

IN THE HIGH COURT OF SOUTH AFRICA



GAUTENG DIVISION, JOHANNESBURG

CASE NUMBER: 37520/2021

DELETE WHICHEVER IS NOT APPLICABLE

- (1) REPORTABLE: YES
- (2) OF INTEREST TO OTHER JUDGES: YES
- (3) REVISED:

In the application of:

CENTAUR MINING SOUTH AFRICA (PTY) LTD

Applicant

and

CLOETE MURRAY N.O.

1st

Respondent

SIVALUTCHMEE MOODLIAR N.O.

2nd Respondent

NDUMISO SENZOSENKOSI SIBIYA N.O.

[In their capacities as duly appointed joint provisional

liquidators of Trillian Management Consulting (Pty) Ltd]

3rd Respondent

TRILLIAN CAPITAL PARTNERS (PTY) LTD

4th Respondent

TRILLIAN SECURITIES (PTY) LTD	5 th Respondent
TRILLIAN NOMINEES (PTY) LTD	6 th Respondent
TRILLIAN SHARED SERVICES (PTY) LTD	7 th Respondent
TRILLIAN PROPERTY (PTY) LTD	8 th Respondent
TRILLIAN FINANCIAL ADVISORY (PTY) LTD	9 th Respondent
ZARA W (PTY) LTD Respondent	10 th
THE MASTER OF THE HIGH COURT, PRETORIA Respondent	11 th
THE COMPANIES AND INTELLECTUAL PROPERTY COMMISSION Respondent	12 th

Coram: Wepener J

Date of hearing: 22nd August 2022

Date of Judgment: 12 September 2022

This judgment is made an Order of Court by the Judge whose name is reflected herein, duly stamped by the Registrar of the Court and is submitted electronically to the Parties/their legal representatives by email. The judgment is further uploaded to the electronic file of this matter on Caselines by the Judge or his secretary. The date of this Order is deemed to be September 2022.

Summary: An order collapsing or integrating companies whose incorporation is found to be an unconscionable abuse of the juristic personality, may be granted in terms of s 20(9) of the Companies Act. The powers granted to a court to make appropriate orders include an order integrating it into a company in winding-up, as the powers contained in s 20(9)(b) are sufficient to encompass an order referring the matter to the Master to perform certain further functions, which was necessary because the company into which the companies declared not to be separate juristic persons was integrated, was in liquidation.

JUDGMENT

Wepener, J:

[1] The applicant ('CMSA') seeks a rescission of an order issued by this court (Keightley, J) on 20 October 2020 under s 54 of the Companies Act¹ ('the Companies Act') on the basis that the winding-up proceedings (of the collapsed or integrated companies) referred to below was incompetent; or under Rule 42(1)(a) of the Uniform Rules of Court or the common law, based on good cause. The last basis can be safely disregarded as CMSA did not make out a case based on good cause nor argue a case based thereon. This requirement when rescission is sought under the Rules, obliges the party seeking a rescission to set up a bona fide defence against the relief previously granted. CMSA has not set up such a defence, nor can it.

¹ Act 71 of 2008.

[2] The pertinent parts of the s 20(9)² order under the Companies Act are found in para 2(a) thereof:

'It is hereby declared that the rule nisi in the following terms are granted ("the provisional order")

