

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

(1)	REPORTABLE: YES
(2)	OF INTEREST TO OTHER JUDGES: YES
(3)	REVISED.
.....
SIGNATURE	DATE

Case No: 2021/43053

In the matter between:

BARAK FUND SPC LTD

Applicant

and

INSURE GROUP MANAGERS LIMITED
(In liquidation)

First Respondent

THE MASTER OF THE HIGH COURT, JOHANNESBURG
(*the Conversion Application*)

Second Respondent

Case No: 2021/47302

In the matter between:

JOHANNES HENDRIKUS DU PLESSIS N.O

First Applicant

NKAGISENG MATSEDISO MILLICENT MODUKA N.O

Second Applicant

INSURE GROUP MANAGERS LIMITED
(In liquidation)

Third Applicant

and

ERICODE (PROPRIETARY) LIMITED
(Registration No: 2012/110448/07)

First Respondent

LEBONIX (PROPRIETARY) LIMITED

Second Respondent

(Registration No: 2012/047776/07)

THE MASTER OF THE HIGH COURT, JOHANNESBURG

Third Respondent

THE COMPANIES AND INTELLECTUAL PROPERTY

COMMISSION

Fourth Respondent

BARAK FUND SPC LTD

Intervening Party

(‘The Section 20(9) Application’)

Case No: 2021/50157

In the matter between:

JOHANNES HENDRIKUS DU PLESSIS N.O

First Applicant

NKAGISENG MATSEDISO MILLICENT MODUKA N.O

Second Applicant

INSURE GROUP MANAGERS LIMITED

Third Applicant

(In liquidation)

and

REUBEN MAPHAHA N.O

First Respondent

NATASHA LUITERS N.O

Second Respondent

THE MASTER OF THE HIGH COURT, JOHANNESBURG

Third Respondent

EBM PROJECT (PTY) LTD

(In Liquidation)

Fourth Respondent

BARAK FUND SPC LTD

Intervening Party

(‘the Interdict Application’)

Case No: 2021/41947

In the matter between:

BARAK FUND SPC LTD

Applicant

and

INSURE GROUP MANAGERS LIMITED

First Respondent

(In liquidation)

THE MASTER OF THE HIGH COURT, JOHANNESBURG

Second Respondent

(‘the Barak Arbitration Award Application’)

Summary: Six applications served before the court. The sufficiency of evidence to support a finding of ‘unconscionable abuse’ as provided for in section 20(9) of the Companies Act considered. Court’s powers to order the liquidation of companies retrospectively upon a finding in terms of section 20(9) of the Companies Act discussed and evaluated. Obligation to join creditors and serve court processes on creditors addressed. Principles relating to costs *de bonis propriis* and as between attorney and client applied to both liquidators and attorney of record.

JUDGMENT

INGRID OPPERMAN J

Introduction

[1] There are six applications before this Court. First, an application at the behest of Barak Fund SPC Limited (*‘Barak’*) to convert the creditors’ voluntary winding-up of Insure Group Managers Limited (*‘Insure’*) into a compulsory winding-up by the Court (*‘the Conversion Application’*) which is unopposed and a draft order has been agreed to. Second, an application at the behest of the first and second applicants (*‘the Liquidators’*) claiming an order in terms of section 20(9) of the Companies Act, 2008 (*‘the New Companies Act’*) that the first and second respondents (*‘Ericode’* and *‘Lebonix’*) be "...deemed not to be separate juristic entities in respect of any right, obligation or liability of the company or of a shareholder of the company..." and "be integrated into the third applicant (*‘Insure’*) and that the two entities shall exist as a single entity ... and wound-up as such by [the Liquidators]..." with effect from 21 June 2021 (*‘the Section 20(9) Application’*). Third, an application at the behest of the Liquidators (of Insure) claiming an interim interdict against the holding of the first statutory meeting of creditors in EBM (Proprietary) Limited (in liquidation) (*‘EBM’*) pending the outcome of the Section 20(9) Application (*‘the Interdict Application’*). Fourth, an application at the behest of Barak to intervene in the Section 20(9)

Application and the Interdict Application (*'Intervention Application'*). Fifth, the conditional counter-application at the behest of Barak claiming a mandatory interdict against the Master to convene the first statutory meeting of creditors in EBM should the Section 20(9) Application and Interdict Application fail (*'the Conditional Counter Application'*). Sixth, an application at the behest of Barak to have the arbitration award between Barak and Lebonix made an order of Court. The Liquidators sought leave to intervene in this application and opposed the relief claimed by Barak (*'the Barak Arbitration Award Application'*) but during the hearing consented to an order being taken in the Barak Arbitration Award Application.

The central features of these applications

[2] As pointed out by Mr Daniels SC, representing the Liquidators, the central application is the Section 20(9) Application, which seeks to collapse the corporate structure of Ericode and Lebonix and for them to be dealt with as if liquidated and part of Insure. The adjudication of such application requires adjudication of the Intervention Application. Mr Daniels submitted that the Interdict Application would follow the result of the Section 20(9) Application.

[3] Mr Fine SC, representing Barak in these proceedings, submitted that a core issue in each of the applications is the right to enforce the Lebonix shareholders' loan claim in EBM and the entitlement (right) to vote on the shares Lebonix pledged to Barak which rights arose by no later than October 2020, but in any event prior to the liquidation of EBM or the voluntary winding-up of Insure. He submitted (and by the end of the hearing it was common cause as the Liquidators consented to the relief sought in the Barak Arbitration Award Application), that at the first statutory meeting of creditors, Barak would be entitled to prove a claim both as a creditor of EBM in respect of its claim from the Loan Agreements of approximately USD 34 million and

as cessionary of a Lebonix Loan Claim and would also be entitled to vote in respect of Lebonix's pledged shares.

The facts

[4] EBM, a mining enterprise, had different names over the years and was owned by different holding companies. It formed part of the Exxaro Group when Lebonix bought the shares in EBM from Exxaro Resources Limited on 11 October 2012. The Sale of Shares and Claims Agreement was signed by one Mr Venter on behalf of EBM and Mr Ngale, Mr van den Berg and Mr Grobler as chairman and directors of Lebonix.

[5] Barak is a creditor of EBM having lent and advanced US\$ 8 340 000 to EBM in terms of an agreement concluded on 2 October 2014 to develop EBM's zinc beneficiation structure. Barak entered into a web of security agreements with EBM, Lebonix (the wholly owned subsidiary of Ericode), Ericode (the wholly owned subsidiary of Insure) and Insure (collectively referred to as '*the Insure Group*'), which security agreements included a written guarantee by Insure in favour of Barak in terms of which Insure guaranteed EBM's obligations to Barak in terms of the loan agreements. Six separate security agreements were concluded between Barak and Ericode, and Barak and Lebonix, on 15 December 2017. On 29 January 2018, Barak provided EBM with a further facility of some US\$ 17 Million to develop the zinc beneficiation structure.

[6] Insure's business was to collect insurance premiums from insured persons and to transmit these, after certain deductions, to insurers. It was the largest insurance premium collector in South Africa and collected premiums for short-term and long-term insurance companies on the strength of hundreds of thousands of debit orders per month. Insure's revenue model was such that it could retain the

collected premiums for 45 days in the case of short-term insurers and 30 days in respect of long-term insurers before having to pay those amounts across to the insurance companies. This did not happen in all instances and is referred to as 'the fraud', which was perpetrated on the insurance companies by Insure. I too will refer to it as such.

[7] It would appear that Insure had invested some of the premiums that it had collected in different subsidiaries whose businesses had nothing to do with Insure's core business of conducting the business of a financial services provider. One of the divisions into which some of the premiums might have been invested was the mining division. This division beneficiates mine dumps by extracting various metals. At the apex of this division within Insure is Ericode which holds the shares in Lebonix which in turn holds the shares in EBM, the operating company. EBM is the holder of a mining interest, the most valuable asset in the Insure Group. Barak has claims against EBM via its own loan to EBM and via its having taken cession of the claims of Ericode and Lebonix against EBM. Insure itself does not have a claim against EBM. That is an inconvenient truth for Insure. The efforts to circumvent that truth make up much of the litigation in this matter.

[8] Another division of Insure's which may have received premiums, the property division, consists of a company PCI Rentals (Pty) Ltd which holds various percentages of shares in a web of property-owning companies.

[9] Mr Lategan, The Hollard Insurance Company Limited's representative ('*Hollard*'), stated that Insure had invested some R880 million in the mining division and some R550 million in the property division.

[10] The principal creditors of Insure are the insurance companies for which Insure collected premiums. The largest Insure creditors swapped part of their claims

against Insure for shares in Insure in debt-for-equity transactions. Insure is now, for all practical purposes, owned by insurance companies, of which Hollard is one. (It is in liquidation presently and under the control of the Liquidators.)

[11] On 14 September 2018, the Financial Services Conduct Authority appointed Mr Bezuidenhout as Insure's curator.

[12] From the papers it would appear that the Liquidators assert *locus standi* to bring the Section 20(9) Application on the basis that Insure is a creditor of Ericode and Insure is a contingent creditor of Lebonix. The Annual Financial Statements ('AFS') of Insure, Ericode and Lebonix do not reflect Insure as a creditor contingent or otherwise of Lebonix. During argument however, Mr Daniels SC, representing the Liquidators, submitted that an interest was sufficient to rely on Section 20(9) of the New Companies Act. More about this later.

[13] Ericode's loan claim against Lebonix in the amount of R930 822 652 has been ceded *in securitatem debiti* to Barak and Lebonix's loan claim against EBM in an amount of R1 051 739.94 has been ceded *in securitatem debiti* to Barak.

Litigation history

[14] On 9 December 2020, Barak instituted an application against EBM claiming judgment against EBM in an amount of US\$ 34 556 750. On 11 December 2020 Barak caused a demand to be made on Insure in terms of a written guarantee.

[15] On 14 December 2020 EBM was placed under business rescue by a directors' resolution (*'the EBM resolution'*) and Mr Venter was appointed the business rescue practitioner.

[16] On 22 December 2020 Hollard instituted an application seeking to place Insure under business rescue (*'the First Hollard Application'*). On 20 January 2021 Barak instituted an application against EBM in which Barak sought to set aside the

EBM resolution (*'the Barak Application'*). On 26 February 2021, Lebonix brought an application to intervene in the Barak Application. I heard the First Hollard, Barak and intervention applications from 15 to 17 March 2021 and reserved judgment.

[17] On 23 February 2021 Insure, Ericode, Lebonix and EBM instituted an arbitration against Barak claiming certain declarators in relation to the loan agreements and securities given by each of EBM, Lebonix, Ericode and Insure to secure EBM's obligations of Barak (*'the International Arbitration'*).

[18] On 15 April 2021 (and before judgment in respect of the hearing of 15 to 17 March 2021 was delivered), Mr Venter instituted an *ex parte* application in his capacity as the business rescue practitioner of EBM, in which he sought to convert the business rescue proceedings of EBM to provisional liquidation proceedings with extended powers for the provisional liquidators (*'the Venter Application'*). This he initiated in the urgent court before another Judge and whilst the judgment in the First Hollard, Barak and intervention applications were pending, without notifying anyone who had an interest in the Venter application, including me.

