with the question whether there is a reasonable prospect for rescuing the company. The other pertinent requirement in s 131(4), namely, that the company must be financially distressed, seems to turn on a question of fact. As to whether there is a reasonable prospect of rescuing the company, it can hardly be said, in my view, that it involves a range of choices that the court can legitimately make; of which none can be described as wrong. On the contrary, as I see it, the answer to the question whether there is such a reasonable prospect can only be 'yes' or 'no'. These answers cannot both be right*. …"

[234.2] Brand JA further held in *Oakdene Square Properties* in para 23 to 28 found that even "… w*here it is clear from the outset that the company can never be saved from immediate liquidation and that the only hope is for a better return than that which would result from liquidation*", the requirements of section 131(4) are still met if the "*a better return for the creditors or shareholders of the company than would result from immediate liquidation*" could be achieved. This

[145] *Oakdene Square Properties (Pty) Ltd and Others v Farm Bothasfontein (Kyalami) (Pty) Ltd and Others* 2013 (4) SA 539 (SCA) para 18.
[146] Cachalia JA, Van der Merwe AJA, Zondi AJA and Meyer AJA concurring.

finding is binding on me. It reads into section 131(4) a further alternate condition not reflected in the words of the section.

[235] In my view, the balance that I have to strike between the rights and interests of all relevant stakeholders coincides with my finding that the business rescue companies are not viable companies in respect of which a case has been made out that there is a reasonable prospect of rescuing them:

[235.1] The liquidation of the companies took place on during early 2019. The directors in the context of the events leading up to the resolutions to wind-up, saw no way forward;

[235.2] The group's existing business model of doing business with the state and state-owned entities, has come to a stop;

[235.3] There is no indication of any resumption of the past business model;

[235.4] Business stopped a long time ago, and the key employees of the business rescue companies probably have found alternate employment;

[235.5] Any new business would require employing personnel;

[235.6] The movable assets of the business rescue companies have been sold and are unlikely to be recovered. This would require funding in a distressed environment, a capital injection, or the availability of credit finance, or own funding;

[235.7] Any venturing into the private sector would be in effect a start-up business, with a complete inability by anyone to predict likely success. Such ventures would have to commence from a discredited basis (rightly or wrongly), making success even less likely;

[235.8] In the normal course, it takes time to establish new businesses, more so with the reputational risk suffered by the group. The business operations would need funding. The longer it takes to establish the new businesses, the greater the need;

[235.9] At least ABSA and FNB seem unlikely to get involved in funding. There is the additional difficulty that the business rescue companies

do not have bank accounts and will have to use an account of Sun Worx. Not only does this exclude them from receiving government tenders (should the bar on doing business with them ever be lifted), but it is a structure with business risk;

[235.10] The ability to develop a business rescue plan hampered by the absence of reliable accounting records. On the common cause facts, the accounting records of the group are unreliable and have been unreliable at least for some years. The business rescue applicants had to rely on them;

[235.11] There is proof of wrongdoing in the accounting records, according to the reports by auditing firms;

[235.12] SARS has a substantial claim against the group. The business rescue companies are unable to settle that debt. SARS is of the view that it is the single largest third-party creditor of the group of companies. It is of the view that the group is indebted to it in the sum of R850 Million, and about R312 Million in respect of the six business rescue companies[147] a sum that it is not final, and could be much more due to further assessment, understatement penalties and interest. These are evolving numbers, in formal assessments the figures are in round figures R600 million and R62 Million. The amounts and additional amounts may still be challenged, but it is the closest to working figure that is available. The available funding may have to be used to pay SARS. SARS contends, with merit, that the application is doomed to fail without a plan to pay SARS. It is not a minimal amount;

[235.13] The only creditor before me, SARS, does not want to see a business rescue process allegedly to increase its return. It is unlikely to vote in favour of a business rescue plan; and

[147] In round figures: Operations R184 Million, Properties R27 Million, Technology Systems R31 Million, Leading Prospect R19 Million, Youth Development Centres R45 Million, and Security Intelligence R6 Million.

[235.14] In any event, ultimately, as was held in *Oakdene Square Properties* para 39, merely to have more cash in the bank, is not a proper business rescue purpose.

[236] The provisional liquidators put it as follows:

> "… *the Rescue Companies have no assets, have no employees, have no contracts to service nor any monetizable or commercialisable concerns, do not have transactional bank accounts and that they have entirely been divested of their substratum*".

[237] The stance by the applicants (and perhaps somewhat crudely put) is that the business rescue practitioner must devise a plan. There is no such plan as there is no such plan. My overall impression was that no one truly could argue that new business on a balance of probabilities would be established and would be successful. They needed, as a minimum, to establish a prospect based on reasonable factual grounds, and not speculation, as was held in *Oakdene Square Properties* para 29-30, and could not do so.

[238] Under these circumstances, I make no finding based on the alleged fraudulent activity in Consilium Business Consultants (Pty) Ltd, alleged fraudulent activity in Miotto Trading and Advisory Holdings (Pty) Ltd, alleged fraudulent activity in Supply Chain Management, piercing of the corporate veil (of the business rescue companies) as a result, the effect of section 22 of the 2008 Act, or that such evidence tendered was admissible before me.

[239] This is not the end of the argument, as based on *Oakdene Square Properties,* the requirements of section 131(4) are still met if "*a better return for the creditors or shareholders of the company than would result from immediate liquidation*" could be achieved.

