IN THE HIGH COURT OF SOUTH AFRICA
NORTH WEST DIVISION - MAHIKENG

CASE NO.: CIV APP FB 01/2018
HIGH COURT CASE NUMBER: M9/2015
Reportable: NO
Circulate to Judges: NO
Circulate to Magistrates: NO
Circulate to Regional Magistrates: NO

In the matter between:

RUSTENBURG CREMATORIUM (PTY) LTD	**1ST APPELLANT**
JOSLYN H GELDENHUYS	**2ND APPELLANT**
FREDERICK L GELDENHUYS	**3RD APPELLANT**
THE TRUSTEE OF THE RUSTY'S FAMILIE TRUST	**4TH APPELLANT**

AND

ADRIAAN JORDAAN N.O	**1ST RESPONDENT**
DALEEN JORDAN N.O	**2ND RESPONDENT**
VOLKER HELMUT JOHANNES KRUGER	**3RD RESPONDENT**

CIVIL APPEAL

CORAM: PETERSEN J, REDDY AJ AND MFENYANA AJ

ORDER

(i) The appeal is upheld.

(ii) The order of the court *a quo* (per **Kgoele J**) placing the first appellant in final liquidation is set aside and replaced with the following order:

"The application for the final liquidation of the first respondent (Rustenburg Crematorium (Pty) Ltd) is dismissed with costs."

(iii) The first to third respondents shall pay the costs of appeal which costs shall include the costs of the court *a quo* in dismissing the application for leave to appeal and the costs of the application for leave to appeal in the Supreme Court of Appeal, jointly and severally, the one paying the other to be absolved.

JUDGMENT

PETERSEN J

Introduction

[1] This is an appeal to the Full Court of this Division against the whole of the judgment and order of **Kgoele J** (the court *a quo*) handed down on **15**

December 2016. The appeal comes before this Court with leave of the Supreme Court of Appeal granted on **23 October 2017** on petition by the appellant only against the judgment and order of **Kgoele J**. Leave to appeal has been granted in the following terms:

"1) Leave to appeal is granted to the Full Court of the North West Division of the High Court, Mahikeng.

2) The costs of the court a quo in dismissing the application for leave to appeal is set aside AND the costs of the application for leave to appeal in this court and the court a quo are costs in the appeal. If the applicant does not proceed with the appeal, the applicant is ordered to pay these costs."

Chronology

[2] The respondents (applicants in the court *a quo*) launched an application on **16 January 2015**, which was enrolled on **19 February 2015**, in which they sought an order in the following terms:

"1. The Respondents are ordered to keep proper accounting records of the First Respondent for the financial years from 2011 to 2015 and kept at the registered office of the First Respondent;

2. The Respondents are ordered to make available to the Applicants forthwith the revised annual financial statements for the years 2011 to 2014, as well as the memorandum of incorporation of the First Respondent;

3. The First Respondent is ordered to call an annual general meeting, in the alternative special general meetings for the years 2011 to 2015;

4. The Second and Third Respondent, alternatively the First Respondent is ordered to make available to the Applicants forthwith draft annual

financial statements for the years 2011 to 2015 for its consideration prior to the convention of the annual general meetings;

5. *The Respondents are ordered to convene forthwith an annual general meeting, alternatively a special general meeting to consider and finalise the annual financial statements for the year 2011 to 2014 and to deal with any matter arising therefrom;*

6. *The Second Respondent is ordered to reimburse the sum of R641609.72 to the First Respondent in respect of directors' remuneration;*

7. *The Second and Third Respondent is ordered to pay the cost of this application, jointly and severally, the one paying the other to be absolved;*

8. *Further and/or alternative relief."*

[3] The appellants (respondents in the court *a quo*) filed a notice of opposition on **06 February 2015**. On **17 February 2015**, the application was removed from the unopposed roll as the matter had become opposed. It would appear that the appellants filed their answering affidavit around **04 March 2015**. On **06 March 2015**, the fourth appellant as represented by the second appellant in her capacity as director of the first appellant and in her capacity as a trustee of the fourth appellant, filed a counter application. The details of the counter application need not detain this Court for purposes of this appeal. The respondents thereafter filed their replying affidavit on **26 March 2015**.

[4] On **29 April 2015**, the respondents applied to the Registrar of this Court for the allocation of a date for hearing of the application on the opposed motion court roll. It is not clear from the papers which date, if any, had been allocated by the Registrar. What the record next reflects is that the first respondent (Adriaan Jordaan N.O. in his official capacity of the Adriaan Jordaan Familie Trust) on, **27 August 2015**, delivered an Amended Notice of Motion in which

the main relief he sought, enrolled for hearing on 10 September 2015, was couched in the following terms in respect of the first appellant ("the Rustenburg Crematorium"):

"1. The First Respondent company be and is hereby placed under provisional winding-up;

2. That all persons who have a legitimate interest are called upon to put forward their reasons why the Court should not order the final winding-up of the First Respondent on 22 October 2015 at 10:00;

3. That a copy of this order be forthwith served on the First Respondent company at its registered office and be published in the Government Gazette and in the Citizen newspaper;

4. That a copy of this order be forthwith forwarded to each known creditor by prepaid registered post; …"

[5] The first respondent in addition to the main relief sought in the Amended Notice of Motion, relegated the relief he sought in the initial/original Notice of Motion to a prayer for alternative relief.