[19] On 16 April 2021 Mr Bezuidenhout (the curator of Insure) used the Lebonix Loan Claim (which had been ceded *in securitatem debiti* to Barak, a fact acknowledged by him in the Lebonix Intervention Application) to support the Venter application for the provisional liquidation of EBM, and he thereafter used the Lebonix Loan Claim against EBM to support a requisition to the Master to obtain the appointment of a provisional liquidator to EBM. In so doing, Mr Bezuidenhout represented to the Master that Lebonix was a creditor of EBM and, as its member (shareholder), enjoyed certain rights. Mr Bezuidenhout's conduct led to a dispute between Barak, on the one hand and Lebonix on the other hand as to Lebonix's rights to prove a claim in EBM and to vote as member.

[20] On 19 May 2021, Hollard instituted a conditional application in terms of which it sought to intervene in the Venter Application and sought to place EBM in final winding up should the Venter Application fail (*'the Second Hollard Application'*).

[21] On 14 June 2021, this court placed EBM into final liquidation by issuing a court order in the Second Hollard Application and it dismissed the Venter Application with a punitive costs order made against Mr Venter, *de bonis propriis* for, amongst other reasons, approaching the urgent court without notice to Barak and this court.

[22] On 16 June 2021 Insure was placed in a voluntary creditors' winding up pursuant to a resolution taken by its members. Barak was not included or reflected as a creditor of Insure in the statement of affairs accompanying the resolution to place Insure under the creditor's voluntary winding up.

[23] On 19 July 2021 an arbitration agreement was entered between Barak and Lebonix in terms of which the parties sought to determine the rights and obligations of each of the parties in relation to the security agreements between them and in particular, whether Lebonix may prove a claim in EBM, whether Lebonix could vote on that claim, whether Lebonix could vote as a member of EBM in any matter in relation to the liquidation of EBM, including the appointment of liquidators (*'the Barak Arbitration'*).

[24] On 29 July 2021, 23 days after the Liquidators' appointment, the Master authorised the Liquidators to convene an enquiry in terms of sections 417 and 418 of the Old Companies Act (this authorisation was *ultra vires*). Barak had no idea of this authorisation until much later. The Liquidators convened no enquiry in terms of sections 417 and 418 of the Old Companies Act.

[25] The Barak Arbitration was heard before retired Judge Harms and on 12 August 2021, he handed down his Award (*'the Award'*) in which he found:

'1.1 All Lebonix's rights in the shares in EBM Project Proprietary Limited (in liquidation) ("EBM") ("the Pledged Shares") and all claims and rights of action ("the Ceded Rights") which include the rights in the loan made by Lebonix to EBM ("the Lebonix Loan") have been transferred to Barak who is the holder of these rights and entitled to exercise all rights associated with being holder of the Ceded Rights including:

- 1.1.1. the right to vote in respect of the Pledged Shares;
- 1.1.2. the right to claim and enforce payment of the Lebonix Loan and prove a claim in EBM in respect of the Lebonix Loan; and
- 1.1.3. the right to exercise any rights and voting rights in respect of the Lebonix Loan, to the exclusion of Lebonix.

1.2 Lebonix has been divested of its rights and benefits both in relation to the Pledged Shares and the Lebonix Loan with the result that it has no contractual relationship with or enforceable claim or rights against EBM until all amounts owed by EBM to Barak ("the Secured Obligations") have been discharged in full.

1.3 Barak as creditor of EBM and the holder of the Ceded Rights because of the Pledge and Cession in Security is the only party entitled to exercise the rights in respect of the Ceded Claims and Claims to vote in respect of the Ceded Claims and Claims in all matters relating to the liquidation of EBM.

1.4 Lebonix has no rights in respect of the Ceded Rights which are enforceable in the liquidation of EBM and is not entitled to prove a claim as a creditor of EBM or to vote for the appointment of a liquidator or to participate or vote on any of the matters referred to in sections 364, 386(4), 387(1) and (2) and 389 of the Companies Act, 1973 and the only party entitled to exercise these rights is Barak.

1.5 By virtue of the Pledge and Cession in Security Agreement Lebonix has no rights in and to the Lebonix Loan.'

[26] In September 2021, Barak launched the Conversion Application. This resulted in extensive negotiations between Mr Versfeld, on behalf of Barak, and Mr Schickerling, on behalf of the Liquidators for Insure, over the period September to October 2021, which culminated in an agreement between Barak and the Liquidators in relation to the order to be granted in respect of the Conversion Application and

which effectively allows for a proper enquiry into the affairs of Insure in terms of sections 417 and 418 of the Old Companies Act.

[27] On 4 October 2021 the Liquidators launched the Section 20(9) Application. Barak was not joined as a party thereto.

[28] On 5 October 2021, Mr Schickerling wrote to the Master requesting that the first statutory meeting of creditors in EBM be postponed pending the outcome of the Section 20(9) Application (*the 5 October 2021 letter*). The motivation for the postponement was set out as follows:

(2) In a letter dated 13 July 2021 the Master of the High Court exercised its discretion not to convene the first meeting of creditors and members in EBM, *inter alia*, on the basis that there were pending arbitral proceedings between Lebonix (Pty) Limited ("Lebonix") and Barak Fund SPC Limited **which arbitral proceedings would affect dominium of the rights of Lebonix as a shareholder and creditor of EBM.** A copy of this letter is attached hereto marked "A" for ease of reference.

.....

(3) The Master is herewith requested to again exercise its discretion not to convene the first meeting of creditors and members of EBM also pending the outcome of an application, this time, the application is brought by the joint liquidators of [Insure] (the application) [being a reference to the Section 20(9) Application]. A copy of the application is attached marked "B" for ease of reference. **The application, like the arbitrable proceedings will affect the dominium of the rights of Lebonix as shareholder and creditor of EBM.**

.....

(5) **By allowing the first meeting of creditors before the application is adjudicated, [Insure] will be divested of the right to prove a claim as creditor in EBM for the monies unlawfully diverted to EBM. Furthermore, [Insure] will not be able to give direction to the joint liquidators of EBM as member. These rights are sacrosanct in the proper administration of [Insure] to the benefit of the concursus [Insure].'** (emphasis provided)

[29] It is significant that the Award by retired Justice Harms had at that stage already been made. Despite this, paragraph 2 of the 5 October 2021 letter creates the false impression that no decision has yet been made. The Master is told that the first meeting of creditors and shareholders of EBM should be postponed as the Section 20(9) Application will affect the *dominium* of the rights of Lebonix as shareholder and creditor of EBM. The Master was not told that the Award was made and that in terms of such Award, Lebonix effectively has no rights until Barak is paid.

[30] In respect of paragraph (5) of the 5 October 2021 letter to the Master, the Master is told that Insure was divested of a right by virtue of '*the monies unlawfully diverted to EBM*' but the Master is not told that Insure was never a creditor of EBM and that the Section 20(9) Application could not create a claim for Insure.

[31] Barak was not copied with this letter, which was written at a time that Mr Schickerling was engaged in extensive negotiations with Mr Versfeld to settle the Conversion Application.

[32] The Liquidators contend that the Master failed to respond to their request to postpone the first meeting of creditors and shareholders of EBM. This resulted in the launch of the Interdict Application. Crucially, had the Master acceded to the request, the Interdict Application would not have been brought as it would not have been necessary. The significance of this will be dealt with later in this judgment.

[33] On 21 October 2021, the Liquidators launched the Interdict Application, which recorded that the Section 20(9) Application was, to date thereof, unopposed. Service of the application on Ericode and Lebonix took place at an address, which both Mr Schickerling and the Liquidators knew was unoccupied.

[34] On 21 October 2021 the liquidators of EBM, at the prompting of Mr Schickerling, issued a circular attaching a copy of the notice of motion in the Interdict Application to EBM's creditors, which included Barak.

[35] No person reading the circular would have had any idea of what was contemplated, nor of the existence of the Section 20(9) Application.

[36] Barak contends that both the invocation of the assistance of the Liquidators of EBM and the pretence that notice to a cooperative liquidator would constitute notice to creditors is an egregious and underhand attempt to subvert Barak's rights to avoid the requisite joinder or notice to Barak.

[37] Mr De Wet's¹ circular to creditors dated 21 October 2021 (*the circular of 21 October 2021*) is cryptic. It reads:

'Find attached herewith Notice of Motion received by the joint provisional liquidators of EBM Project (Pty) Limited (In liquidation)

The application deals with a interdict requesting the staying of the first meeting of creditors of EBM Project (Pty) Limited (in liquidation).

Creditors are advised accordingly.'

[38] The notice of motion which was attached, in relevant part, reads as follows:

1. That the First, Second and Third Respondents be interdicted from convening the first meeting of creditors and members of EBM Project (Pty) Limited (in liquidation).
2. That the order in paragraph 1 is to operate as an interdict, with immediate effect, pending the outcome and final determination of the High Court application under case number 2021/47302.'

[39] The reference to case number 2021/47302 is to the Section 20(9) Application. There are a number of observations to be made from the foregoing facts. They are: First, the liquidators of EBM did not annex to the circular to creditors either the notice of motion under case number 2021/47302 (being the Section 20(9) Application) nor the affidavits filed in support thereof. Second, there is no summary nor outline of

¹ On behalf of the joint provisional liquidators for EBM.

what relief is sought in terms of the court application under case number 2021/47302 (the Section 20(9) Application). Third and even though there has been no determination of the court application under case number 2021/47302 and upon which relief the interdict application would be dependent, interim relief is sought without any determination of the issues under the Section 20(9) Application.

Non-joinder and Barak's right to intervene

[40] The Liquidators oppose Barak's application to intervene in both the Liquidators' Applications on the basis that Barak only has a financial interest and not a cognisable legal interest, which allows intervention.

[41] Barak has an obvious interest in the outcome in each of the Liquidators' Applications and the nature of Barak's interest is well known to the Liquidators and Mr Schickerling and their conduct recognises it. Their conduct appears to have been calculated to undermine Barak's security and diminish its rights.

[42] During the period September to October 2021, Mr Schickerling and Mr Versfeld had been communicating with each other in relation to the Conversion Application. Consensus in relation to the content and terms of the draft order in the Conversion Application was reached between Mr Versfeld and Mr Schickerling on 22 October 2021. When these discussions took place the Liquidators' Applications had already been conceived. At the time that Mr Schickerling wrote to the Master on 5 October 2021, the Section 20(9) Application was complete (it was issued on 5 October 2021). Mr Schickerling unaccountably did not copy the 5 October 2021 letter to the Master to Mr Versfeld nor advise him that the Liquidators intended seeking a further adjournment of the first statutory creditors' meeting of EBM. The Liquidators and Mr Schickerling caused the Section 20(9) Application to be served on both Ericode and Lebonix at addresses which to their knowledge were not occupied

by responsible representatives of either Ericode or Lebonix and in circumstances where it had been contended that Barak had acted unlawfully in reconstituting the boards of Ericode and Lebonix.

[43] Service on Ericode and Lebonix in the manner aforesaid was, in my view, an attempt by the Liquidators to pay lip service to the requirement of service and subvert the object of service. Why else would the Liquidators affect service on Ericode and Lebonix at an address/es which they knew were no longer occupied by these companies' boards.

[44] Barak is both a creditor and a secured creditor of EBM and the relief sought in both the Liquidators' Applications self-evidently adversely affects its rights (or potentially does so) in relation to its securities.

[45] In *SA Riding*² the Constitutional Court expressed itself on the principles of intervention thus:

[9] It is now settled that an applicant for intervention must meet the direct and substantial interest test in order to succeed. What constitutes a direct and substantial interest is the legal interest in the subject-matter of the case which could be prejudicially affected by the order of the court. **This means that the applicant must show that it has a right adversely affected or likely to be affected by the order sought.** But the applicant does not have to satisfy the court at the stage of intervention that it will succeed. **It is sufficient for such applicant to make allegations which, if proved, would entitle it to relief.**

[10] **If the applicant shows that it has some right which is affected by the order issued, permission to intervene must be granted.** For it is a basic principle of our law that no order should be granted against a party without affording such party a predecision hearing. This is so fundamental that an order is generally taken to be binding only on parties to the litigation.