[240] The business rescue applicants approached the matter largely with the second purpose in mind, a better winding-up. In my reading of the cases, this is a difficult hurdle. It seems to me that the Constitutional Court (see below) is of the view that the companies to be rescued are at least primarily, those where there is "*a reasonable prospect for rescuing the company",* the same requirement contained in evaluating a resolution under section 129(1) of the

2008 Act,[148] as addressed in *Panamo Properties (Pty) Ltd and Another v Nel N.O. and Others* para 9,[149] a judgment by Wallis JA.[150] See too the objection to such a resolution on the basis that there is no reasonable prospect for rescuing the company, as set out in section 130(1)(a).[151]

[241] The Constitutional Court case that I refer to is *Diener NO v Minister of Justice and Correctional Services and Others* para 54,[152] where Khampepe J[153] held (underlining added):

> "*The purpose of business rescue is to assist a financially distressed company with paying its debts, avoiding insolvency, and maximising the benefit to stakeholders upon liquidation (if inevitable). It is stated expressly in section 7(k) of the Companies Act that one of the purposes of the Act is to "provide for the efficient rescue and recovery of financially distressed companies, in a manner that balances the rights and interests of all relevant stakeholders". It must be emphasised that this must be done while balancing the rights of all affected persons, including creditors, employees, and shareholders.[154] The primary goal of business rescue is to avoid liquidation and its attendant negative consequences on stakeholders.[155] In addition, a secondary purpose is to achieve a*

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[148] "***129 Company resolution to begin business rescue proceedings***
(1) Subject to subsection (2) (a), the board of a company may resolve that the company voluntarily begin business rescue proceedings and place the company under supervision, if the board has reasonable grounds to believe that-
(a) the company is financially distressed; and
(b) there appears to be a reasonable prospect of rescuing the company."

[149] *Panamo Properties (Pty) Ltd and Another v Nel N.O. and Others* 2015 (5) SA 63 (SCA) para 9.

[150] Navsa ADP, Majiedt and Zondi JJA and Dambuza AJA concurring.

[151] "***130 Objections to company resolution***
(1) Subject to subsection (2), at any time after the adoption of a resolution in terms of section 129, until the adoption of a business rescue plan in terms of section 152, an affected person may apply to a court for an order-
(a) setting aside the resolution, on the grounds that-
(i) there is no reasonable basis for believing that the company is financially distressed;
(ii) there is no reasonable prospect for rescuing the company; or
(iii) the company has failed to satisfy the procedural requirements set out in section 129".

[152] *Diener NO v Minister of Justice and Correctional Services and Others* 2019 (4) SA 374 (CC) para 54.

[153] Mogoeng CJ, Basson AJ, Cameron J, Dlodlo AJ, Froneman J, Goliath AJ, Mhlantla J, Petse AJ and Theron J concurring.

[154] "*[37] Sections 7(k) and 128(1)(h) of the Companies Act above n 1. See also KJ Foods id at para 68; Panamo Properties above n 21 at para 1; Cloete Murray N.O. v Firstrand Bank Ltd t/a Wesbank [2015] ZASCA 39; 2015 (3) SA 438 (SCA) at para 12; Oakdene Square Properties (Pty) Ltd v Farm Bothasfontein (Kyalami) (Pty) Ltd [2013] ZASCA 68; 2013 (4) SA 539 (SCA) at para 23*."

[155] "*[38] Cassim "Business Rescue and Compromises" in Cassim Contemporary Company Law 2 ed (Juta & Co Ltd, Cape Town 2012) at 862. For a critical reprisal of this rationale, see Loubser "Tilting at windmills? The quest for an effective corporate rescue procedure in South African law" (2013) 25 SA Merc LJ 4*."

> *better outcome on liquidation or disinvestment, whereby "[t]he underlying principle behind restructuring or reorganisation proceedings is that a business may be worth a lot more if preserved, or even sold, as a going concern than if the parts are sold off piecemeal".*[156] *At the same time, where it is not viable to rescue a company, it should be liquidated and its business sold.*[157] *Business rescue can only begin where there is a reasonable prospect of saving the company.*[158] *This was highlighted in KJ Foods, where the Supreme Court of Appeal quoted with approval the High Court in DH Brothers Industries, which stated that -*
>
> > *'Chapter [6] as a whole reflects "a legislative preference for proceedings aimed at the restoration of viable companies rather than their destruction" but only of viable companies, not of all companies placed under business rescue.'*[159] *42*
>
> *This is in line with the ultimate aim of balancing the rights and interests of all relevant stakeholders.* "

[242] It seems to me that this approach is in fact in accordance with the judgment by Brand JA, who was compelled to read into section 131(4)(a) of the 2008 Act the secondary purpose due to the poor drafting of the 2008 Act. The 2008 Act contains inexplicable omissions to reflect the secondary purpose of business rescue proceedings consistently. This does not mean that in every winding-up case, one must choose between two methods.

[243] It further appears from the rest of *Oakdene Square Properties*, as I read the judgment, that the learned judge does not see business rescue appropriate where the motivation for it is say a cheaper form of liquidation (rendering a larger return). In this regard see the remarks by Gamble J in *Van der Merwe and Others v Zonnekus Mansion (Pty) Ltd (in liquidation) and Another (Commissioner for the South African Revenue Service and Another Intervening)* para 35-41 on *Oakdene:*[160]

> "*[35] In circumstances where a business rescue practitioner, as opposed to the liquidator, is likely to have to sell property belonging to the embattled company, Brand JA points out that the purpose of business rescue is not intended to serve as a less expensive form of winding up.*

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[156] "*[39] McCormack "Super-priority new financing and corporate rescue" (2007) Journal of Business Law 701 at 703*."