[6] The Amended Notice of Motion reflects that it was served on the appellants attorneys of record, the South African Revenue Service (SARS) and the Master of the High Court on **27 August 2015**. Prior to the Amended Notice of Motion being filed with the Registrar, the first respondent through his legal representatives caused **letters** to be served by the Sheriff of this Honourable Court on a number of persons informing the said persons that an application would be made on **10 September 2015**, for the provisional liquidation of the Rustenburg Crematorium. The said persons were identified in the Sheriffs returns as follows, all letters having been served on the second appellant. The second appellant (first defendant); a person identified as Nico Oberholzer (second defendant); Liandi Mitchell (third defendant); Illza Mitchell (fourth defendant); Armand (Puna) Goosen (fifth defendant); D Makatatene (sixth

defendant); B Kapenda (seventh defendant); and D Moganga (eighth defendant). None of the said persons, save for the second appellant were cited as respondents in the liquidation application. They appear to have been the employees of the Rustenburg Crematorium.

[7] On **10 September 2015** and by agreement between the parties, an order was granted by the Court (per **Landman J**), the consent order, in the following terms:

> *"1. THAT: The matter be and is hereby removed from the roll for the 10th day of September 2015;*
>
> *2. THAT: The costs wasted occasioned by the removal are reserved for determination by the Court ultimately hearing the application;*
>
> *3. THAT: The Applicants consent to the supplementary affidavit filed by the Respondents as being admitted as forming part of the papers in the main application;*
>
> *4. THAT: The Applicants are afforded the opportunity of filing further affidavits in response thereto, such affidavits to be filed on or before the 25th day of SEPTEMBER 2015, leave being granted to the Respondents to respond thereto, if so advised and if necessary;*
>
> *5. THAT: The notice of amendment of the notice of motion of the Applicants in terms whereof they seek the liquidation of the First Respondent is noted but not opposed, subject thereto that Respondents contend that no case has been made out for the relief sought by the Applicants in the amended notice of motion and legal submissions will be made to the above Honourable Court at the final hearing of the application."*

[8] The application was consequently enrolled for hearing on **3 March 2016**. On **3 March 2016,** a number of points *in limine* were argued before **Gura J** and judgment was reserved. On **01 August 2016** judgment was handed down. The order reads as follows:

"IT IS ORDERED

THAT: The First Respondent be and is hereby placed under provisional winding-up;

THAT: All persons who have a legitimate interest be and are hereby called upon to put forward their reasons why the Court should not order the final winding-up of the First Respondent on the 15th day of SEPTEMBER 2016 at 10:00;

THAT: A copy of this order be served on the First Respondent at its registered office, all the employees of the First Respondent and be published in the Government Gazette and in the Sowetan Newspaper;

THAT: A copy of this order be forwarded to each known creditor by prepaid registered post;

THAT: The First and Second Respondents pay the costs of this application jointly and severally, the one paying the other to be absolved;

THAT: Such costs to include costs of the 10th day of SEPTEMBER 2015."

[9] Counsel before us remain at loggerheads, as they were before **Kgoele J**, on whether or not argument was presented on the application for the provisional liquidation of the Rustenburg Crematorium, before **Gura J** on **3 March 2016**.

[10] On **15 December 2016**, **Kgoele J** granted an order placing the Rustenburg Crematorium in final liquidation. As indicated *supra* the appeal lies against this final order, premised on leave to appeal having been granted by the SCA. **The provisional order of Gura J is not an appealable order and it follows axiomatically that leave to appeal could only be sought on petition to the SCA against the final liquidation order of Kgoele J**. The provisional order of **Gura J** in terms of which the Rustenburg Crematorium was placed in provisional liquidation was the catalyst for the final liquidation order granted by **Kgoele J**. Absent the provisional liquidation order, having regard to the peculiar circumstances of this matter, no final liquidation order could be granted by **Kgoele J**. It will therefore be shown that the provisional order of **Gura J** is inextricably linked to the final order of **Kgoele J** and that the final order was not competent because of a material misdirection by **Gura J** in granting the provisional order.

Factual Background

[11] The first and second respondents are married and trustees of the Adriaan Jordaan Family Trust along with the third respondent. The Adriaan Jordaan Family Trust has a 49% shareholding in the Rustenburg Crematorium. The second and third appellants are similarly married and trustees of the Rusty Family Trust which has a 51% shareholding in the Rustenburg Crematorium.

[12] The respondents alleged that the Rustenburg Crematorium was in financial difficulty. They premised this allegation on the conduct of the second and third appellants. In this regard they firstly allege, that the second and third appellants operated the business of the Rustenburg Crematorium as a personal slush fund. In amplification of this averment, they alleged that the third appellant had drawn an amount of R641 609.72 from the Rustenburg Crematorium's bank account under the ruse or guise of being director's remuneration. In brief, the respondents alleged that the second and third appellants were financially irresponsible. Secondly, the respondents alleged that the second and third appellants demonstrated a flagrant disregard for the legislative provisions of the Companies Act 71, 2008 ("the Companies Act").