² *SA Riding for the Disabled Association v Regional Land Claims Commissioner and others* 2017 (5) SA 1 (CC).

[11] Once the applicant for intervention shows a direct and substantial interest in the subject-matter of the case, the court ought to grant leave to intervene. In *Greyvenouw CC* this principle was formulated in these terms:

'In addition, when, as in this matter, the applicants base their claim to intervene on a direct and substantial interest in the subject-matter of the dispute, **the Court has no discretion: it must allow them to intervene because it should not proceed in the absence of parties having such legally recognised interests.**' (emphasis added)

[46] The obvious targets of the Liquidators' Applications are the Barak securities. The Liquidators seek to wrest control of these securities from Barak whose rights as a creditor of the Insure Group are materially affected by such a ploy.

[47] The obvious interest of Barak in each of the Liquidators' Applications is the impact on its rights as a creditor; how these would be affected by each of the applications. This is illustrated by comparing and contrasting its current position and the rights it enjoys against the Insure Group with the hypothetical position it would occupy if the relief sought in each of the Liquidators' Applications was granted.

[48] Although discrete relief is sought in the pending applications, they are inseparably linked and cumulatively seek to achieve the same objective – to delay and stall the holding of the adjourned first statutory meeting of creditors of EBM (which was adjourned on 16 July 2021) in order to create a claim in the hands of Insure against EBM, and for the Liquidators to then use that claim to direct the affairs of EBM and to prove a claim in favour of Insure against EBM as EBM is the only company in the Insure Group which is possessed of assets of substantial value.

[49] At present, Barak is the single largest creditor in EBM with a loan claim in excess of US\$ 34 million and the ceded Lebonix Loan claim in an amount in excess of R1.1 billion. Barak is entitled to prove a claim at the first statutory meeting of EBM

in respect of its loan claim, and as cessionary of the Lebonix Loan Claim, and vote *qua* member as a result of the Pledged Shares.

[50] The purpose of the Section 20(9) Application is a reorganisation of the assets and liabilities of Ericode and Lebonix within the Insure Group, so that all assets and liabilities of these two companies will now form part of Insure and be dealt with by the Liquidators which would include not only Ericode's claim against Lebonix but also the Lebonix Loan Claim against EBM, all of which have been ceded and pledged to Barak.

[51] Ericode and Lebonix have not only guaranteed the EBM indebtedness to Barak, but also their own. If the section 20(9) Application were granted, those creditors who (formerly) had claims against either Ericode and Lebonix, will be obliged to prove those claims not against Ericode and Lebonix but against Insure and share those assets with the creditors of Insure, who are not currently creditors of either Ericode and Lebonix. In other words a Trojan horse of debt would be brought within the walls of Insure where the prize, the assets of EBM, would be exposed to a new army of creditors. If the section 20(9) application were refused Barak would be able to make its recovery without its claims being diluted in this way.

[52] The prejudice to the position of Barak is manifest. A postponement of the adjourned statutory meeting of creditors of EBM (which was to be held on 16 July 2021 but was postponed pending the outcome of the Barak Arbitration) will also be affected and Barak's rights to insist on the reconvened meeting will be affected since Barak is the single largest creditor of EBM and is entitled to exercise voting rights in respect of both its loan claim (of US \$34 million) and as cessionary of the Lebonix Loan Claim (in an amount in excess of R 1 billion) and is also entitled to exercise voting rights in respect of the Lebonix Pledged Shares. If the Liquidators

have their way, then Barak will not be able to exercise its rights in respect of these claims until either the Section 20(9) Application and the Interdict Application have been disposed of and will not be entitled to insist or call upon either the Master or the liquidators of EBM to take steps to reconvene such meeting.

[53] However, if the statutory meeting in EBM goes ahead then Barak will be entitled to exercise its rights in relation to EBM and in particular those in relation to the appointment of a liquidator. Barak will also be able to give instructions to a liquidator duly appointed in terms of section 386(3)(a) of the Old Companies Act.

[54] The rights in and to the Lebonix Loan Claim and the voting rights in respect of the Lebonix Pledged Shares can only be exercised by Barak and that right has been confirmed by the Arbitration Award. The sole purpose of the Section 20(9) Application and the Interdict Application is to reverse this situation, to divest Barak of those rights and to vest those rights in the Liquidators of Insure so as to ensure that these rights are dissipated and/or watered down. Barak would then be obliged to participate and share the proceeds of the realisation of assets of EBM with Insure, a situation which is obviously adverse to its interests, a situation which does not currently exist.

[55] It follows that, at this level, Barak's rights as the single largest creditor in EBM will be substantially and adversely affected, since Barak will now compete with Insure as a creditor of EBM.

[56] The Liquidators' recognition of Barak's rights in its securities should have triggered them to join Barak.

[57] In *Swartland Municipality*,³ the Supreme Court of Appeal made the point thus:

[9] It is trite that a mere financial interest in the outcome of litigation does not give a party the right to be joined in legal proceedings. **But a mortgagee, as the**

³ *Standard Bank of South African LTD v Swartland Municipality and others* 2011 (5) SA 257 (SCA).

holder of a real right in property, which includes buildings on the land, erected lawfully or otherwise, in my view clearly has more than a financial interest in the outcome of proceedings for the demolition of those buildings. In *Home Sites (Pty) Ltd v Senekal Schreiner* JA said that where a person claimed to have a servitude in land, and the validity of the servitude might become an issue in litigation between other parties, she had a clear right to be joined — to be given an opportunity to be heard and joined as a party. He cited in support of this the criterion stated in *Collin v Toffie*: where a person has a 'direct and substantial interest in the results of the decision' the matter cannot be 'properly decided' without her being joined as a party.

[10] In my view the bank had a clear and substantial interest in the outcome of the application in the magistrates' court. The value of the property in which it had real rights would no doubt be affected by the demolition of structures erected on it. The bank's ability to sell the property for the amount owed to it was placed in jeopardy. It was accordingly necessary for the municipality to join the bank as a respondent in the application.

[11] The municipality's response that it was unaware of the existence of the two bonds does not assist it. Bonds are registered in the Deeds Office and the municipality is deemed to have knowledge of their existence: *Frye's (Pty) Ltd v Ries*.

[12] The High Court thus erred in finding that the bank did not have a right to be joined...' (emphasis added)

[58] In my view, each application affects, not only Barak's financial interests, but its legal rights as a secured creditor of Insure, Ericode, Lebonix and EBM – all of which are well known to the Liquidators.

[59] At the very least, the consequence of any order granted in any one of the applications would be as follows: the liabilities of Ericode and Lebonix (and presumably the security furnished by Lebonix) would now be integrated into Insure to be administered by the Liquidators. At meetings of creditors in EBM, Barak's rights (both as a loan creditor and in respect of the ceded Lebonix Loan Claim) would be materially affected. A postponement or adjournment of the statutory meeting of

creditors would be prejudicial to Barak's rights as a creditor. If the relief in the Section 20(9) Application was granted (and since the fate of the Interdict Application is largely dependent upon its outcome) opposition by Barak to the Interdict Application would be limited and curtailed.

[60] In the circumstances, the contention by the Liquidators that Barak has no interest, which entitles it to intervene in these proceedings, is contrived. If the Liquidators concede on Barak's intervention, then it would follow that Barak should have been joined from the outset.

Cause of action in Section 20(9) Application

[61] The Liquidators seek an order in terms of section 20(9) of the New Companies Act that both Ericode and Lebonix be deemed not to be separate juristic persons in respect of any rights, obligations or liabilities of either company or of a shareholder of the company for the purposes of the winding-up of Insure and that Ericode and Lebonix be integrated into Insure in order for them to be regarded as a single entity as contemplated by section 20(9), and that they be wound up as such by the Liquidators of Insure as part of the liquidation. In essence the intention underlying the Section 20(9) Application is to disregard the separate corporate juristic personality of Ericode and Lebonix in respect of any of their rights, obligations and liabilities and have them integrated into and wound up and administered as part of Insure.

[62] Insure was voluntarily wound up on 16 June 2021 in terms of sections 349 and 351 of the Old Companies Act and the *concurso creditorum* in relation to Insure and its creditors took effect from the date of registration of the Resolution.⁴

⁴ In terms of section 351, a voluntary winding-up of a company is a creditor's winding-up if the resolution contemplated in section 349 so states but such resolution shall be of no force and effect unless it has been registered in terms of section 200. The effect of these provisions is that the creditor's voluntary winding-up in terms of section 351 takes effect from the date of registration of the appropriate resolution.

[63] It is common cause that neither Ericode nor Lebonix have been placed under winding-up in terms of the Old Companies Act and there is accordingly no *concursum creditorum* in relation to either Ericode or Lebonix. The relief sought by the Liquidators cannot be granted. Since they are not under winding-up in terms of the Act and the Liquidators have accordingly misconceived the nature, purpose and requirements of section 20(9), and what is appropriate relief in the circumstances.

[64] The Liquidators have failed to explain the extraordinary stance which has been followed by them: on the one hand they claim *locus standi* based on the claims which they allege vest in Insure as a creditor of Ericode and a contingent creditor of Lebonix; but then contradictorily, seek to disregard the separate corporate personality of Ericode and Lebonix which they contend constitutes an obstacle to the asset in EBM which, they contend was acquired unlawfully. The Liquidators seek the relief with effect from 16 June 2021, which is the effective date upon which Insure was placed under a creditor's voluntary winding-up. But that date is both legally and factually irrelevant insofar as the relief sought by the Liquidators affects both Ericode and Lebonix and its creditors, since although cited in the application as being under liquidation, the Liquidators have now correctly accepted that neither Ericode nor Lebonix are under liquidation. There is no legal basis which entitles or permits the Liquidators to wind up Ericode and Lebonix and administer their assets as part of the winding-up in Insure - since, neither is in winding-up nor have liquidators been appointed in either company.

[65] This is fatal to the relief sought since the relief which the Court can grant, if it disregards the separate corporate personality of a company, must be appropriate in the circumstances. Put otherwise, a court cannot grant relief which it is not empowered to grant. This offends the principle of legality. The Liquidators must

identify the source of the Court's power to declare that Ericode and Lebonix (which are not under winding-up) be wound-up by the Liquidators as part of the winding-up of Insure; grant that form of relief with effect from 16 June 2021, when neither Lebonix nor Ericode has been placed under liquidation; allowing companies which are not in liquidation to be wound-up as if they are in liquidation.

[66] The chosen date of 16 June 2021 from which date the order is to take effect makes no provision for the discharge of the debts of Ericode and Lebonix and provision for the securities held by Barak.

[67] In *Morar*,⁵ a court had appointed a liquidator to liquidate a common law partnership. The liquidator of the partnership had difficulty in carrying out his duties, and applied to the High Court for it to give him extra powers – which it refused. The powers he sought were, *inter alia*, the power to order a partner to contribute to the costs of liquidation, or to order that the partner be interrogated by counsel. The Supreme Court of Appeal, in upholding the decision of the court *a quo*, and with reference to the power of a court to grant an order (other than that which had been agreed to between the parties) said the following:

'[19] Once the court is asked to go beyond this, it is necessary to identify a source of its power to do so. That is central to the rule of law that underpins our constitutional order. Courts are not free to do whatever they wish to resolve the cases that come before them. The boundary between judicial exposition and interpretation of legal sources, which is the judicial function, and legislation, which is not, must be observed and respected. In this case, no such source was identified.'