[157] "*[40] KJ Foods above n36 para 77, endorsing DH Brothers Industries (Pty) Ltd v Gribnitz NO and Others 2014 (1) SA 103 (KZP) (DH Brothers Industries); Cassim above n38 at 863*".

[158] "*[41] Section 129(1)(b) of the Companies Act above n1*".

[159] "*[42] DH Brothers Industries above n40 para 10*."

[160] *Van der Merwe and Others v Zonnekus Mansion (Pty) Ltd (in liquidation) and Another (Commissioner for the South African Revenue Service and Another Intervening)* [2016] ZAWCHC 193 para 35-41.

> *"[33] My problem with the proposal that the business rescue practitioner, rather than the liquidator should sell the property as a whole, is that it offers no more than an alternative, informal kind of winding-up of the company, outside the liquidation provisions of the 1973 Companies Act which had, incidentally, been preserved, for the time being, by item 9 of schedule 5 of the 2008 Act. I do not believe, however, that this could have been the intention of creating business rescue as an institution. For instance, the mere savings on the cost of the winding-up process in accordance with the existing liquidation provisions could hardly justify the separate institution of business rescue. A fortiori, I do not believe that business rescue was intended to achieve a winding up of the company to avoid the consequences of liquidation proceedings, which is what the appellant's apparently seek to achieve."*

[36] Further, Brand JA refers to the important investigative powers of a liquidator acting under the old Companies Act in circumstances where there have been, for example, questionable transactions on the part of the company or its directors or employees, and which warrant further investigation by way of interrogation.

> *"[35] …On the respondents' version the company has been stripped of all its income and virtually all its assets while under the management [of one of the company's directors]. These allegations are, of course, denied by the appellants. But, as I see it, that is not the point. The point is that these are the very circumstances at which the investigative powers of the liquidator - under s417 and 418 of the 1973 Companies Act - and the machinery for the setting aside of the improper dispositions of the company's assets - provided for in the Insolvency Act 24 of 1936 - are aimed. In this light I believe there is a very real possibility that liquidation will in fact be more advantageous to creditors and shareholders - excluding, perhaps, the appellants - than the proposed informal winding up of the company through business rescue proceedings."*

[37] Finally, Brand JA points out that where the majority of creditors are against the proposed business rescue scheme, that is an important consideration for the court to have regard to –

> *"[38] …As I see it, the applicant for business rescue is bound to establish reasonable grounds for the prospect of rescuing the company. If the majority creditors declare that they will oppose any business rescue scheme based on those grounds, I see no reason why that proclaimed opposition should be ignored. Unless, of course, that attitude can be said to be unreasonable or mala fide. By virtue of s132 (2) (c) (i) read with s152 of the Act, rejection of the proposed plan by the majority of creditors will normally sound the death knell of the*

> *proceedings. It is true that such rejection can be revisited by the court in terms of s153. That, of course, will take time and attract further costs. Moreover, the court is unlikely to interfere with the creditors' decision unless their attitude was unreasonable. In the circumstances I do not believe that the court can be criticised for having regard the declared intent of the major creditors to oppose any business rescue plan along the lines suggested by the appellants."*

[38] An applicant for business rescue is not required to set out a detailed business rescue plan. However, the applicant must establish grounds for the reasonable prospect of achieving one of the two goals mentioned in section 128 (1)(b) of the Act (ie a return to solvency or a better deal for creditors and shareholders than through liquidation). A reasonable prospect means a possibility that rests on objectively reasonable grounds.[161]

[39] In Propspec[162] *van der Merwe J observed that –*

> *"There can be no doubt that, in order to succeed in an application for business rescue, the applicant must place before the court a factual foundation for the existence of a reasonable prospect that the desired object can be achieved."*

Expanding thereon, the court noted[163] *that-*

> *"..(A) reasonable prospect in this context means an expectation. An expectation may come true or it may not. It therefore signifies a possibility. A possibility is reasonable if it rests on the ground that it is objectively reasonable.… [a] reasonable prospect means no more than a possibility that rests on an objectively reasonable ground or grounds."*

[40] In Wedgewood Village[164] *Binns-Ward J held the view that an applicant for business rescue must be able to place before the court a cogent evidential foundation to support the existence of a reasonable prospect that the desired object could be achieved.*

[41] Lastly, by way of background, it is generally accepted that business rescue is intended to be a short-term measure. In Gormley [11][165] *Traverso DJP made the following observation:*

> *"….The Act envisages a short-term approach to the financial position of the company. This is so for self-evident reasons. There must be a*

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[161] "*[7] Propspec Investments (Pty) Ltd v Pacific Coast Investments 97 Ltd 2013(1) SA 542 (FB) at [12*]".
[162] "*[8] [31*]".
[163] "*[9] [12*]".
[164] "*[10] Koen and Another v Wedgewood Village Golf and Country Estate (Pty) Ltd and Others 2012(2) SA 378 (WCC) at [17]".*
[165] "*[11] Gormley v West City Precinct Properties (Pty) and Another [2012] ZAWCHC 33 (18 April 2012) at [11]".*

> *measure of certainty in the commercial world. Creditors cannot be left in a state of flux for an indefinite period. The provisions of the Act make it clear that the concept of business rescue only applies to companies which are financially distressed as defined in the Act. If a company is not so financially distressed, the provisions of Chapter 6 of the Act will not apply. It must either be likely that the debts can be repaid within 6 months or that there is the likelihood that the company will go insolvent in the ensuing 6 months."*
>
> *Traverso DJP went on to find that because the company in question was at the time insolvent and that it required a moratorium to pay its debts, the company was not financially distressed within the meaning of section 128(1)(f) of the Act*".