In particular, they allege that the second and third appellants, failed to comply with the provisions of sections 24 and 25 of the Companies Act. They are alleged to have failed to keep a memorandum of incorporation as required by section 24(3); failed to hold annual general meetings (shareholders meetings) as required by section 24(3)(c) and (d); and failed to prepare annual financial statements as required by section 30 of the Companies Act.

The grounds of appeal

[13] The grounds of appeal can be succinctly distilled to four main grounds. Firstly, there was non-compliance with the provisions of section 346(4A)(a)(ii) of the Companies Act 61 of 1973 ('the Companies Act") by not furnishing the employees of the Rustenburg Crematorium with a copy of the application; Secondly, there was non-compliance with the provisions of section 346(4A)(c) of the Companies Act by not serving a copy of the provisional liquidation order on the South African Revenue Service (SARS); Thirdly, the merits of the liquidation application were not argued before Gura J; and lastly that no case was in any event made for the granting of the provisional liquidation in the founding affidavit and the filing of further affidavits did not advance the application in favour of the respondents.

[14] In my view this appeal turns in the main on the allegation that the liquidation application was not argued before **Gura J**. If this ground of appeal is upheld, it would be dispositive of the appeal with no need to consider the remainder of the grounds of appeal. I qualify the latter statement only insofar as it would be prudent to place the allegations regarding the failure to furnish the application to the employees of the Rustenburg Crematorium and service of the provisional liquidation order on SARS in perspective with regard to binding authority from the SCA. I turn first to deal with the latter grounds of appeal.

Discussion

1. *Non-compliance with the provisions of section 346(4A)(a)(ii) of the Companies Act 61 of 1973 by not furnishing the employees of the Rustenburg Crematorium with a*

copy of the application non-compliance with the provisions of section 346(4A)(c) of the Companies Act by not serving a copy of the provisional liquidation order on the South African Revenue Service (SARS)

[15] Nothing turns on these grounds of appeal when regard is had to the binding authority in ***EB Steam v Eskom Holdings* 2015 (2) SA 526 (SCA)**. **Kgoele J**, in my view, succinctly dealt with the alleged non-compliance with the provisions of section 346(4A)(a)(ii) of the Companies Act 61 of 1973 insofar as it is alleged that the employees of the Rustenburg Crematorium were not furnished with a copy of the liquidation application and SARS not served with the provisional order. The following extracts from the judgment of **Kgoele J** are apposite:

> *"[22] According to the respondents' Counsel, the provisional order should be discharged because:-*
>
> - *It does not seem that the application was served on the employees of the first respondent;*
> - *Nor on the Trade Union where they belong inclusive of;*
> - *On the Revenue Services (SARS).*
>
> *According to the respondents' Counsel the provisional order is therefore defective and is bound to be discharged.*
>
> *[23] This argument has been ill-conceived from the onset firstly because the service affidavit filed by the applicants found in* ***paginated page 364*** *reveals that the service to SARS and the Master was done, inclusive of the filling of the Security of Costs before the provisional order was granted.*
>
> *[24] Secondly, the case of* ***EB Steam v Eskom Holdings 2015 (2) SA 526 (SCA)****, which the respondents' Counsel based his support on to*

the effect fact that the provisional order is defective does not support him. In ***paragraph 23*** *it was decided:-*

"To sum up thus far the position is as follows. The requirement that the application papers be furnished to the persons specified in s 346(4A) is peremptory. ***It is not however peremptory, when furnishing them to the respondent's employees, that this be done in any of the ways specified in s346(4A)(a)(ii)****. If those modes of service are impossible or ineffectual another mode of service that is reasonably likely to make them accessible to the employees will satisfy the requirements of the section. If the applicant is unable to furnish the application papers to employees in one of the methods specified in the section, or those methods are ineffective to achieve that purpose and it has not devised some other effective manner, the court should be approached to give directions as to the manner in which this is to be done. Throughout the emphasis must be on achieving the statutory purpose of so far as reasonably possible bringing the application to the attention of the employees."*

[24] In ***paragraph 24*** *the following was said:-*

"That leaves one final question, whether the inability of the applicant, for whatever reason, to furnish the application papers to the employees before the hearing precludes the court from granting any relief… The position in regard to the notification provisions in s346(4A) is different. ***Their purpose is to ensure that certain specified persons, who may have an interest in the winding-up, in order to protect their own interests, are, so far as reasonably possible, furnished with the application papers in order to assess their own position in the light of the case made by the applicant…****"*

[25] Finally in ***paragraph 25*** *the Court remarked:-*

"The fact that the requirement that these persons be furnished with the application papers is peremptory, means that it is not permissible for the court to grant a final winding-up order without that having occurred. Does that mean that it is equally impermissible for the court to grant a provisional winding-up order? In my view it does not. The position may well be that an overwhelming case is made on the papers for the grant of a winding-up order and that any delay will allow assets to be concealed or disposed of to the detriment of the general body of creditors and particularly the employees and SARS, who may have preferential claims. It would be absurd to hold that the court was disabled from granting a provisional order merely because it had not been feasible, possible as a result of the conduct of the employees, to furnish a copy of the application papers to the employees or a representative trade union or even SARS, although the latter is unlikely to be a practical problem". [My Emphasis]

[26] In casu, although the employees were not served with the initial amended notice of motion itself, some letters were apparently sent to them notifying them of the intended application. Although there is no proof attached that the said letters did reach these employees, there is a return of service for each employee as a proof that the provisional order had been served on them. In my view, the statutory purpose of bringing the application to their notice has been achieved."