[68] The Liquidators have not identified the source or set out any legally cognisable basis which permits this Court to grant the relief sought where neither Ericode nor Lebonix have been placed under winding-up as contemplated in terms of the Old

⁵ *Morar NO v Akoo and Another* 2011 (6) SA 311 (SCA).

Companies Act. Liquidators have not been appointed to wind up their affairs.⁶ This failure is not a mere technicality but, offends the concept of a *concursum creditorum* which is regarded as one of the key concepts of the South African law of insolvency, and which entails that the rights of creditors as a group are preferred to the rights of individual creditors and which only comes into effect upon the granting of a sequestration or liquidation order by the court or a company being placed under voluntary winding-up in terms of the relevant provisions of the Old Companies Act.

[69] The effect of a winding-up is to establish a *concursum creditorum* and nothing can thereafter be done by any of the creditors to alter the rights of the other creditors. No transaction can thereafter be entered into with regard to estate matters by a single creditor to the prejudice of the general body of creditors. The claim of each creditor must be dealt with, as it existed at the date when the *concursum* was formed.⁷

[70] The importance of a proper winding-up under the Old Companies Act is self-evident. Not only does it affect the *concursum creditorum*, and the rights and obligations of creditors, from the date it takes effect but it also triggers further steps that are taken and to be taken in the winding-up of a company and which arise from statutory provisions which deal with, *inter alia*, the rights, duties and obligations of liquidators, the effect of the winding-up on legal proceedings and attachments and, the powers of the liquidator to take into his possession all the property of the company concerned.⁸

[71] Since this requirement has not been met, the Liquidators have no power to assume control of any of the assets, rights or obligations of Ericode and Lebonix.⁹

⁶ Section 350 deals with a Members' voluntary winding-up, section 351 deals with a Creditors' voluntary winding-up and sections 344 read with section 346 deals with a winding-up by the Court.

⁷ *Walker v Syfret N.O.* 1911 AD 141 at 160 and 166

⁸ See, amongst other sections, sections 356 to 361 of the Old Companies Act.

⁹ *Walker v Syfret NO* 1911 AD 141 at 166; *Commissioner South African Revenue Service v Pieters and Others* 2020 (1) SA 22 (SCA) at [10] and [11].

[72] The rights, obligations, and liabilities in respect of which the order is to operate are not stated or defined. Nor is any provision made for the payment and discharge of liabilities to creditors of each company or in respect of security held by any creditor in each company and, particularly, Barak. This is particularly relevant having regard to the fact that Barak holds guarantees from all members of the Insure Group, including Ericode and Lebonix, and also holds security in the form of the ceded Lebonix Loan Claim and the Lebonix Pledged Shares and, is entitled to exercise those rights to the exclusion of Lebonix and other creditors of the Insure Group.

[73] The process of vesting and administration can only take place after the winding-up by the court (or where the winding-up is in terms of sections 349, 350 and 351, after registration of the resolutions) and only after the appointment of the Liquidators to those companies. In terms of section 361 of the Old Companies Act, custody of, or control over and vesting of property of a company takes place only after a winding-up by the court. Thereafter, the property vests first in the Master, until a provisional liquidator has been appointed; whereafter the property is under the custody and control of the provisional liquidator, and then the final liquidator. There can be no vesting unless there has been a winding-up order, and a provisional liquidator appointed (until the appointment of a final liquidator). That has not occurred in the present case, and is fatal to the outcome of the Section 20(9) Application.

[74] Even if everything stated by the Liquidators in the founding affidavit is accepted, there is still no basis upon which the relief sought can be granted. A Court can only grant an order which is appropriate in the circumstances if, the other jurisdictional requirements have been met which obviously is an order which is legally appropriate and one which a court is empowered to make. In the present

circumstances the order is inappropriate as the court does not have the power to make an order in the terms contended for.

Section 20(9) and the relief sought in terms thereof analysed

[75] During the hearing of the matter, the liquidators consented to the Award being made an order of court. The consequence of this concession is, amongst other things, that it is now undisputed that Barak has a loan claim of approximately US \$34 million against EBM (the '*Barak Debt*'). Insure, Ericode, and Lebonix have independently guaranteed payment of the Barak Debt in accordance with written guarantees furnished by each of them. In addition Barak also holds security from Insure, Ericode, Lebonix and EBM, which it is entitled to enforce against each of these companies. Barak is accordingly a creditor of all the companies in the Insure Group in respect of the Barak Debt, so that if the relief sought by the Liquidators is granted in terms of section 20(9), Barak's rights as a creditor of each one of these companies will be materially affected. Barak, in addition to its rights as a creditor in respect of the Barak Debt, is also a creditor of EBM in respect of the ceded Lebonix Loan Claim in an amount of R1,005 billion. As between Lebonix and Barak, Barak is the only party entitled to claim and enforce rights against EBM in respect of the Lebonix Loan Claim and in relation to the Lebonix pledged shares.

[76] Insure is not a creditor of EBM.

[77] The Liquidators contend that Insure is a creditor of Ericode in an amount of R1,332,414,869 and a contingent creditor of Lebonix in the amount of R930,822,652. Assuming this to be correct, Insure would have a claim against Lebonix and not EBM. This route does not have the desired effect for the Liquidators since it does not allow recourse against EBM which is the obvious target of these proceedings and

which holds the valuable asset, which both the Liquidators and the Insurance Companies covet.

[78] Section 20(9), reads as follows:

- '(9) If, on application by an interested person or in any proceedings in which a company is involved, a court finds that the incorporation of the company, any use of the company, or any act by or on behalf of the company, **constitutes an unconscionable abuse of the juristic personality of the company as a separate entity**, the court may –
- (a) declare that the company is to be deemed not to be a juristic person in respect of any right, obligation or liability of the company or of a shareholder of the company or, in the case of a non-profit company, a member of the company, or of another person specified in the declaration; and
 - (b) make any further order the court considers appropriate to give effect to a declaration contemplated in paragraph (a). (emphasis provided)

[79] Mr Daniels argued that section 20(9) is not to be interpreted restrictively and that it is not a remedy to be used sparingly and only in exceptional circumstances.¹⁰ He argued that *Gore* recognised that it was a self standing remedy with its own requirements and that the width of the provision broadens the bases upon which the courts have been prepared to grant relief that entails the disregarding of corporate personality.¹¹ Mr Daniels argued, in my view correctly, that there is no closed category of what constitutes an unconscionable abuse. He placed much emphasis on the principle distilled in *Gore* at para [34] that '*The provision brings about that a remedy can be provided whenever the illegitimate use of the concept of juristic*

¹⁰ The proper application and the principles applicable to section 20(9) have been exhaustively dealt with in *Ex parte Gore NO 2013 (3) SA 382 (WCC)* and to a lesser extent in *City Capital SA Property Holdings Limited v Chavonnes Badenhorst St Clair Cooper and Others 2018 (4) SA 71 (SCA)*. The statements in *City Capital* in relation to the proper application of section 20(9) are *obiter* but are nevertheless wholly aligned with both the common law and what was stated in *Gore*.

¹¹ *Ex parte Gore NO* (supra) at para [33]

personality adversely affects a third party in a way that reasonably should not be countenanced.'

[80] I need not, by virtue of my findings herein, decide whether *Gore* was correctly decided and nothing said herein should be construed as either dissent or support of such decision, suffice to say that the common law in relation to the circumstances under which a court would pierce or lift the corporate veil, is still relevant in determining what constitutes an unconscionable abuse of the juristic personality, for the purposes of section 20(9) and includes conduct which entails the use of, or act by, a company to commit fraud, for a dishonest or improper motive or, where the company is used as a device or façade to conceal the true facts.¹²

[81] The common law in relation to the piercing or lifting of the corporate veil strives to strike a balance between: the fundamental principle of company law on the one hand, which recognises the importance of the separate corporate personality of a company and that its assets and property rights are separate and distinct from its shareholders; and, on the other hand, the circumstances which justify ignoring that separate personality and piercing or lifting the veil.

[82] In *Shipping Corporation of India Limited*,¹³ the following was stated by the Appellate Division:

'It seems to me that, generally, it is of cardinal importance to keep distinct the property rights of a company and those of its shareholders, even where the latter is a single entity, and that the only permissible deviation from this rule known to our law occurs in those (in practice) rare cases where the circumstances justify 'piercing' or 'lifting' the corporate veil. And in this regard it should not make any difference whether the shares be held by a holding company or by a Government. I do not think it is necessary to consider or attempt to define the circumstances under which the Court will pierce the corporate veil. Suffice it to

¹² *City Capital* at [28] to [29].

¹³ *Shipping Corporation of India Limited v Evdomon Corporation and Another* 1994 (1) SA 550 (A) at 566 C-F.

say that they would generally have to include an element of fraud or other improper conduct in the establishment or use of the company or the conduct of its affairs. In this connection words 'device', 'stratagem', 'cloak', and 'sham' have been used.¹⁴

[83] Just as there were no strictly defined or prescribed circumstances under which a court under the common law would lift the corporate veil, there is similarly, in terms of section 20(9), no comprehensive definition of what constitutes "unconscionable abuse". Thus, courts have held that an unconscionable abuse, although not defined, would include the common law grounds for piercing the corporate veil – which are the use of or an act by a company to commit fraud or for the dishonest or improper purpose or where the company is used as a device or façade to conceal the true facts.¹⁵

[84] In *City Capital*, the Supreme Court of Appeal endorsed the view that section 20(9) appears to supplement the common law and thereafter construed the section in the context of whether it authorises the appointment of a liquidator. In doing so the Court held as follows:

[29] The meaning of '*unconscionable*' in the Oxford English Dictionary includes, '*Showing no regard for conscience . . . unreasonably excessive . . . egregious, blatant . . . unscrupulous.*' It is in my view undesirable to attempt to lay down any definition of '*unconscionable abuse*'. It suffices to say that the unconscionable abuse of the juristic personality of a company within the meaning of s 20(9) of the 2008 Act includes the use of, or an act by, a company to commit fraud; or for a dishonest or improper purpose; or where the company is used as a device or facade to conceal the true facts.

[30] Thus, where the controllers of various companies within a group use those companies for a dishonest or improper purpose, and in that

¹⁴ See also *Cape Pacific Limited v Lubner Controlling Investments (Pty) Ltd and Others* 1995 (4) SA 790 (A) at 808 E, *Gore* at [4] and *City Capital* at [27].

¹⁵ *City Capital* at [29].

process treat the group in a way that draws no distinction between the separate juristic personality of the members of the group, as happened in this case, this would constitute an unconscionable abuse of the juristic personalities of the constituent members, justifying an order in terms of s 20(9) of the 2008 Act. This is not new. In *Ritz Hotel* this court referred to English authority in which Lord Denning MR observed that, as regards piercing the corporate veil, there was a general tendency to ignore the separate legal entities of various companies within a group and to look instead at the economic entity of the whole group, especially where a parent company owns and controls the subsidiaries.”

[85] There is no single allegation that either the affairs of the Insure Group were conducted in a manner that maintained no distinguishable corporate identity between the various constitutive companies in the group or that the entire group was operated, in effect, as one entity through the holding company, Insure. The books, records and AFS’s of the Insure Group contradict any such suggestion.

[86] Barak’s affidavits are replete with references to those instances where the Insure Group and the Insurance Companies relied heavily on the inter-company group transactions described in the Insure Group AFS and where reliance was placed on the loan transactions recorded in the Insure Group AFS and the manner in which the valuable EBM asset would be realised through the recognised corporate structure to the benefit of both EBM and Insure and its creditors. The indirect interest of Insure in EBM was recognised.