[244] I do not read the authorities binding on me that such a better liquidation purpose should easily sway a court. It is not an inarguable case, but it is a hard one to succeed with. Our law has settled, generally applicable winding-up proceedings apply for good reason. There is some merit in the argument about lower expected fees in business rescue proceedings, but if the issue is the remuneration of liquidators, that issue must be addressed instead of applying business rescue as an alternate method of liquidation.

[245] There is some merit in the submission that the inquiries under section 417 of the 1973 Act may be derailed if the business rescue applications were to succeed. To date, that risk has not materialised, but it cannot be excluded. This too point away from a better liquidation as a motivation for relief.

[246] The anti-dissipation tools in the Insolvency Act are powerful tools to set aside impeachable transactions. This too point away from a better liquidation.

[247] As stated, the only creditor before me, SARS, does not want to see a business rescue process allegedly to increase its return. This is a material fact. Ultimately, creditors can look after themselves best in the liquidation process. They can direct the liquidators.

[248] I am not convinced to any reasonable extent that business rescue would result in a better return than liquidation on the case argued by the business rescue applicants, leaving aside the limitations that *Plascon Evans* places on them. Again, as was held in *Oakdene Square Properties* para 34, in principle, there is no reason why a business rescue practitioner would obtain a better price for

the property, and it is difficult to seek to compare the fees of the two offices. Also, in this case, more litigation and thus higher business rescue (time based) fees could be expected. I am not convinced that there is a reasonable prospect of better values being obtained in a less hasty sales process. In a period of almost a year before the auction, no such purchasers materialised. In addition, even considering the timing of the auction (on short notice, in December 2019), potential purchasers knew of the liquidation of the companies, knew that assets would/might become available for sale, and a public auction was held. It achieved in most cases at least forced sale values.

[249] In light of my finding on the effect of section 82(8) of the Insolvency Act on the sales of movables, my sense is that such sales are unlikely to be set aside in at least many cases. There is time to consider the sales of the immovable assets. I am not persuaded that business rescue will result in a better return, despite the various illustrative sums done by the applicants.

[250] Despite some success in the auction application, the business rescue application still stands to be dismissed. I disagree that there is a factual basis for the conclusion by the business rescue practitioners in their supplementary heads of argument:

> "*134 We furthermore submit that the Rescue Application:*
>
> *134.1 is, in and of itself, the quintessential example of a flagrant abuse of the business rescue and court processes;*
>
> *134.2 is persisted with the clear ulterior motive to neutralise the appointment of independent liquidators to the subject companies under circumstances where the Bosasa protagonists had a clearly intended plan in mind when they placed the said companies in liquidation on day one; and*
>
> *134.3 is otherwise in want of merit on every and any conceivable basis*."[166]

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[166] This submission is in effect repeated in the heads of argument in the auction application:

"*24 The context already provided, even only by way of introduction, persuasively evinces that this application:*

24.1 is the quintessential abuse of the business rescue process legislated under Chapter 6 of the 2008 Act; and

24.2 was purposefully employed by the applicants with the sole purpose of obstructing, frustrating and derailing the liquidation proceedings pending in respect of the subject companies.

25 …

[251] The alleged "*Bosasa protagonists*" brought an arguable business rescue application to court. I dismiss it, but I disagree that the application was so lacking in merit that it constituted an abuse. The inference that the provisional liquidators seek to draw, is not consistent with all the proven facts, nor is an evil scheme from the start, the most plausible conclusion. See the judgment by Southwood J, *Skilya Property Investments (Pty) Ltd v Lloyds of London Underwriting* at 780H-781D.[167] As the provisional liquidators correctly argued in the auction application (underlining not added, but footnotes omitted):

> "*37 Primary facts are those capable of being used as a basis for the drawing of inferences as to the existence or nonexistence of other facts. Such further facts in relation to primary facts are called secondary facts. Secondary facts, in the absence of primary facts are nothing more than the deponent's own conclusions and do not constitute evidential material capable of supporting a cause of action.*
>
> *38 Moreover, inference is to be distinguished from speculation, and is to be based on properly proved objective facts. As held in **Skilyia Property Investments (Pty) Ltd v Lloyds of London Underwriting**, an inference sought to be drawn must further be consistent with all proved facts*."

[252] On the same reasoning, I reject the argument in the provisional liquidators' heads of argument in the auction application that the business rescue application was impermissibly used as a springboard to bring the auction application. Again, there is no factual basis for such an inference. The fact that the application was made had legal consequences, and these are addressed in the auction application, the proper forum.

Eighth matter for decision: Costs

[253] I have already at the outset dealt with some interlocutory cost orders. Where I grant costs in the order below, I mostly followed the rule that costs follow the result.

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26 Ultimately, this application is persisted with the clear ulterior motive to neutralise the appointment of independent liquidators to the subject companies under circumstances where the Bosasa protagonists had a clearly intended plan in mind when they placed the said companies in liquidation on day one."

[167] *Skilya Property Investments (Pty) Ltd v Lloyds of London Underwriting* 2002 (3) SA 765 (T) at 780H-781D, reversed on appeal but not on the summary of the law.