(my emphasis)

[16] Counsel for the appellants has conceded that he was unaware of the *EB Steam* judgment of the SCA. Paragraph [25] of the said judgment makes it plain that there is no bar to granting a provisional winding-up order even if there has been non-compliance with section 346(4A)(a)(ii) of the Companies Act 61 of 1973. In my view, on a vigilant examination of the papers, the first respondent dismally failed to comply with the provisions of section 346(4A) in respect of the employees and the determination of the existence of any registered trade union. The letters which were served by the Sheriff prior to the Amended Notice of Motion being filed is not countenanced by the

Companies Act. However, such non-compliance is not fatal to the grant of the provisional order as it is made clear in *EB Steam*. Whilst the facts of *EB Steam* in respect of not furnishing the employees with the application are distinguishable from the facts of the present matter, in that the employees were served with **letters** through the Sheriff of this Honourable Court, before the amendment of the notice of motion in which the respondents sought the liquidation of the Rustenburg Crematorium, the principle that a provisional liquidation may still be granted prevails. The papers in respect of service of the application on SARS is clear and nothing turns on this ground of appeal. I now turn to the ground of appeal which, in my view, is central to the appeal.

The merits of the liquidation application were not argued before Gura J

[17] As indicated *supra*, counsel remain at loggerheads, as they were before **Kgoele J**, on whether or not the merits of the liquidation application were argued before **Gura J**. The parties agreed that only the points *in limine* would be argued before **Gura J** and not the merits of the liquidation application. It is accordingly necessary to have regard to the record of proceedings in this regard. Initially, **Gura J** was very alive to the fact that all that was to be argued were the points *in limine*. It is not necessary for purposes of this judgment to identify and discuss the points *in limine* save to note that four (4) points *in limine* were argued.

[18] The following excerpt from the record attests to the fact that **Gura J** was acutely aware that he was called upon to adjudicate only the points *in limine*. When *Adv de Villiers* for the respondents (applicants in the main application) according to **Gura J** attempted to traverse the merits of the application he said:

"COURT: Mr De Villiers please do not discuss the merits of the case.

MR DE VILLIERS: I would not discuss it is not the merits of the case M'Lord. It is in respect of a relief claim and because this [intervenes]

COURT: It is?

MR DE VILLIERS: The submissions are made in respect of a relief claim…"

[19] Later in the record when *Adv de Villiers* was still addressing the points *in limine*, **Gura J** took a complete turn on the fact that the merits should not be argued when he engages counsel as follows:

"COURT: One point I wish to hear just in brief. If your client would not have brought a notice of amendment, what would it have meant? It would have meant that your client continues with the case to finality with the original notice of motion. Assuming your client lost the case, and now your client wanted to have this company liquidated, it would have meant if you had not brought an amendment it would have meant that they must bring a new application all together.

MR DE VILLIERS: No M' Lord. [intervenes]

COURT: Do you follow what I say? I say if your client had not brought an application for amendment, and would have stayed on the papers as they were without liquidation went to finality for instance on the other heads which you have pleaded as alternatives now here, if the client lost that application at the end of the day, then it would have meant that your client should lodge a new application where she or he the company is claiming now that the respondent should be liquidated.

MR DE VILLIERS: No M'Lord I would submit not. M'Lord [intervenes]

*COURT: **I gather that perhaps you do not follow me, because you are asking the Court to exercise its discretion. You are asking the Court to exercise its discretion in favour of your client. Now I am asking if I say your client was not entitled to raise this ground of liquidation at the stage when it raised it if I make that ruling what does it mean. It means I***

say then it must have lodge a new application after this one had been handled where she was dealing with liquidation only.

MR DE VILLIERS: No M'Lord.

COURT: ***I am looking at the question of cost also and the balance of convenience of parties***.

MR DE VILLIERS: ***M'Lord, my submission is it would make no difference if M'Lord makes such a finding and I make the statement for the following reason. If M'Lord finds that the liquidation application cannot proceed, it will only rule out prayer one of the amended notice of motion. The other prayers still remains and it is still there in the alternative***.

COURT: Ja the other prayers will remain.

MR DE VILLIERS: So it will not fall away. The main application still stands. It will have no effect on the costs. The main application with regard to the accounting records and the shareholders and [indistinct] still proceed. I have pointed out to M'Lord in my amended practice note that they have not complied with all the issues any way I take M'Lord [intervenes]

COURT: ***I do not think you follow me quite correctly. Mr Botha be prepared just to give me your view on this point, because I am supposed to exercise a discretion***.

MR BOTHA: Yes M 'Lord.

COURT: On the question of liquidation.

MR BOTHA: Yes.