[87] The indirect route to the EBM asset available to Insure prior to default by EBM and prior to the intervention by Barak in the form of the Barak Application (where Barak sought to set aside the EBM Resolution) and the intervention by Barak in the First Hollard Application, where it became apparent that Barak intended

exercising its rights and securities, together with the outcome in the Barak Arbitration appears to have caused the change in front.

[88] The Lebonix Loan Claim has been ceded *in securitatem debiti* to Barak which, as matters presently stand, is the only party entitled to enforce that claim in the liquidation of EBM and to the exclusion of Lebonix.

[89] The pledge theory applicable to the pledge of corporeal movable property assets applies also to a cession of an incorporeal right and *in casu* the ceded Lebonix Loan Claim.¹⁶ The precise nature and extent of the rights of the cedent in the case of a cession *in securitatem debiti* has now been authoritatively dealt with by the Supreme Court of Appeal in *Development Bank*¹⁷ and *Grobler* where it was stated that the cedent retains a reversionary interest (not dominium) which is described as his interest in the performance by the debtor of his obligations to the creditor. But, as was stated in *Development Bank*, where the principal debt remains undischarged, the only party entitled to exercise the rights in terms of the ceded claim is the cessionary and not the cedent.

[90] However, different considerations apply to the liquidator of a cedent in liquidation, and this all-important distinction is graphically illustrated in *Development Bank* where the following is stated:

'... It is, that reversionary interest that vests in the cedent's trustee upon his insolvency, to be administered 'in the interests of all the creditors and with due regard to the special provision of the pledgee' (*Millman NO v Twigs and Another* (supra) at 676 H-I):

"That can itself be attached or ceded, that invests him with the locus standi to sue or be sued, or apply for the debtor's to sequestration; and may conceivably

¹⁶ *Grobler v Oosthuizen* 2009 (5) SA 500 SCA at 507A – 508B.

¹⁷ *Development Bank of Southern Africa Limited v Van Rensburg and Others NNO*, 2002 (5) SA 425 (SCA)

entitle the cedent in an appropriate case, notwithstanding the cession to perfect in order to protect the ceded security.’¹⁸

[91] The reason for this circular route is quite clear. Since Lebonix is not in liquidation, the only party entitled to enforce the ceded Lebonix Loan Claim is Barak – to the exclusion of Lebonix. Even though there is a reversionary interest which resides in Lebonix (which it may at some time be able to enforce). Lebonix may not, in the absence of regulation to that effect, recover performance by the debtor, i.e. EBM. Only the cessionary (Barak) has standing to enforce the principal debt.

[92] Mr Daniels argued that the question is not whether Insure is a creditor of EBM, but rather whether the Liquidators have an interest in seeking the relief or not. The interest, he argued, lies in the fact that they are the Liquidators, whose subsidiary, Ericode and/or Lebonix, was used to commit a fraud.

[93] The Liquidators’ *locus standi* and the basis upon which they approached the court was that Insure is a creditor of EBM. This is false. On no construction of the facts is Insure a creditor of EBM. The case they made out was not that they had an interest in seeking the relief. This position was advanced for the first time during argument and cannot be countenanced.

The case made out in the founding affidavit analysed

[94] In motion proceedings the founding affidavit is both the pleadings and the evidence required to establish the basis for the relief sought.¹⁹ The affidavit in support of the relief sought must contain admissible evidence, which falls within the personal knowledge of the deponent, and if not, the source of that knowledge must be stated with clarity and confirmed by that person.

¹⁸ *Development Bank* at [50].

¹⁹ *Hart v Pinetown Drive-in Cinema (Pty) Ltd* 1972 (1) SA 464 (D); *Transnet Ltd v Rubenstein* 2006 (1) SA 591 (SCA).

[95] The affidavits must contain facts based on admissible evidence and not on speculation or opinion. In *Die Dros*²⁰ the following was stated:

'It is trite law that the affidavits in motion proceedings serve to define not only the issues between the parties, but also to place the essential evidence before the court for the benefit of not only the court, but also the parties. The affidavits in motion proceedings must contain factual averments that are sufficient to support the cause of action on which the relief that is being sought is based. Facts may either be primary or secondary. **Primary facts are those capable of being used for the drawing of inferences as to the existence or non-existence of other facts. Such further facts, in relation to primary facts, are called secondary. Secondary facts, in the absence of the primary facts on which they are based, are nothing more than a deponent's own and accordingly do not constitute evidential material capable of supporting a cause of action.**' (emphasis added)

[96] The Liquidators were appointed and assumed office in July 2021. The events and facts they rely upon do not fall within their personal knowledge and occurred, on their version, many years before their appointment. The facts, relating to the structure of the Insure Group and the manner in which it operated fall clearly within the knowledge of the Insure Group and the Insurance Companies who administered their affairs at the relevant times.

[97] This is self-evident from what was stated in the previous litigation and the documents generated at the time by the Insure Group and in particular the AFS of the Insure Group.

[98] The Liquidators have not resorted to the task of consulting with or interviewing those persons within the Insure Group who deposed to affidavits in the previous proceedings and who have knowledge of the relevant facts.

²⁰ *Die Dros (Pty) Limited and Another v Telefon Beverages CC and Others* 2003 (4) SA 207 (C) at [28].

[99] In *Bernstein*,²¹ the Constitutional Court referred with approval to the English Court of Appeal decision in *Cloverbay*,²² which pointed out that, post liquidation, liquidators come as strangers to the company.²³ They have no personal knowledge of any of the events leading up to the liquidation of the insolvent company and are under a statutory duty to investigate the affairs of the insolvent company. One of the mechanisms provided by the Old Companies Act for the proper discharge of their duties, is the power to hold an enquiry in terms of sections 417 and 418. In *Bernstein*, the Constitutional Court made the point that:

[16] The enquiry under ss 417 and 418 has many objectives.

- (a) It is undoubtedly meant to assist liquidators in discharging these abovementioned duties **so that they can determine the most advantageous course to adopt in regard to the liquidation of the company.**
- (b) In particular it is aimed at achieving the primary goal of liquidators, namely to determine what the assets and liabilities of the company are, to recover the assets and to pay the liabilities and to do so in a way which will best serve the interests of the company's creditors.
- (c) **Liquidators have a duty to enquire into the company's affairs.**
- (d) This is as much one of their functions as reducing the assets of the company into their possession and dealing with them in the prescribed manner, and is an ancillary power in order to recover properly the company's assets.
- (e) **It is only by conducting such enquiries that liquidators can:**
 - (i) **determine what the assets and who the creditors and contributories of the company are;**

²¹ *Bernstein and others v Bester and others* NNO 1996 (2) SA 751 (CC).

²² *Cloverbay Ltd (Joint Administrators) v Bank of credit and Commerce, International SA* [1991] Ch 90 (CA) at 102 A.

²³ At [20].

- (ii) **properly investigate doubtful claims against outsiders before pursuing them, as well as claims against the company before pursuing them.**
- (f) It is permissible for the interrogation to be directed exclusively at the general credibility of an examinee, where the testing of such person's veracity is necessary in order to decide whether to embark on a trial to obtain what is due to the company being wound up.
- (g) Not infrequently the very persons who are responsible for the mismanagement of and depredations on the company are the only persons who have knowledge of the workings of the company prior to liquidation (such as directors, other officers and certain outsiders working in collaboration with the former) and are, for this very reason, reluctant to assist the liquidator voluntarily. In these circumstances it is in the interest of creditors and the public generally to compel such persons to assist.
- (h) **The interrogation is essential to enable the liquidator, who most frequently comes into the company with no previous knowledge and finds that the company's records are missing or defective, to get sufficient information to reconstitute the state of knowledge that the company should possess; such information is not limited to documents because it is almost inevitable that there will be transactions which are difficult to discover or understand from the written materials of the company alone.**
- (i) The liquidator must, in such circumstances, be enabled to put the affairs of the company in order and to carry out the liquidation in all its varying aspects.
- (j) The interrogation may be necessary in order to enable the liquidator, who thinks that he may be under a duty to recover something from an officer or employee of a company, or even from an outsider concerned with the company's affairs, to discover as swiftly, easily and inexpensively as possible the facts surrounding any such possible claim.

- (k) There is a responsibility on those who use companies to raise money from the public and to conduct business on the basis of limited liability to account to shareholders and creditors for the failure of the business, if the company goes insolvent. **Giving evidence at a s 417 enquiry is part of this responsibility. This responsibility is not limited to officers of the company, in the strict sense, but extends also to the auditors of the company.**' (emphasis added)

[100] The Liquidators have not exercised any of these powers²⁴ but inverted the process and appear to have misconceived their duties. Rather than conduct a proper enquiry, they have opted for the Section 20(9) Application without primary facts at their disposal and without any proper investigation.

[101] A draft order for the relief sought in the Conversion Application has been agreed to. I have been requested to endorse it, have considered it and intend granting it. Why this order was not taken by agreement earlier and why this valuable tool (the section 417 and 418 enquiry) was not used to unravel the facts and to approach this court with admissible evidence consisting of primary facts (if the established facts warranted the relief), is not explained. After all, the Section 20(9) Application need not be launched at this juncture.

[102] The Liquidators have approached this Court on primarily hearsay allegations in which they claim far reaching relief. This conduct is, at best, a gross failure to discharge their duties properly or adequately and, at worst, reckless.

[103] The Section 20(9) Application is predicated on a simple unsupported supposition that monies collected by Insure and destined for the Insurance Companies was retained, fraudulently, by Insure and invested into, *inter alia*, the "mining division" of EBM.

²⁴ They had unlawfully enjoyed the power of interrogation but did not exercise it and, the whole purpose of the Conversion Application was to allow a proper investigation into the affairs of Insure.

[104] The Liquidators, without any reference to the AFS of the Group make the allegation that Ericode and Lebonix were used as a conduit for the misappropriated funds. The Liquidators draw no causal nexus between the misappropriated funds and the loans made from Insure to Ericode and Ericode to Lebonix and Lebonix to EBM.

[105] The void in the Liquidators' case is made more apparent when one looks for an answer to the question whether the misappropriation related to Lebonix's acquisition of EBM in 2012 or to investments made thereafter. That question is not answered. It is not suggested that Lebonix committed a fraud much less is it suggested that Lebonix utilized funds which Insure misappropriated to make that acquisition.²⁵

[106] The high-water mark of the Liquidators' case is that:

'37. The administration, financial affairs and day-to-day management of [Insure] and the other companies in the group are inseparably intertwined and their existence linked to the tainted transactions perpetrated by the controlling minds of [Insure] and the income stream from the collection of insurance premiums were used to acquire the assets of EBM.'

[107] The AFS's of the various companies and the composition of their boards at the relevant time puts paid to that proposition, as do the records in the AFS's which record the recognition by Insure of the corporate structure of the Insure Group and the imperative that Ericode should be realised and sold for the benefit of the Insurance Companies.

[108] The Liquidators found their case on:

'38. Whilst "unconscionable abuse" is not defined in the 2008 Act it will be submitted at the hearing of this application that the unconscionable abuse of the juristic personality of a company includes the use of, or an

²⁵ The persons who signed the Sale of Shares and Claim Agreements concluded in December 2012 on behalf of Exxaro and Lebonix were, from the evidence placed before this court, at no stage involved with Insure.

act by, a company to commit fraud; or for a dishonest or improper purpose; or where the company is used to conceal the true facts. It will also be submitted at the hearing of this application that these are precisely the circumstances contemplated in section 20(9) of the 2008 Act.'