[254] Emotions ran high in this matter. I take into account the pressure under which the papers were prepared, and the increasing tension in the matter. Usually in litigation, one simply reads past those instances where, on reflection, the lawyers should have acted more measuredly, and simply deal with the merits of the matter. It was not possible in this matter. The matter was argued with unpleasant animosity between the legal representatives representing the provisional liquidators and those representing the applicants in the business rescue and auction applications.[168]

[255] This case mainly had to be decided on affidavit by applying *Plascon Evans.*[169] It does not assist at all to pepper a letter (in reality written for the court) or an affidavit or heads of argument with averments and innuendo about dishonest motives, adjectives and adverbs conveying imputations of dishonest motives, and the like. I have already reflected the argument regarding the business rescue application.

[256] *Reynolds NO v Mecklenberg (Pty) Ltd*[170] is clear that improper argument must be removed from papers and a disciplined approach to pleading cases in opposed motions should be followed. In that case, Stegmann J dealt with a record of only 430 pages. Yet another plea for restraint is the useful summary of the authorities in *Venmop 275 (Pty) Ltd and Another v Cleverlad Projects (Pty) Ltd and Another* at para 7-14.[171] There was no such restraint in this matter. The case was not argued on facts, placed in a chronological order, proven where necessary with documents, from which permissible factual and legal conclusions were drawn. The papers and the heads of argument by the provisional liquidators are replete with averments and innuendo that persons involved in the business rescue and auction applications are dishonest and have dishonest motives. Much of this was aimed at Mr J Watson. Predictably with certainty, it added nothing to the matter.

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[168] I stress that I exclude the representatives for SARS and Fidelity. The disputes between the applicants in the business rescue and auction applications and the intervening parties were argued, firmly and directly, but without unpleasant animosity. This included the case that substantial tax was improperly avoided, a case that imputes unlawful conduct by the companies-in-liquidation.

[169] *Plascon Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) (SA) 623 (A) at 634E-635C.

[170] *Reynolds NO v Mecklenberg (Pty) Ltd* 1996 (1) SA 75 (W).

[171] *Venmop 275 (Pty) Ltd and Another v Cleverlad Projects (Pty) Ltd and Another* 2016 (1) SA 78 (GJ) at para 7-14.

[257] I already have made serious findings of unlawful conduct by the provisional liquidators. In light of those findings, their unduly aggressive litigation becomes even more unacceptable. It was argued before me, on their behalf, that upon winding-up, "*the law*" takes control of the company in liquidation. My distinct impression was that the provisional liquidators equated that concept with themselves. They may be used to wielding wide powers in insolvency matters, but the exercise of such wide power is the more reason for humility and restraint.

[258] Wallis JA[172] held in *Murray and Others NNO v African Global Holdings (Pty) Ltd and Others* para 42:[173]

[258.1] That it was assumed in error that the provisional liquidators-

> "… *would not discharge their duties properly under the supervision of the Master and in accordance with the directions of creditors*",

[258.2] That Ameer AJ-

> "*ignored the fact that as provisional liquidators their powers were limited and did not extend to doing the things he attributed to them*".

[259] It is my respectful view, whilst I take no issue with the finding by SCA, that what Ameer AJ accepted, became true: The provisional liquidators acted unlawfully and exceeded their powers.

[260] I do penalise the provisional liquidators with attorney-and-client costs in one instance (the auction application), and I deprive them of part of their costs in the business rescue application. I did so as they crossed the line in the litigation and they acted unlawfully in two major respects (disregarding the Bhoola order and the business rescue application).

[261] The heads of argument in the business rescue application gives a clue as to their motivation:

> "*183 The practice of delivering an application for business rescue has, since the SCA's judgment in Richter, been open to abuse*."

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[172] Mokgohloa, Plasket and Nicholls JJA and Gorven AJA concurring.
[173] *Murray and Others NNO v African Global Holdings (Pty) Ltd and Others* 2020 (2) SA 93 (SCA) para 42.

[262] The heads of argument of the provisional liquidators in the auction application repeats the above almost verbatim:

> "*134 The practice of delivering an application for business rescue to stifle liquidation proceedings has, since the SCA's judgment in Richter, been open to abus*e",

[263] It was not for them to decide not to apply the law if they disagree with the SCA. The heads of argument of the provisional liquidators in the auction application gives this answer why they continued with the auction (and took it upon themselves to continue without seeking relief in a court):

> "*12 The business rescue application, comprising in excess of one thousand pages [supported by a founding affidavit that without its annexures span one hundred and sixty-two pages] could have been brought as long ago as March 2019 but it was rather issued the day before the auction.*
>
> *13 It was manifestly purposefully only issued on 3 December 2019 in an [unsuccessful] attempt to trigger the provisions of 131(6) of the 2008 Act, to suspend the liquidation proceedings and derail the auction.*
>
> *14 However, having formed the view that the business rescue application is an abuse and in want of merit on every conceivable basis, MacRoberts duly informed the applicants on 4 December 2019 that the liquidators would be proceeding with the auction on the morning of 4 December 2019, the issue of the business rescue application notwithstanding*."

[264] Not only was it not for the provisional liquidators to ignore the fact that the business rescue application was made, but the inference of an abuse factually fails at three common cause facts: The recent change in legal representation by the applicants, the recent change in the board of Holdings, and that Ameer AJ had ruled that the winding-up should be set aside.

[265] In considering the conduct of the provisional liquidators in the litigation, one must not lose sight of the facts that they had acted unlawfully, deliberately.