COURT: ***If the Court finds that this application for liquidation this ground was not properly introduced, after your client had tendered a plea in the opposing what does it mean if on the other grounds as originally they were the applicant lost, it would have meant that the applicant must come again before Court in a new separate case in future and bring an application for liquidation****.*

MR BOTHA: Yes M'Lord.

COURT: ***Now I am going to ask you when your time comes whether it is not is it not then convenient for all the parties that this new ground would should have been raised as it is raised, because the parties are already before Court, because it will involve the same costs as the cost for the original application. That is where I am going. I am considering what if I dismiss it. It will mean additional costs on all the parties, rather than adjudicating the application today and also adjudicating the liquidation. Thank you Sir, you may have your say****?*

MR BOTHA: As the Court pleases.

COURT: Thank you Sir. Mr De Villiers thank you very must Sir. Thank you very much. I assume that you have finished I just raised this point I just want to hear your opinion on this issue, but you have responded. Thank you very much.

MR BOTHA ADDRESSES COURT: M' Lord, may I start with your Lordship's question regarding this liquidation aspect?

COURT: Yes Sir.

MR BOTHA: ***M'Lord, with all due respect this liquidation application cannot be entertained because there is simply no liquidation application before this Court****.*

COURT: But there is. There is, the amended notice of motion.

MR BOTHA: Yes it is only an amended notice of motion.

COURT: Not on the founding affidavit.

MR BOTHA: There is no founding affidavit in support of a liquidation application. It is with all due respect not sustainable in law. Now M'Lord, there is another aspect what the applicants must be careful for. If they rely I know they have alternative relief but at some point they must make an election. What is the case that they want to bring before this Court? Is it an liquidation application or is it an alternative prayers, because if it is a liquidation application and that is dismissed, then the application is actually dismissed [indistinct] of the application.

They must make an election at some stage, is it a liquidation application or is it the alternative prayers, but M'Lord the point that I have taken is there is no liquidation application before this Court, because if Your Lordship actually listened to the argument of my learned friend he wants to build a liquidation application from certain paragraphs in the respondents opposing affidavit, a paragraph in the replying affidavit and an annexure of a Mr Ferreira that was attached to the supplementary affidavit of the respondents.

M'Lord so with all, there is simply there is no application before this Honourable Court, and in any event M'Lord it is not possible for the respondent to answer to a liquidation application, because it is not there, because they take a paragraph there a paragraph there and a paragraph there. With respect M'Lord it is not sustainable.

COURT: Your client has answered?

MR BOTHA: As the Court pleases.

COURT: *Look at the court order of Landman is it Landman or one of my sister's or brother's last year [intervenes]*

MR BOTHA: *Yes M'Lord.*

COURT: *He made an order or she then ordered that after they had raised this new ground now you should be given a chance to be heard on those new grounds which had been raised.*

MR BOTHA: ***M'Lord, with all due respect if Your Lordship looks at the supplementary affidavit it is not there because of the amended notice of motion. The supplementary was filed because of various grounds that was raised in the replying affidavit****.*

COURT: *So it means that [intervenes]*

MR BOTHA: *Inter alia the aspect of the liquidation that they raised, but this [intervenes]*

COURT: *So do you suggest Mr Botha I am sorry.*

MR BOTHA: *Yes M'Lord.*

COURT: ***That your client has not been given the opportunity now to answer now these allegations about the liquidation?***

MR BOTHA: Not at all M'Lord, because there is no application with all due respect. It is impossible to answer thereto. M'Lord and just on that point while we are busy with the court order, it clearly states in paragraph 5 that is now on page 369 of the paginated papers the notice of amendment of the notice of motion not anything else of the applicants in terms whereof they seek the liquidation of the first respondent is noted but not opposed subject to that the respondents

content that no case has been made out for the relief sought by the applicants in the amended notice of motion.

It was merely to say you can amend your notice of motion. It is nothing more than that to concede that we can now argue a full blown condonation application. It is simply to save time and cost amended and then we will answer thereto. M'Lord*, [intervenes]*

COURT: ***What about, are you through with liquidation now****?*

MR BOTHA: I just wanted to look at my notes, because I started [intervenes]

COURT: Okay.

MR BOTHA: Asking Your Lordship question and then I went on.

COURT: Oh yes, yes, I remember.

MR BOTHA: Just to see [intervenes]

COURT: You can, you can let me have a glass of water.

MR BOTHA: M'Lord, my learned friend inter alia attacked paragraph 2.2 page 4 of the supplementary heads of the respondents where I quoted the matter of Director of Hospital Services v Mystery to Your Lordship where my learned friend said well this was pertaining to another argument of the respondent. M'Lord, this case law is exactly to the point. I did not proceed with another argument.

COURT: No, I think are you referring to that case it is Footnote number 12 or something like that?