[109] The question which arises is, which facts can be considered in support of the conclusion of 'unconscionable abuse'?

[110] Barak brought an application to strike out all the irrelevant matter (which of course includes inadmissible evidence) as understood in the *Zuma*²⁶ matter.

[111] The difficulty with the approach of the Liquidators to this litigation is that rather than dealing with the allegations of a failure to properly investigate the affairs of Insure before having brought this application, accepting that they do not enjoy personal knowledge of the facts, they content themselves with the argument that the fraud is common cause and that liquidators generally have no personal knowledge of the facts.

[112] The issue in the application, and raised squarely by Barak, is that it cannot be established that the monies misappropriated from Insure were used to fund the acquisition of EBM. EBM was acquired in 2012. Mr Bezuidenhout was only appointed in 2018. This court does not know when the fraud was perpetrated. Also, throughout the previous litigation, the integrity of the corporate structure of the Insure Group was recognised and Insure accepted that the route to EBM was through the then existing corporate structure being Ericode and Lebonix. It is precisely because the Liquidators have no personal knowledge of the facts that they are obliged to conduct a proper enquiry in the discharge of their fiduciary duties. The fact that they do not have personal knowledge of any relevant facts does not relieve them of this duty nor does

²⁶ *National Director of Public Prosecutions v Zuma* 2009 (2) SA 277 (SCA).

it constitute an exception to the rule that the application and affidavits must be based on admissible evidence.

[113] Mr Daniels argued that the hearsay evidence relied upon by the Liquidators was admissible because it was true. For this he relied on what the Liquidators said.

They said:

- '27. What Lategan and Bezuidenhout may have thought of Ericode and Lebonix is entirely irrelevant to the relief itself. What is relevant is that a fraud was committed on the creditors of [Insure], that fraud was perpetrated through Ericode and Lebonix to the detriment, *inter alia*, of the creditors of [Insure] and that Barak's position is vis-à-vis its special and secured position as a pledgee will not be affected by the relief sought by [the Liquidators].
28. On the issue of fraud, the position taken in the Barak affidavit is nothing short of remarkable. It contends, at length, that [the Liquidators] have not adduced admissible evidence of fraud. In advancing this contention, Taylor inexplicably omits to refer the court to the various occasions on which he, in affidavits described the fraud. This approach is nothing short of misleading when regard is had to, *inter alia*, the fact that under Case No. 2021/453053 – the conversion application (which application is enrolled before this court also to be considered with this application) – Taylor, [said] ..."

[114] Each of the quotes which then follow²⁷ are presented as a concession by Barak that the fraud committed by Insure is common cause and that the evidence presented in the founding affidavit is not hearsay.

[115] The quotations, extracted from the Conversion Application, were presented in support of the reason for the conversion of Insure's winding-up from that of a creditors' voluntary winding-up into a compulsory winding-up of the court so that an enquiry in terms of sections 417 and 418 of the Old Companies Act could be

²⁷ Section 20(9) Application: answering affidavit, page 004-840, paragraphs 28.1 to 28.4.

conducted. Barak's position was made amply clear in its replying affidavit, where it was said:

- '16. So, again, whilst it is true that it is common cause that large amounts were misappropriated by Insure from the Insurance Companies, Barak has previously (and in the present application) made it clear that the facts in relation to the misappropriation remain obscure and opaque.
17. Barak stated the following in its founding affidavit, which has been conveniently ignored by the Liquidators:
- '20. The Liquidators have not stated when, precisely, and the precise amount of the premiums which were allegedly misappropriated by Insure and, what the precise amount of the shareholders' claim [sic] in relation to the premiums allegedly misappropriated by Insure is or what amount is claimable by them and how this amount is precisely calculated and arrived at.
21. So, while Barak accepts that **some insurance premiums were misappropriated by Insure**, it remains entirely opaque when these misappropriations took place and what the extent thereof is, especially in light of the insurance companies [sic] converting some (or all) of the debt into equity and those premiums being treated as loans to the Insure Group.'" (bold in original text)

[116] From the foregoing, the only fact which is common cause is that '*some insurance premiums were misappropriated by Insure.*' Mr Daniels argued quite strenuously that the question which remains unanswered is where the money came from to purchase the mine if not from the misappropriated premiums? Apart from the fact that speculation on this front would not have been necessary had the Liquidators consented to the order sought in the Conversion Application and then conducted a section 417 and 418 enquiry to explore all these facts, no reason has been advanced why the Section 20(9) Application had to have been brought at this point in time. If there were /are grounds for such an application it could be brought at any time unless

of course it serves another purpose, which I am driven to conclude it does, which is that it is the only potential way to 'create' a claim for Insure against EBM.

[117] But back to Mr Daniel's question about the source of the funds on the evidence before this court. Mr Daniels submitted that Mr Cilliers was the mastermind and driving force behind all the frauds that were committed (this assertion does not appear in the affidavits) as he was a director of Insure (from 1 March 2004), Ericode (from 1 May 2013), Lebonix (from 1 August 2015) and EBM (from 30 November 2013) up to February 2019 when he resigned. Allegations that Mr Cilliers participated in the conclusion of most of the relevant agreements does not bear scrutiny. By way of example: He was not one of the signatories who signed the Shareholders Agreement with Exxaro on behalf of Lebonix. The evidence before this court shows that amounts misappropriated by Insure were in certain instances converted into loans by the Insurance Companies and capitalized. Further amounts were loaned and advanced by the Insurance Companies to Insure.

[118] The Insurance Companies funded the EBM Project from time-to-time; the funds of Insure were mixed with premiums received from the Insurance Companies and were not kept separate. On 12 November 2018, Mr Bezuidenhout recorded that he had suspended payment of premiums to the Insurers (around 50 Insurance Companies) and that he had retained some R400 million in cash due to them. He stated that he had informed them that he would invest around 75% of such funds in the illiquid assets of Insure to enable him to dispose of the assets in an orderly fashion and to settle all creditors. He stated that the largest recipient of these funds would be EBM which entity would receive R132 million and which he had been advised would be sufficient to bring EBM into full production by March 2019. He communicated that utilization of such funds commenced on 19 October 2018 and

further that he had a project underway to convert R300 million of the debt owing to the Insurers into equity.

[119] The Liquidators attached a summons to the founding affidavit in the Section 20(9) Application in terms of which the Insurance Companies instituted a claim against Insure and others, based on its obligation to render intermediary services i.e. to collect premiums and to pay them over but had failed to do so. Mr Fine drew attention to the averments contained in the summons, which were premised on the acceptance that Insure had its own funds but that it had failed to ensure '*that the premiums collected for the plaintiffs were readily discernable from **its private assets or funds***'. (emphasis provided)

[120] EBM was acquired in 2012. Mr Bezuidenhout, the curator, was appointed 5 years later. Surely an enquiry can provide answers to how all of this came about?

[121] Mr Pullinger (also representing Barak) drew attention to the provisions of Section 3 of the Law of Evidence Amendment Act 45 of 1988, as amended ('*the Law of Evidence Amendment Act*') which provides that hearsay evidence shall not be admitted as evidence at civil proceedings, unless there is, amongst other requirements, agreement about the admission of such evidence (which clearly there is not in this instance) or an application is made to the court for receipt of such evidence. No such application has been made in this matter and crucially, the failure to have first convened an enquiry, scuppered any successful reliance on section 3(1)(c) of the Law of Evidence Amendment Act.

[122] I intend granting the striking out applications both in respect of the Section 20(9) Application and the Interdict Application on the basis that such paragraphs²⁸ constitute inadmissible hearsay.

²⁸ Those listed at Caselines 004-820 and 004 – 974

[123] I thus conclude that on the evidence before me, I can find no more than that Insure failed to pay over all the insurance premiums collected by it to the Insurance Companies. When this occurred or what the ill-gotten gains were utilized for, remains opaque on the admissible evidence placed before this court.

The conduct of the Liquidators of Insure and the liquidators of EBM in relation to the convening of the adjourned statutory meeting of EBM

[124] There appears to have been an effort by both the Liquidators of Insure and EBM to prevent the reconvening of the adjourned statutory meeting of EBM as Barak, as the single largest creditor, would influence the outcome of that meeting. But if Insure and the Liquidators were successful in creating a claim in favour of Insure, different considerations apply.

[125] The exchange of correspondence between Barak and its attorneys and Mr De Wet (one of EBM's liquidators) illustrate the attempts made by the liquidators of EBM to achieve this result which is consistent with what the Liquidators of Insure seek to achieve. Barak contends that both sets of Liquidators have acted in collaboration with each other.

[126] I am driven to conclude that both the liquidators of EBM and of Insure intended that at least the Section 20(9) Application would be unopposed and probably the Interdict Application.²⁹ The purpose of the scheme was two-fold. First, it was designed to ensure that the Section 20(9) Application went through unopposed; and Second, to ensure a situation where Barak would not have the controlling vote in EBM. This would allow the Insurance Companies to retain Mr De Wet, as a 'friendly liquidator' in EBM. The purpose of the scheme is in Mr Schickerling's letter of 5 October 2021 to the Master.

²⁹ That much is clear from the communication between the Liquidators and Mr De Wet and the contents of Mr De Wet's 21 October 2021 circular to creditors already referred to.

[127] Mr De Wet placed a far-fetched interpretation on the effect and outcome of the Barak Arbitration and then used that interpretation to prevent or delay the Barak Arbitration Award Application in which he and EBM had no cognisable interest. The Liquidators' application to intervene in the Barak Arbitration Award Application has no merit. There is no conceivable basis for the intervention application and none was suggested during oral argument. The ineluctable conclusion was that it was a stratagem of delay. The withdrawal of the opposition to the relief sought therein is telling.

[128] There is no cogent or plausible explanation as to why Mr Schickerling did not furnish Mr Versfeld with a copy of his letter dated 5 October 2021 addressed to the Master or why he did not advise Mr Versfeld during the course of their discussions that the Liquidators intended launching both the Liquidators' Applications. The joint liquidators contend that whilst they are obliged to act in the interests of all creditors and all other stakeholders, this does not translate to carrying out the orders and instructions of the likes of Barak and had Mr Schickerling shared his instructions with Mr Versfeld, the liquidators would have taken him to task. Also, it was argued that there was no obligation on Mr Schickerling to inform Mr Versfeld of the Liquidators' intentions, or to ask his blessing before the Section 20(9) Application was issued.

[129] The scheme seems to have been hatched on or about 18 August 2021 when, after the Award had been handed down, Webber Wentzel, on behalf of Barak, wrote to the Master and to the Magistrate, Springs (where the first statutory meeting of creditors in EBM was to be held) requesting that the first meeting of creditors in EBM take place as soon as possible. The Master's response was that he would only convene a first meeting of creditors once the Award had been made an order of court.

[130] Mr De Wet became involved in response to Webber Wentzel's objection to what it considered an *"unnecessary and unreasonable prerequisite, which may unduly delay the process."* Mr De Wet contended that the Award *"... failed to confirm the date on which the Lebonix Pledged Shares were transferred to Barak."* There was never any suggestion that the Pledged Shares had been transferred to Barak.

[131] Mr De Wet had not investigated the position properly. Had he done so he would have realized that there had never been any contention that the Pledged Shares had been transferred. Mr De Wet required that Barak seek a declaration of rights in relation to the date on which the pledged shares were transferred to Barak.