[266] This brings me to the extent to which the provisional liquidators crossed a line. I do not have to go beyond the heads of argument of the provisional liquidators to reflect the unacceptable way the provisional liquidators conducted themselves.

[267] This is an extract from the heads of argument in the business rescue application dealing with the chronology:

"*14 The calculated timing of this application is telling. It was manifestly purposefully only issued on 3 December 2019 in an [unsuccessful] attempt to trigger the provisions of 131(6) of the 2008 Act i.e. to suspend the liquidation proceedings and derail the auction.*

15 It is, in and of itself, a further quintessential example of a flagrant abuse of court process.

16 However, having diagnosed this application as an abuse and to be in want of merit on every conceivable basis, the liquidators duly informed the applicants on 4 December 2019 that the liquidators of the subject companies would be proceeding with the auction on the morning of 4 December 2019, the issue of this application notwithstanding."

[268] These submissions are repeated almost word for word in the heads of argument in the auction application:

"*89 It suffices to state that the business rescue application:*

89.1 comprising in excess of a 1000 pages [supported by a founding affidavit that without its annexures span 162 pages];

89.2 could have been brought as long ago as March 2019, but was demonstrably purposefully only issued on 3 December 2019 in an [unsuccessful] attempt to trigger the provisions of section 131(6) of the 2008 Act i.e. to suspend the liquidation proceedings and derail the auction;

89.3 is the quintessential example of a flagrant abuse of court process and in want of merit on every conceivable basis."

[269] I have earlier quoted a similar extract from the supplementary heads of argument.[174]

[270] In context, the provisional liquidators acted illegally in proceeding with the sale. In context, it is common cause that the applicants for business rescue obtained new legal representation mere days before the business rescue application was made. New legal representation would have looked afresh at matters. Within a very short time span, the business rescue application was issued. Why would the most probable inference from such facts be dishonest

[174] "*134 We furthermore submit that the Rescue Application:*
134.1 is, in and of itself, the quintessential example of a flagrant abuse of the business rescue and court processes;
134.2 is persisted with the clear ulterior motive to neutralise the appointment of independent liquidators to the subject companies under circumstances where the Bosasa protagonists had a clearly intended plan in mind when they placed the said companies in liquidation on day one; and
134.3 is otherwise in want of merit on every and any conceivable basis."

manipulation of court processes ("*a flagrant abuse of court process*")? Why would the period from March 2019 be relevant where new lawyers are appointed? More importantly, in opposed motion court, which judge would make a positive finding of a dishonest manipulation of court processes on the reasoning of the provisional liquidators?

[271] The same tone was adopted throughout the litigation by the provisional liquidators. In the supplementary heads of argument, with the stated aim to address a supplementary affidavit introduced by them, and *inter alia* to address:

> "*The unconscionable abuse of the separate juristic entities by the Bosasa protagonists in pursuance of the perpetration of substantial frauds and their involvement in numerous corrupt activities*".

[272] It is common cause that there was a change in directors. The persons involved in the winding-up resolution are no longer active in the matter. The questions then are who these "*Bosasa protagonists*" are with ulterior motives, and what their plan all along was. How are they involved in the "*perpetration of substantial frauds and … in numerous corrupt activities*"? These are most serious allegations and could only be directed at Mr J Watson and Ms L Watson (apart perhaps from the lawyers). On what factual basis are they accused of committing fraud and corruption? The long heads of argument by the provisional liquidators,[175] in my reading of them, does not reflect proof that any person involved in the matter before me committed fraud, or acts of corruption. Even more objectionable is that the same heads of argument also argue that Mr J Watson lacks personal knowledge of matters that predated about the time of his appointment as director.[176]

[273] At the heart of the Constitution stand the rights to equality and to dignity. These two rights are for good reason mentioned first and second in the Bill of Rights.

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[175] Heads in the business rescue application (156 pages), heads in the business auction application (114 pages), supplementary heads in the business rescue and auction applications (43 pages), and note in the Rule 42 application (28 pages).

[176] "*33 That being said, this application is premised on a founding affidavit deposed to by one Jared Michael Watson ("Mr Watson"), the nephew of the late Gavin Watson, who was only appointed to the board of Holdings on 20 November 2019, thereby entailing the obvious and unassailable conclusion that he himself does not have primary personal knowledge of any facts that precede his appointment as such*."

I firmly believe that courts should be vigilant in protecting the rights to equality and to dignity of those who find themselves involved in court processes. It matters not what wrong any family member of you is alleged to have done (or conversely how highly regarded your family name is). In a court you will be treated with dignity, and equal to everyone else. I will put it bluntly: If in the end it is to be found that the late Mr Gavin Watson and other employees of the group committed fraud, or acts of corruption, and that the books of account of the group constituted a fiction, Mr J Watson and Ms L Watson still will be treated with respect in my court.

[274] It does not end here. The provisional liquidators accused senior counsel and a senior attorney for the business rescue applicants in their heads of argument in the business rescue application of misleading the Honourable Wright J in chambers about the length of urgent application that was being prepared (70 pages[177] versus an ultimate 170 pages)[178] for hearing on 4 December 2020. The lawyers were meeting the judge in chambers whilst the papers were being prepared in their absence. This conduct is then submitted to have been intended to mislead Wright J:

> "*173 The actual extent of the urgent application papers was certainly not correctly represented to Wright [J] in chambers*";
>
> "*175. The actual extent of what was truly contained and traversed in the urgent application and what were to be required for it to be heard was, in the circumstances, equally not accurately represented to Wright [J]*";
>
> "*177. Essentially, through the manipulative non-disclosure of material detail, the applicants unconscionably orchestrated an obligation upon the liquidators to have consulted on, consider and respond to affidavits in excess of 1200 pages[179] over-night and within approximately 18 hours*."