MR BOTHA: Director of Hospital Services v Mistry M'Lord, and [intervenes]

COURT: *What is the name again or the case again?*

MR BOTHA: *Director of Hospital Services v Mistry.*

COURT: *If I understood him there properly [intervenes]*

MR BOTHA: *Yes.*

COURT: *He says in this case your client has been given a chance to answer.*

MR BOTHA: *M'Lord if the [intervenes]*

COURT: *The allegation the new allegations now. He seems to suggest that that was not I did not ask him what were the facts in that case.*

MR BOTHA: *Yes.*

COURT: *But he seems to suggest that those were not the facts in that case. The respondent or whoever had not been given the chance to answer now this new case which is being raised.*

MR BOTHA: *M'Lord as I understood him my learned friend said [intervenes]*

COURT: *Yes.*

MR BOTHA: *That this case said you cannot go with new facts in replying affidavits, but what they are doing they are just relying on facts that was stated in the opposing affidavit, and that is why he said that this case is not the same as the situation that we have before Your Lordship today.*

COURT: *I see.*

MR BOTHA: But M'Lord still it remains untenable. You cannot build your case on the opposing affidavits and then amend subsequently amend your notice of motion and furthermore M'Lord what is very important in this case and I just want to read this again to Your Lordship or I will just read the whole paragraph.

COURT: What are you reading, what document the page?

MR BOTHA: Paragraph 2.2 page 4 of the supplementary heads of argument of the respondent.

COURT: It is page 4 of the paginated papers?

MR BOTHA: No M'Lord, of the respondents supplementary heads of argument paragraph 2.2.

COURT: I will not be able now to get that document unless you use the paginated numbers, the numbers which are in this two bundles?

MR BOTHA: M'Lord, this is the heads of argument, or supplementary heads of argument.

COURT: Oh sorry your heads.

MR BOTHA: Yes.

COURT: Oh sorry.

MR BOTHA: The supplementary heads M'Lord.

COURT: I was not with you. I was not with you. You are at paragraph 2.
MR BOTHA: 2.2 M'Lord. Now I have quoted this in my argument M'Lord, but I just want to restate it.

"The general rule which has been laid down repeatedly is that an application must stand [intervenes]

COURT: *One moment, one moment please I am looking at the applicants yes. I think you are now the applicant. You are no more the respondent.*

MR BOTHA: *Well M'Lord if I am the applicant then I just ask that the application be dismissed then.*

COURT: *2.2 of your heads.*

MR BOTHA: *2.2 M'Lord. M'Lord I just want to restate.*

"The general rule which has been laid down repeatedly is that an application must stand or fall by the founding affidavit and the facts alleged in it."

COURT: *Where are you reading now Mr Botha?*

MR BOTHA: *Paragraph 2.2 page 4 M'Lord.*

COURT: *Respondents second heads of argument?*

MR BOTHA: *The supplementary heads.*

COURT: *Page 3.*

MR BOTHA: *Page 4 M'Lord.*

COURT: *Look at that.*

MR BOTHA: *Paragraph 2.2.*

COURT: *No, no, no, 2.2 is not on page 4.*

MR BOTHA: *Of the sup [intervenes]*

COURT: *2.2 is on page 3.*

MR BOTHA: *M'Lord I apologise it is not the supplementary heads it is the initial heads of argument.*

COURT: *It is the original?*

MR BOTHA: *Ja of the initial heads of argument.*

COURT: *The initial heads.*

MR BOTHA: *That is my mistake I apologise M'Lord.*

COURT: *Yes Sir.*

MR BOTHA: *Paragraph 2.2 M'Lord.*

> *"The general rule which has been laid down repeatedly is that an applicant must stand or fall by the founding affidavit and the facts alleged in it, and that although sometimes it is permissible to supplement the allegations contained in that affidavit still the foundation of the application is the allegation of facts stated therein because those are the facts that the respondent is called upon either to affirm or deny. The appellate division has held that it is not permissible to make out new grounds for an application in a replying affidavit."*

M'Lord this is not even new grounds. This is a total new course of action the liquidation that the respondents now seek, and it specifically states that it is the founding affidavit that the respondent must come and answer to either affirm or deny.

MLord, with all due respect this liquidation application of the applicants is simply not sustainable in law. What they can do if they want to they can withdraw this application and lodge an liquidation application or if this application is refused or even if they are successful with this application they can still proceed with the liquidation application.

COURT: But will that not be an expensive exercise?

MR BOTHA: M'Lord with all due respect [intervenes]

COURT: As compared to the present step which they have taken.

MR BOTHA: M'Lord, [intervenes]

COURT: Look at the balance of convenience to the parties as well as to the Court and the expenses involved if this matter is handled now, despite this authority you have just quoted here on this paragraph 2.2 of your heads? Do not you think it is convenient for the parties now to deal with liquidation as it is at this stage?

MR BOTHA: M'Lord with all due respect [intervenes]

COURT: As compared to if they would have lodged in future the new application for liquidation?

MR BOTHA: M'Lord, with all due respect now the reasons for that I understand that we do not want to unnecessary burden this Honourable Court with unnecessary litigation.

COURT: Yes.

MR BOTHA: But M'Lord the applicant must choose its battle.

COURT: Must choose?

MR BOTHA: Its battle. It must choose what application it wants to launch against the respondent, and it must stand by that application. If they decide in the middle of the application they want to lodge another application now, they cannot complain and say but it is additional costs, because the respondent is also prejudiced. It is the respondent that is prejudiced when they are in the middle of a case suddenly amend and then want to proceed with another application, because it is not properly before Court.