[132] Crucially, on 6 September 2021, Mr Versfeldt in a letter to Mr de Wet said that paragraphs 5 and 18 of the Award recorded that an Enforcement Event had occurred prior to the liquidation of EBM (by the latest on 20 November 2020), that Lebonix was not opposing the Barak Arbitration Award Application and that it was not open to Mr de Wet to attempt to dispute this.

[133] On 1 October 2021 the Barak Arbitration Award Application was launched. What followed were further attempts by Mr De Wet to prevent the meeting of creditors in EBM taking place.

[134] The Liquidators said:

'31. The reality is that, as matters stand [Insure] and its creditors have no recourse against EBM, the only actual "asset", which is effectively protected by the fact that both Ericode and Lebonix have been interposed, as obstacles ...'

[135] Mr Schickerling's letter of 5 October 2021, which refers to the arbitration proceedings, evidences his knowledge of the Award and his recognition of the effect thereof and Barak's interests and those of the Insure Group and Insure. The letter also unequivocally demonstrates that Mr Schickerling knew the circumstances under

which the original statutory meeting of creditors in EBM had been adjourned. Mr Schickerling's failure to have copied the letter to Barak and the opinion asserted in the Liquidators' heads of argument that they *bona fide* believed that Barak's joinder was unnecessary, is in these circumstances, difficult to accept. The proposition is exacerbated by the Liquidators' belated intervention in the Barak Award Application where they asserted (but not persisted with during argument) a direct and substantial interest in the outcome of that application, which they clearly do not have.

[136] Mr Daniels argued that the Liquidators' Intervention application in Barak's Arbitration Award application had as an attachment the Section 20(9) Application. Thus, so the argument ran, despite not being cited as a party to the Section 20(9) Application, Barak was provided with a copy of the application on 9 November 2021. The facts reveal that Barak's attorneys called for the case referred to in the Interdict Application which was identified simply as case 47302/2021. Barak had thus received the Section 20(9) Application from Mr Schickerling but not because of anything Mr Schickerling had disclosed but rather because the Interdict Application became necessary because of the failure of the Master to have given the undertaking as called for and because Barak's attorneys were prudent. Had the Master given the undertaking by 13 October 2021, there would have been no need for the Interdict Application and the attorneys for Barak may only have found out about the Section 20(9) Application too late to oppose it.

Costs

[137] Barak seeks an order that Mr Schickerling and the Liquidators pay the costs of this litigation as between attorney and client, *de bonis propriis*. The reasons for seeking an order for costs both as between attorney and client and *de bonis propriis* are many.

[138] Barak contends that the Liquidators' Applications and the Intervention Application have been brought with an ulterior motive. It is argued that they are vexatious in effect, are without merit and are replete and riddled with speculation and inadmissible evidence; that the affidavits are laconic in the extreme and deliberately so; that there are gross misstatements of fact in relation to material issues; that there is a failure to come to grips with the relevant issues and facts and when challenged, the Liquidators, instead of confronting the issues resort to speculation and invective.

[139] There is merit in these submissions: By way of example, the Liquidators state that the directors were common to both Insure and Ericode. This is gainsaid by the schedule of directors annexed to Barak's answering affidavit and not disputed in the Liquidators' replying affidavit. In relation to the acquisition by Lebonix of EBM and the Liquidators' assertion that this was acquired with misappropriated funds, the cornerstone of the Section 20(9) Application, there are no facts to support this contention. Their reliance on the conclusion of the Barak suite of agreements in 2018 signed by Mr Cilliers in support of the contention that all the directors common to each of the companies were involved in the misappropriation of funds, is not supported by the facts as, on their version, the "unconscionable conduct" occurred at least five years previously in 2012.

[140] The reason for the manner in which the Liquidators have approached both their applications appears to lie in the fact that they did not anticipate opposition to the relief sought in the applications as they were effectively seeking such relief *ex parte* and without notice to Barak.

[141] On the 4th of October 2021, the Liquidators launched the Section 20(9) Application. Barak was not joined as a party. The Section 20(9) Application was brought on a short form notice of motion, thus demonstrating that no opposition was

intended. The founding affidavit proclaimed that the application was to date thereof (affidavit signed on 4 September 2021) unopposed. How could that even be known before the application was served? How could that even be known unless a plan had been hatched to achieve that objective? How could that even be plausible knowing the history of the matter and where the granting of the relief sought in the Section 20(9) Application would, according to Mr Schickerling himself, *'affect the dominium of the rights of Lebonix as shareholder and creditor of Lebonix'*.

[142] Mr Schickerling knew that Barak was sitting with an Award in its pocket granted by retired Judge Harms just over a month before (on 12 August 2021). How could it at all be contemplated that Barak would stand by and do nothing to protect its interests and let the relief sought in the Section 20(9) Application be taken without uttering a word in protest?

[143] No mention of the Award was made in the founding affidavit in the Section 20(9) Application. That this was done by design is supported by the content of Mr Schickerling's letter sent the following day, the 5th of October 2021, to the Master in which he says: *'The application [reference to the Section 20(9) Application], like the arbitral proceedings, will affect the dominium of the rights of Lebonix as shareholder and creditor of EBM.'* He did not say that the Award had been made on 12 August 2021 and that the issue of the rights of Lebonix as a shareholder and creditor of EBM had been resolved in such arbitral proceedings fundamentally and additionally, that Lebonix had no rights at that time (other than the reversionary interest elaborated on hereinbefore).

[144] Service of the application on Ericode and Lebonix took place at an address which both Mr Schickerling and the Liquidators knew was unoccupied and it is hardly

surprising that they could forecast in the founding affidavit that the application would be unopposed because they already knew that their service of it would be ineffective.

[145] Mr Schickerling afforded the Master until 13 October 2021 to provide an undertaking to hold over the convening of the first meeting of creditors and members in EBM pending the outcome of the Section 20(9) Application. No response was received.

[146] Had an undertaken been given by the Master, the Interdict would not have been launched, Barak would not have known of the Section 20(9) Application and the relief would in all likelihood have been granted on an unopposed basis. It had in fact been enrolled on the unopposed motion roll.

[147] It was the failure by the Master to have responded which necessitated the Interdict Application. This was instituted on 21 October 2021. On the same day Mr Schickerling transmitted an email to Mr de Wet (and the attorneys for EBM), attaching the Interdict Application and recorded that service on the liquidators (which included Mr de Wet) is deemed to be service on all known creditors.

[148] On 21 October 2021 Mr de Wet mailed a circular advising the parties of the Interdict Application. I find the failure to have annexed the notice of motion in the Section 20(9) Application to the circular and the failure to have provided a summary or outline of what relief was being sought, to have been deliberate.

[149] Mr Schickerling and Mr Versfeld were in frequent and extensive communications with one another about the Conversion Application. Despite this, Mr Schickerling did not copy the 5th of October 2021 letter sent to the Master, to Mr Versfeld. Confronted with this during argument, Mr Daniels argued that there was no reason for Mr Schickerling to have done that – he argued that apart from perhaps a collegial courtesy obligation, there was no legal duty to do so.

[150] Despite the costs order being sought against Mr Schickerling quite squarely on the papers, the first time that he went on oath to explain his actions was during the hearing of this matter. He deposed to a supplementary affidavit, the purpose of which was to persuade this court not to make an order *de bonis propriis* against him, in which he did not explain why a short form notice of motion was chosen, why his client would depose to an affidavit in September 2021 in which he would say the Section 20(9) Application is unopposed, why he did not tell Mr Versfeld at any stage prior to 21 October 2021 about the Section 20(9) Application, why Ericode and Lebonix were cited as being in liquidation.

[151] In my view and given the circumstances of this case, there was absolutely an obligation to tell Mr Versfeld, to join Barak and to give Barak notice of the Section 20(9) Application. These circumstances include: the knowledge of the arbitral proceedings, the knowledge of the Award, the knowledge of the reason for the Conversion Application, the knowledge of the existence of the Conversion Application, the knowledge of the conception of the Section 20(9) Application, which at that stage was being prepared or already finalized, the knowledge that Barak enjoyed substantial securities given by each member of the Insure Group including Ericode and Lebonix, the knowledge that Barak was the only party entitled to exercise rights in respect of the Lebonix Loan Claim and the Lebonix Pledged Shares and the knowledge of the Venter Application judgment. It should be mentioned, that the Liquidators too had knowledge of all the facts and circumstances listed herein.

[152] Barak learnt of the Section 20(9) Application when its attorneys (Ms Bham) called for case 47302/2021, referred to in the Interdict Application's notice of motion, which had been attached to the circular sent by Mr de Wet.

[153] The facts and circumstances as summarized under this rubric up and until this point would be sufficient to warrant a punitive costs order as well as *de bonis propriis*.

[154] The following considerations add fuel to the fire: the Section 20(9) Application, which is the core of the Liquidators' case, is fatally defective both in relation to the relief that is sought and the basis for such relief; the Liquidators have made no attempt to investigate the affairs of Insure with particular reference to the contentions they now advance in the present applications; they failed to conduct an enquiry which would have provided the factual foundation for their application if at all, which they were obliged to do, both because they occupy a fiduciary position and because they depose to these issues under oath.

[155] The Liquidators accept that the Liquidators' Applications have been initiated on the instructions of the Insurance Companies and for their benefit. They have been repeatedly challenged by Barak to explain the unaccountable change in front evidenced by what was stated in the previous litigation in which the separate corporate personality of both Ericode and Lebonix was accepted and indeed relied upon in endeavours by the Insurance Companies to realise the indirect investment in EBM. They state that what was stated by other parties in the other proceedings is irrelevant but it is clearly not, since it is those same parties who now support the unsustainable change in front.

[156] In my view, the Liquidators and Mr Schickerling attempted to steal a march on Barak by not joining Barak in either of the Liquidators' Applications in circumstances where it is quite obvious that Barak has a real and substantial interest.

[157] When these facts are conjoined and read together with the collaboration between the respective Liquidators and the attempts to forestall the reconvening of the statutory meeting of creditors in EBM, I conclude that the conduct of those

responsible for this delay and these applications is reprehensible in the extreme. There is no reason why Barak, a substantial creditor of the Insure Group, should bear any of these costs or allow the Liquidators the luxury of litigating with impunity.

[158] I have found that there was no intention to join Barak. In the Section 20(9) Application, I find a material non-disclosure of the most serious kind given the background to the previous applications and the stance taken in those proceedings there is little doubt, that if a court, apprised with the correct facts, would at least have required some explanation as to the perceptible and discernible change in tactic.

[159] There is no reason why the estate of the insolvent companies be denuded by the costs of this litigation or why Barak should bear any part of those costs. The Liquidators and Mr Schickerling proffer no valid reason.

[160] The judgment in *Alluvial Creek*³⁰, and those which follow it,³¹ provide cogent authority for the proposition that vexatious litigation, whether brought *bona fide* or with an ulterior motive, attracts an order for costs on a punitive scale. The court held:

‘An order is asked for that he pay the costs as between attorney and client. Now sometimes such an order is given because of something in the conduct of a party which the Court considers should be punished, malice, misleading the Court and things like that, but I think the order may also be granted without any reflection upon the party where the proceedings are vexatious, and by vexatious I mean where they have the effect of being vexatious, although the intent may not have been that they should be vexations. **There are people who enter into litigation with the most upright purpose and a most firm belief in the justice of their cause, and yet whose proceedings may be regarded as vexatious when they put the other side to unnecessary trouble and expense which the other side ought not to bear. That I think is the position in the present case.**’ (emphasis added)

³⁰ *In Re Alluvial Creek Ltd* 1929 CPD 532

³¹ Collected in *Venmop 275 (Pty) Ltd and another v Cleverlad Projects (Pty) Ltd and another* 2016 (1) SA 78 (GJ) at [33].