[275] Wright J ordered that an answering affidavit in the urgent application be delivered the next morning and stood the matter down (certainly not an unusual step for a judge). He then struck the urgent application from the roll.

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[177] "… *Wright [J], who was informed in chambers by the applicants:*
170.1 First, that the urgent application papers [still at that time in the process of being collated] comprised of ***approximately 70 pages***;"

[178] " …*172 However, when the urgent application had subsequently come to hand, at around 16h00 on 4 December 2019, it emerged that it in actual fact comprised* ***more than 170 pages***."

[179] Referring to the business rescue application papers too.

Please bear in mind, the urgent application to which this dispute relates, was not before me. It had been dealt with by Wright J.

[276] The same version of the lawyers (senior counsel and a senior attorney) misleading Wright J is repeated verbatim in paragraph 102 of the heads of argument in the auction application:

> "*102. Essentially, through the manipulative non-disclosure of material detail, the applicants unconscionably orchestrated an obligation upon the liquidators to consult on, consider and respond to affidavits in excess of* ***1200 pages*** *over-night and within approximately* ***18 hours***."

[277] Why is this relevant in the matters before me, even if true? Which judge would make such a finding in these applications? If the papers were longer than expected, why is the most probable inference that the lawyers are involved in a dishonest manipulation of court processes or that they re-considered what to add to the papers?

[278] The provisional liquidators, in their heads of argument in the auction application go as far as accusing the lawyers preparing the business rescue application to have "*been in the process of preparing an application contemplated by section 354 of the 1973 Act and after they reflected on the SCA Judgment and realised that such an application will not achieve a stay of the auction, they, at the last minute converted that application to a business rescue application*". This is done despite those counsel only being briefed days earlier. The averment is made in the case pursued of a counsel being part of a conspiracy to abuse the court process. There is no factual basis for this, and an unreserved apology should have been tendered. Reflection should have led to moderation.

[279] Under these circumstances, the application to strike out should have been dealt with at the outset. More than just offensive matters were in issue, these papers could have been a lot shorter if relevance and admissibility of, in effect opinion, were to be considered. It is ironic that the provisional liquidators

quoted *Van Zyl and Others v Government of the Republic of South Africa and Others* para 45-46[180] about endless repetition.

[280] Threats of further steps were made during argument by one counsel. If Wright J was misled, it is a matter that must be dealt with by the professional bodies and it was the duty of the lawyers to have done so a long time ago, or face themselves, possible disciplinary steps by the professional bodies for failing to refer the matter. If the provisional liquidators crossed the line in this litigation (as I believe they did), the matter must be dealt with by the professional bodies, and potentially in our courts.

Concluding remarks

[281] I have said little about *Plascon Evans.* I endeavoured to apply it. No one seriously suggested that I should refer the matter to oral evidence or to trial. It seems to me that no factual issue stood in the way of deciding the matter and that kicking the can down the road for another judge to deal with, would not have been in the interest of anyone. As such, I limited my comments on contested versions, and focussed on the facts required to come to a decision. Those were by and large objectively determinable.

[282] I order that this judgment be referred to the Master. I bring two matters to her/his attention:

[282.1] The deliberate unlawful conduct by the provisional liquidators and the penalising costs order that I make against the provisional liquidators; and

[282.2] The potential impact of the deliberate unlawful conduct by the provisional liquidators on the costs of winding-up the companies in liquidation.

[283] I know that my judgment does not resolve the matter, and will cause delay. I could not prevent such delay on my application of the law to the facts. That is an unsatisfactory outcome, but an outcome caused by the provisional liquidators who acted unlawfully. Much more litigation is now foreseeable.

[180] *Van Zyl and Others v Government of the Republic of South Africa and Others* 2008 (3) SA 294 (SCA) para 45-46.

Continued litigation may delay the matter more. In hope, I did seek to provide, in my order, for negotiated, or compulsory, sales of assets, if negotiated progress could be made, as opposed to continued litigation.

[284] It gave me no pleasure to comment on the conduct of the litigation. Litigation is stressful, the stakes are high, and we all have different personalities. In many ways I prefer bluntness in argument, it extracts the principles, and do not bury them under wordiness. My comments, which I did make lightly, do not reflect the extreme pleasure to preside in a difficult matter where able counsel present argument, well researched, and where the attorneys who saw to pagination binding, the continuous updating of my files, and the continuous loading of papers onto CaseLines did such splendid work. I would be remiss if I did not acknowledge the outstanding work too.

[285] I would be remiss too if I did not acknowledge the fact that it took me effectively three months to deliver this judgment. The period that I blocked out to do it in during recess, was in hindsight, far too short. It was much more work than what I thought it would be. I tender my apology too, substantial time had to be spent to complete this judgment, dealing with many issues.