Your Lordship a proper liquidation application is in a founding affidavit where you from the beginning made the allegations exactly why this company must be liquidated. You deal with all the formalities, all the statutory formalities. There are various aspects that must be dealt with and then the respondent can properly answer thereto.

Not with all due respect M'Lord and this haphazard fashion there is a paragraph and there is a paragraph and therefore we can argue this liquidation application. So, M'Lord the reason is it is twofold. There is simply no application before Your Lordship and secondly regarding the costs, the applicant must burden the costs of a liquidation application if they want to proceed there with, but it will only be the respondent or the respondents that will be prejudiced should we convert this into a liquidation application M'Lord.

M'Lord so with respect I submit that the balance of convenience is not applicable in this particular situation M'Lord. They must stand and fall by their application. M'Lord, regarding the locus standi I do not know if Your Lordship has other questions for me on the liquidation aspect.

COURT: ***Yes I am with you on the liquidation. I am with you. Let us deal with the locus standi.****"*

(my emphasis)

[20] The respondents contend, premised on the excerpts from the record above, that counsel for the appellant, *Adv Botha*, in fact did argue the liquidation application before **Gura J**. On this submission counsel for the respondents contend that **Gura J** was therefore correct when he granted an order placing the Rustenburg Crematorium in provisional liquidation. This submission is respectfully disingenuous when regard is had to the transcribed record. In the first place, *Adv de Villiers* addressed **Gura J** on the points *in limine* and not the merits of the liquidation application. In the second place, *Adv Botha*, when regard is had to the record, was engaged by **Gura J** only on the expediency or viability of hearing arguments on the merits of the liquidation application, on a misplaced standard of balance of convenience and saving of costs for the parties. This in fact is what *Adv Botha* was called to address and a careful reading of the record reflects that this is what he answered. The record speaks for itself and cannot be misconstrued as the respondents would want this Court to believe and accept. It will further be shown below that **Gura J** materially misdirected himself when he granted a judgment placing the Rustenburg Crematorium in provisional liquidation.

[21] The belated introduction of a balance of convenience standard and cost saving proposal by **Gura J,** on which he afforded counsel an opportunity to address when considered in the context of this appeal, is nothing more than a red-herring. There were clearly no substantive arguments on the merits of the liquidation application. The reason being straightforward. **The parties agreed and Gura J acquiesced in the agreement, that only the points *in limine* were to be argued before him**. I am edified in this view by the concluding remarks of **Gura J** upon the conclusion of *Adv de Villiers* submissions and upon conclusion of *Adv Botha's* submissions, before reserving judgment. This is further evidenced by the content of a letter dated **10 August 2016** in which it is recorded that:

> ***"On the day of the enrolment, a number of point in limine were argued by Counsel acting for both sides. The merits have yet to be argued***.

[22] Towards the end of *Adv Botha's* submissions on whether or not the merits of the liquidation should be argued, the following appears from the record:

> *"COURT:* ***Yes I am with you on the liquidation. I am with you. Let us deal with the locus standi.****"*
> *(my emphasis)*

[23] **Gura J** was clearly with *Adv Botha* on his submissions on whether or not the merits of the liquidation application should be argued. To this end he even invited *Adv Botha* to return to the arguments on the points *in limine*. **In other words, to return to the agreement that the parties would only argue the points *in limine* which could have been dispositive of the matter, inclusive of the liquidation application**.

[24] The most conclusive and unequivocal indication that the only issues **Gura J** was called to deliver judgment on were the points *in limine,* is found in the concluding remarks:

> *"COURT:* ***Thank you Sir. Judgment is reserved in this matter. As I stated earlier to the counsels I do not think it would be proper for me to try and fix a date on which the main application on the merits could proceed, because no one knows whether these arguments today may terminate the whole proceedings…****"*
> *(my emphasis)*

[25] **Gura J** in his judgment deals extensively with the points *in limine* and counter application of the appellants. The first point *in limine* was dismissed and it was found that the second to fourth points *in limine* could not be resolved without recourse to evidence. **Gura J** then finds that the second to fourth points *in limine* fall to be resolved, if needs be, when he deals with the merits of the case. One would be excused at this stage of **Gura J's** judgment for expecting that this would signal the end of the judgment, particularly in light of his concluding remarks when he emphatically stated in reserving judgment that *"****As I stated earlier to the counsels I do not think it would be proper for***

me to try and fix a date on which the main application on the merits could proceed, because no one knows whether these arguments today may terminate the whole proceedings…*"*.

[26] However, where the pen of **Gura J** should have stopped writing at this point, with the foul swoop of the pen (something that happens all at once or suddenly and kills or destroys, a phrase emanating from the Shakespeare novel *Macbeth*) **Gura J** engages in the merits of the liquidation application which were never argued before him and pronounces on the liquidation application without recourse to the evidence he spoke of. The Rustenburg Crematorium without further ado was provisionally liquidated.