[161] Mr Daniels relied on various authorities and authors to persuade this court that a punitive costs order and one *de bonis propriis* is not warranted. He referred to the authors *Herbstein and Van Winsen*³² and argued that neither the conduct of Mr Schickerling nor that of the Liquidators met the criteria which warranted such an order:

'A representative litigant whose conduct is so unreasonable as to justify this [punitive cost] order can, despite acting in good faith, be ordered to pay the costs *de bonis propriis*. The court will not, however, make such an order lightly, and mere errors of judgment will not be sufficient. It has been held that such an order should not be granted in the absence of some really improper conduct, and that the fairness or unfairness of proceedings honestly brought should not be scrutinised too closely. The criterion has been stated to be actual misconduct of any sort or recklessness, and the reasonableness of the conduct should be judged from the point of view of the person of ordinary ability bringing an average intelligence to bear on the issue in question, not from that of the trained lawyer.'

[162] He argued that the facts supported neither a conclusion of negligence nor of unreasonableness as required in *Pheko and Others v. Ekurhuleni City*.³³

[163] He submitted, with reference to *South African Liquor Traders' Association and Others v. Chairperson Gauteng Liquor Board and Others*,³⁴ that an order of costs *de bonis propriis* is to be made only if a court is satisfied there has been negligence in a serious degree.

[164] Much emphasis was placed on the *dicta* in *CSARS v. Louis Pasteur Investments (Pty) Ltd*,³⁵ where the Court held, *inter alia*, that:

'It is trite that costs *de bonis propriis* should only be awarded in exceptional circumstances. This kind of cost order is granted against

³² Cilliers *et al*, "Herbstein and Van Winsen: The Civil Practice of the High Courts and the Supreme Court of Appeal of South Africa", 5th Edition, vol 2 at 982-987

³³ 2015 (5) SA 600 (CC) at [51]

³⁴ 2009 (1) SA 565 (CC) at [54]

³⁵ (12194/17) [2021] ZAGPPHC 89 (4 March 2021) at [50]

individuals in their personal capacities where their conduct showed a gross disregard for their professional responsibilities, and where they acted inappropriately and in an egregious manner. The assessment of the gravity of the conduct is objective and lies within the discretion of the court.’

[165] A spotlight was also shone on the dissenting judgment of the Constitutional Court in *Public Protector v. South African Reserve Bank*,³⁶ where it was held that:

‘[39] It bears repetition that the grant of ordinary personal costs ought therefore to be viewed as punishment that equates, in terms of seriousness and effect, to costs on an attorney and client scale unexpectedly visited upon a natural person or institution acting on her or its behalf. They are not on par with ordinary costs to be borne by a party litigating in her or its name. When a representative litigant is ordered to pay not only ordinary costs, but also costs on an attorney and client scale from her own pocket, it amounts to an unmasked double punishment.

[40] It ought therefore to take extraordinary circumstances for such costs to be justifiably awarded.³⁷ That decision ought to be a product of much more than a mere box-ticking exercise. It requires deeper reflection, tightly guided by an unmistakably strong sense of justice. After all, courts exist not to crush or destroy, but to teach or guide, caution or deter, build and punish constructively. And that ought to be the purpose of the law in our constitutional dispensation, considering our injustice-riddled past. The law ought not to be applied mechanically, regardless of whether the outcome yields justice or inequity. For then it could be the ass that it has occasionally been allowed to be prior to our current constitutional dispensation.’

[166] Ultimately, a liquidator has a duty to wind-up a company in the best interests of all creditors. The Supreme Court of Appeal said:

³⁶ 2019 (60 SA 523 (CC)).

³⁷ *Nel v Davis SC N.O.* 2016 JDR 1339 (GP) (Davis) at para 25: “A costs order on an attorney and client scale is an extra-ordinary one which should not be easily resorted to, and only when by reason of special considerations, arising either from the circumstances which gave rise to the action or from the conduct of a party, should a court in a particular case deem it just, to ensure that the other party is not out of pocket in respect of the expense caused to it by the litigation.” See also *Lushaba v MEC for Health, Gauteng* 2015 (3) SA 616 (GJ) at para 69 where the court held that “[t]he authorities caution that costs orders *de bonis propriis* [from his or her own pocket] should only be awarded in exceptional circumstances”.

'In the winding up of companies, liquidators occupy a position of trust, not only towards creditors but also the companies in liquidation whose assets vests in them. Liquidators are required to act in the best interests of creditors. A liquidator should be wholly independent, should regard equally the interests of all creditors, and should carry out his or her duties without fear, favour or prejudice.'³⁸

[167] This means that liquidators must act in the interests of creditors as a whole, not a select group thereof. Contrary to this duty, that is precisely what the Liquidators have done.

[168] Again, there is ample authority for the award of *de bonis propriis* costs orders for conduct unbecoming of officers of the court. The decision of the Transvaal Provincial Division *Ex Parte Klopper*³⁹ provides authority for the costs award that is sought by Barak. The Court said:

'The general rule in these cases seems to be that a person in a fiduciary position such as a provisional liquidator should not be ordered to pay the costs of unsuccessful litigation *de bonis propriis* **unless it appears that there was a want of bona fides on his part, or that he acted negligently or unreasonably**; et. *In re Estate Potgieter*, 1908 T.S. 982; *Grobbelaar v Grobbelaar*, 1959 (4) SA 719 (AD)' (Emphasis added)

[169] This is a case where a *de bonis propriis* costs order is appropriate. In *Osteen Health*⁴⁰ the Court was confronted with an application where a firm of attorneys had caused a matter to be enrolled in the unopposed court, without notice to the attorneys acting for the opposing parties, with the express purpose of seeking relief by default. The considerations had by the Court are analogous to those under consideration. Much like the instant case where the conduct of an officer of the court was discovered by fluke, Smith J, held:

³⁸ *Standard Bank v The Master* [2010] 3 All SA 135 (SCA) at [1].

³⁹ *Ex parte Klopper NO: in re Sogervim SA (Pty) Ltd (in liquidation)* 1971 (3) SA 791 (T).

⁴⁰ *Osteen Health Group (Pty) Ltd and Another v Cross-Med Health Centre (Pty) Ltd and Others* (3542/2019) [2020] ZAECGHC 19 (3 March 2020) an unreported judgment of the Eastern Cape Division, Grahamstown under case number 3542/2019 dated 3 March 2020.

- [15] *In Thunder Cats Investments 49 (Pty) Ltd & Others v Fenton & Others* 2009 (4) SA 138 (C), at para. 30, Le Grange J said that:
- 'An order to hold a litigant's legal practitioner liable to pay the costs of legal proceedings is unusual and far-reaching. Costs orders of this nature are not easily entertained and will only be considered in exceptional circumstances.'
- [16] A court will show its displeasure by ordering a legal practitioner to pay costs from his or her own pocket where the conduct materially deviates from the standard expected from legal practitioners to such an extent that it would be unfair or unconscionable to expect his or her clients to bear the costs.
- [17] The following are examples of conduct deserving of censure: "dishonesty, obstruction of the interest of justice, irresponsible and grossly negligent conduct; litigating in a reckless manner, misleading the court, and gross incompetence and a lack of care". (*Multi-Links Telecommunications v Africa Prepaid Services Nigeria Ltd; Telkom SA Soc Limited & another v Blue Label Telecoms Limited & others* [2013] 4 All SA 346 (GNP)).
- [18] In this case it is manifest that the applicants' attorneys had set the matter down on the unopposed roll well knowing that the matter was opposed. They had by that time been served with a proper notice to oppose, as well as an answering affidavit. Their declared intention was to obtain relief by default. And if it were not for the fact that Mr Nettelton had fortuitously become aware that the matter had been enrolled for the following day, they would have proceeded to apply for default judgment.
- [19] To say that their conduct was reprehensible would be an understatement. The inference is ineluctable that they have dishonestly contrived not only to "blindsided" the respondents' legal representatives, but they also no doubt intended to mislead the court. Their conduct amounted to more than mere negligence or even recklessness, since they appeared to have deliberately schemed to achieve their stated objective, namely to obtain default judgment by stealth. In my view, their conduct deviated substantially from the standard of collegial courtesy and ethical behaviour required of officers of the court, and is accordingly deserving of a punitive costs order. I am thus of the view that it is appropriate that they should be ordered to pay the costs ..., *de bonis propriis* and on the attorney and client scale'

[170] The reasoning, in my view, applies with equal force in this case.

[171] In making a costs order I do so having regard to the discretion I have which I exercise in favour of Barak having regard to all the facts which were placed before me. I find the conduct described herein to be reprehensible and falling within the category of 'exceptional' warranting the costs order sought. I find that the Liquidators and Mr Schickerling conspired to 'blindsided' Barak. Had the Master given the undertaking by 13 October 2021 as called for, there would have been no need to launch the Interdict Application and the unopposed Section 20(9) Application would have been moved with not even a murmur of the Award in the founding affidavit, Barak not having been cited or notified.

[172] I find it extraordinary, given the litigation history including this court's previous punitive costs orders due to non-joinder and no notice to Barak, that the Liquidators and Mr Schickerling conducted themselves in the manner they did. One would have expected them to be extra cautious and to have erred on the side of caution.

[173] I accordingly intend granting an order in which the Liquidators, together with Mr

[174] Schickerling, are to pay the costs of some of the applications before court as between attorney and client, *de bonis propriis*, the one paying the other to be absolved including costs of two counsel.

Order

[175] I accordingly grant the following orders:

- 175.1. The paragraphs referenced in paragraphs 1, 2 and 3 of Part A and paragraphs 1 and 2 of Part B of the striking application at Caselines 004-822 to 004-823, are struck from the founding affidavits for containing matter which is inadmissible.

- 175.2. The paragraphs referenced in paragraphs 1 and 2 of the striking application at Caselines 004-975 to 004-976, are struck from the affidavits referred to, for containing matter which is inadmissible.
- 175.3. The Intervention Application, at the behest of Barak to intervene in the Section 20(9) Application and the Interdict Application, is granted.
- 175.4. The Section 20(9) Application is dismissed.
- 175.5. The Interdict Application is dismissed.
- 175.6. The Conditional Counter Application is granted and the Master of the High Court is directed to forthwith convene the first statutory meeting in EBM Project (Proprietary) Limited (in liquidation).
- 175.7. The Arbitration Award dated 12 August 2021 is made an order of court.
- 175.8. The Application by the Liquidators of Insure to Intervene in the Barak Arbitration Award Application is dismissed.
- 175.9. An order is granted in the Conversion Application in terms of the draft order marked "X" hereto.
- 175.10. The Liquidators of Insure Group Managers Limited and Mr Derek Schickerling, jointly and severally, are ordered to pay the costs of the Section 20(9) Application, the Interdict Application and the Barak Arbitration Award Application, jointly and severally, the one paying the other to be absolved, on the scale as between attorney and client to include the costs consequent upon the employment of two counsel.

Judge of the High Court
Gauteng Local Division, Johannesburg

Counsel for the Liquidators and Mr Schickerling: Adv AJ Daniels SC and Adv CT Vetter

Instructed by: Schickerling Incorporated

Counsel for Barak: Adv DM Fine SC and Adv AW Pullinger

Instructed by: Webber Wentzel

Date of hearing: 12, 13 and 14 April 2022

Date of judgment: 12 July 2022

This judgment was handed down electronically by circulation to the parties' legal representatives by email. The date and time for hand-down is deemed to be 10h00 on 12 July 2022.