[286] I make the following orders:

Case Numbers 44827/19 and 42741/19

1. I bring this judgment to the attention of the Master of the High Court;

Case Number 44827/19

2. The reserved costs of the postponement of the hearings of 11 and 12 March 2020 of the application under case number 44827/19, hereinafter called "*the auction application*", are to be costs in the cause of the auction application;

3. The reserved costs of the postponement of the hearings of 4 and 5 May 2020 of the auction application, are to be costs in the cause of the auction application, save that the applicants in the application for postponement dated 18 April 2020 must bear their own costs of that application;

4. The reserved costs of the application for intervention by the first intervening party, (“SARS”), in the auction application, are to be costs in the cause of the auction application, save that the applicants in the auction application are to pay the costs occasioned by any opposition to the intervention, such costs are to include the costs of two counsel;

5. The reserved costs of the application for intervention by the second intervening party (Fidelity Security Services (Pty) Ltd), hereinafter called “*Fidelit*y, in the auction application, are to be costs in the cause of the auction application, save that the applicants in the auction application are to pay the costs occasioned by any opposition to the intervention;

6. The costs of the application to strike out content of affidavits in the auction application, are to be costs in the cause;

7. Any auction of and any other sale, whether by private treaty or otherwise, of assets of AFRICAN GLOBAL OPERATIONS (PTY) LTD (in liquidation); BOSASA PROPERTIES (PTY) LTD (in liquidation); GLOBAL TECHNOLOGY SYSTEMS (PTY) LTD (in liquidation); LEADING PROSPECT TRADING 111 (PTY) LTD (in liquidation); BOSASA YOUTH DEVELOPMENT CENTRES (PTY) LTD (in liquidation); BLACK ROX SECURITY INTELLIGENCE SERVICES (PTY) LTD (“*the six business rescue companies”*)-

    a. Before the second meeting of creditors; and/or

    b. Without the written consent by resolution of the board of directors of AFRICAN GLOBAL HOLDINGS (PTY) LTD (“*Holdings*”); and/or

    c. Without the consent of the court,

    is prohibited;

8. Any sale prior to date of this order, whether by auction or private treaty or otherwise, of assets of any of the six business rescue companies, sold whilst such company was in liquidation and without the written consent by

resolution of the board of directors of Holdings, is declared to be unauthorised;

9. The transfer and registration of immovable property to any prospective purchaser of assets of any of the six business rescue companies, sold prior to date of this order and whilst such company was in liquidation-

    d. Without the consent of the second meeting of creditors; and/or

    e. Without the written consent by resolution of the board of directors of Holdings; and/or

    f. Without the consent of the court,

    is prohibited;

10. The first to thirty-ninth respondents (excluding the fourth and the thirty-fifth respondents), SARS and Fidelity are ordered to pay the applicants' costs of the auction application jointly-and-severally, the one to pay the others to be absolved from liability, such costs are to include the costs of two counsel;

11. The scale of such costs payable by the first to thirty-ninth respondents (excluding the fourth and the thirty-fifth respondents) are to be on the attorney-and-client scale,

Case Number 42741/19

12. The reserved costs of the postponement of the hearings of 11 and 12 March 2020 of the application under case number 42741/19, hereinafter called "*the business rescue application*", are to be costs in the cause of the business rescue application;

13. The reserved costs of the postponement of the hearings of 4 and 5 May 2020 of the business rescue application, are to be costs in the cause of the business rescue application, save that the applicants in the application for postponement dated 18 April 2020 must bear their own costs of that application;

14. The reserved costs of the application for intervention by the first intervening party, (the Commissioner for the South African Revenue Services), hereinafter called "SARS", in the business rescue application are to be costs in the cause of the business rescue application;

15. The costs of the application to strike out content of affidavits in the business rescue application, are costs in the cause;

16. The application to place the six business rescue companies in business rescue, is refused;

17. The applicants are ordered to pay 50% of the respondents' costs of the business rescue application, such costs are to include the costs of two counsel;

18. The applicants are ordered to pay SARS' costs of the business rescue application, such costs are to include the costs of two counsel where so employed;

Case Number 32083/19

19. The application by the fourth to sixth, eighth to thirty-seventh, and thirty-ninth to forty-first respondents to join as co-applicants is struck from the roll;

20. Paragraph 2 of the order granted by the Honourable Boohla AJ dated 28 October 2019 in case number 32083/19 is varied by the insertion of the words "*and African Global Operations (Pty) Ltd (in liquidation)*" after the words "*Bosasa Properties (Pty) Ltd (in liquidation)*";

21. The first, second and third respondents are ordered to pay the applicants' costs of the Rule 42 application occasioned by their opposition thereto.

DP de Villiers AJ

Heard on:	**21 and 22 May 2020**
Delivered on:	**24 August 2020 electronically, by e-mail and by uploading on CaseLines**

On behalf of the applicants in case numbers 44827/19 and 42741/19 and on behalf of the first to third respondents in case number 32083/19

Adv F Joubert SC
Adv J de Vries
Instructed by Goodes & Seedat Attorneys

On behalf of the first to thirty-ninth respondents (excluding the fourth and the thirty-fifth respondents) in case numbers 44827/19 and 42741/19 and on behalf of the eighth to forty-first respondents (excluding the seventh and the thirty-eighth respondents) in case number 32083/19

Adv KW Lüderitz SC
Adv P Lourens
Instructed by MacRobert Attorneys

On behalf of the first intervening party in case numbers 44827/19 and 42741/19 and on behalf of the forty-third respondents in case number 32083/19

Adv HGA Snyman SC
Adv K Kollapen
Instructed by VZLR Inc

On behalf of the second intervening party in case numbers 42741/19 and on behalf of the applicant in case number 32083/19

Adv AC Botha SC

Instructed by Blake Bester De Wet Jordaan Inc