[27] The judgment of **Kgoele J** is on appeal before this Court and as earlier indicated the final order is inextricably linked to the provisional order of **Gura J**. The following extract from the judgment of **Kgoele J** is apposite to the ground of appeal under consideration:

> *"[11]* ***The second submission that the respondent relies on for the provisional order to be discharged is to the effect that the merits of the matter have not been argued before Gura J who granted the provisional order. Only the points in limine were****. The respondents rely firstly as a basis for this contention on* ***paragraph 85*** *of the said judgment which states:-*
>
> > *"I am of the view that all these points in limine falls to be resolved, if need be, when I deal with the merits of the case"*
>
> ***In addition the respondents furthermore placed reliance on the letter from the applicants dated 10 August 2016 which stated:-***
>
> > ***"On the day of the enrolment, a number of point in limine were argued by Counsel acting for both sides. The merits have yet to be argued****.*

[12] Counsel for the Respondents further argued that the respondents have been prejudiced by the fact that Gura J granted a provisional order without affording them an opportunity to make submissions on the merits*.*

[13] The applicants Counsel contended that there is still no prejudice suffered by the respondents because the points in limine that Gura J did not make a formal ruling on, were intertwined with the merits hence Gura J was correct to find that all those points in limine falls to be resolved, when he deals with the merits.

*[14] **I fully agree with the applicants' Counsel that the Court as per Gura J was correct in the approach it adopted. A careful reading of the paragraph quoted by the respondents from the judgment of Gura J, says it all. It is quite clear that the Court as per Gura J was also alive to the fact that the facts averred and argued in these points in limine are so intertwined with the merits to such an extent that it remarked: "if need be, will be dealt with when it analyses the merits". In my view, Gura J was satisfied that the parties addressed the factual averments of the merits sufficiently in their submission including their papers and heads of arguments to enable the Court to pronounce on them**.*

*[15] **Even if I can be wrong in the interpretation of the judgment by Gura J**, the following remarks in the case of **Kalil v Decotex (Pty) Ltd and Another 1988 (1) SA 943 (AD) page 976 and 979** respectively clearly denotes that an application can be granted on the affidavits before Court:-*

> *"Where the application for a provisional order of winding-up is not opposed or where, though it is opposed, no factual disputes are raised in the opposing affidavits, the concept of the applicant, upon whom the onus lies, having to establish a prima facie case for the liquidation of the company seems wholly*

appropriate, but not so where the application is opposed and real and fundamental factual issues arise on the affidavits, for it can hardly be suggested that in such a case the Court should decide whether or not to grant an order without reference to respondent's rebutting evidence"

AND

"Where on the affidavits there is a prima facie case (ie a balance of probabilities) in favour of the applicant, then, in my view, a provisional order of winding up should normally be granted and, save in exceptional circumstances, the Court should not accede to an application by the respondent that the matter be referred to the hearing of viva voce evidence. This does no lasting injustices to the respondent for he will on the return day generally be given the opportunity, in a proper case and where he asks for an order to that effect, to present oral evidence on disputed issues. As it was put in the Wackrill case supra at 285H-286A. [My Emphasis]"

[28] **Kgoele J** anticipates that she may be wrong in the interpretation of the judgment of **Gura J** and proffers an alternative view by relying on *Kalil v Decotex*. Having highlighted the record of proceedings before **Gura J** by having regard to the self-explanatory content thereof and not only the judgment by **Gura J**, it can safely be accepted that **Kgoele J** was in fact wrong in the interpretation of the judgment of **Gura J**. The alternative view proffered by **Kgoele J** in justification of the **Gura J** order is not sustainable when regard is had to the record of proceedings before **Gura J**.

[29] **Gura J** materially misdirected himself in granting the provisional liquidation order. In the absence of a competent order for provisionally liquidating the Rustenburg Crematorium, there can be no final order. The appeal stands to be upheld on this ground. It follows axiomatically that if the final liquidation order is set aside that the provisional liquidation order cannot stand.

Costs

[30] Costs should follow the result and I can find no basis to order otherwise. The respondents are accordingly liable for the costs of appeal, which shall in accordance with the order of the Supreme Court of Appeal, include the costs of the court *a quo* in dismissing the application for leave to appeal and the costs of the application for leave to appeal in the Supreme Court of Appeal.

Order

[31] In the result, the following order is made:

(i) The appeal is upheld.

(ii) The order of the court *a quo* (per **Kgoele J**) placing the first appellant in final liquidation is set aside and replaced with the following order:

"The application for the final liquidation of the first respondent (Rustenburg Crematorium (Pty) Ltd) is dismissed with costs."

(iii) The first to third respondents shall pay the costs of appeal which costs shall include the costs of the court *a quo* in dismissing the application for leave to appeal and the costs of the application for leave to appeal in the Supreme Court of Appeal, jointly and severally, the one paying the other to be absolved.

A H PETERSEN
JUDGE OF THE HIGH COURT
NORTH WEST DIVISION, MAHIKENG

I agree

A REDDY
ACTING JUDGE OF THE HIGH COURT
NORTH WEST DIVISION, MAHIKENG

I agree

S MFENYANA
ACTING JUDGE OF THE HIGH COURT
NORTH WEST DIVISION, MAHIKENG

APPEARANCES:

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Date of Hearing	:	04 November 2023
Date of Judgment	:	06 April 2023