- (a) Trillian Capital Partners (Pty) Ltd [Reg No: 2015/111759/07], Trillian Securities (Pty) Ltd [Reg No: 2015/152852/07], Trillian Nominees (Pty) Ltd [Reg No: 2017/036662/07], Trillian Shared Services (Pty) Ltd [Reg No: 2015/111747/07], Trillian Property (Pty) Ltd [Reg No: 2016/046295/07] and Trillian Financial Advisory (Pty) Ltd [Reg No: 2014/122082/07] ("the subject companies"):
- (i) are deemed not to be separate juristic persons in respect of any right, obligation, or liability of those companies or of a shareholder of the subject companies;
 - (ii) are collapsed into Trillian Management Consulting (Pty) Ltd ("TMC") and the subject companies and TMC henceforth exist as a single entity by ignoring their separate legal existence as contemplated by section 20(9) read with section 22 of the Companies Act, 71 of 2008 ("the 2008 Act") and Chapter 14 of the Companies Act, 61 of 1973 ("the 1973 Act"); and
 - (iii) the effective date of the commencement of the subject companies' liquidation proceedings is the date upon which TMC was placed in liquidation;
- (b) The Companies and Intellectual Property Commission ("CIPC") and the Master of the High Court, Pretoria are directed to amend their records to reflect the consolidation of the subject companies, their composite winding up process and such further consequences as they deem fit and/or necessary, in accordance with the orders granted pursuant to this application.
- (c) The costs of this application are costs are costs in the consolidated winding-up of TMC and the subject companies.'

² '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).'

[3] This order was confirmed by the court on 20 January 2021 when a final order was issued. It is common cause that CMSA was not a party to the proceedings where the s 20(9) order was issued.

[4] After the issue of the final order, the liquidators of Trillian Management Consulting (Pty) Ltd (in liquidation) ('TMC') instituted the action against CMSA based on two agreements in terms of which CMSA lent money to the seventh respondent, Trillian Shared Services (Pty) Ltd ('TSS'), and the ninth respondent, Trillian Financial Advisory (Pty) Ltd ('TFA'), respectively, and which TSS and TFA had partially repaid to CMSA. The liquidators alleged that these payments by TSS and TFA as well as TMC to CMSA constituted voidable dispositions and sought to set it aside in terms of the Insolvency Act.³

[5] Although several issues were canvassed in the papers and heads of argument, counsel for the applicant advised that the issues raised in oral argument are the ones for consideration by this court.

[6] CMSA became aware of the action against it and seeks a rescission of the order that collapsed the lending companies into TMC on the basis that CMSA had an interest in the order which was granted in its absence, and that the court was not competent to issue such order. The general rule is that any party personally affected by an order of court may seek a rescission of that order.⁴ It was said:

'As an affected party, Mr Zuma has a direct and substantial interest in the order sought to be rescinded. He has locus standi to approach this Court for rescission in terms of Rule 42. However, of course, having standing is not the end of the story. Any party reasonably affected by the order of Court may seek a rescission of that order. But those sort of proceedings have little to do with an applicant's right to seek a rescission and everything to do with whether that applicant can discharge the onus of proving that the requirements for rescission are met. Litigants are to appreciate that proving this is no straight forward task. It is trite that an applicant who invokes the rule must show that

³ Act 24 of 1936.

⁴ *Zuma v Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State and Others* (CCT 52/21) [2021] ZACC 28 para 54.

order sought to be rescinded was granted in his order absence *and* that it was erroneously granted or sought. Both grounds must be shown to exist.'

[7] The test whether CMSA had a direct and substantial interest in the s 20(9) order was set out in *Naidoo v Matlala*⁵

'The applicants seek to set aside a sequestration order which was not made against them. Whether they bring the application in terms of s 149(2) of the Act or in terms of the common law or in terms of rule 42(1)(a) they must have locus standi: ie they must show that they had and have a direct and substantial interest in the order sought — see *Amalgamated Engineering Union v Minister of Labour* 1949 (3) SA 637 (A) at 651. As pointed out in *United Watch* supra at 414D – G:

'Before it is possible to consider these various arguments, it is necessary to determine whether the applicants have locus standi to bring an application for the rescission, or setting aside, of para. 4 of the Court's order and for the further consequential relief claimed. . . . It is obvious H that this is fundamental to the whole application and that it is, therefore, the first matter that must be considered.

Whether the application be founded upon Rule of Court 42(1)(a) or upon the common-law rule relating to the non-disclosure of material facts in an ex parte application, it is clear that it is only a limited class of persons who are entitled to bring an application of this nature. The Rule of Court specifically speaks of the application being brought by any party affected; and it is manifest that the Court would not entertain an application under the common-law at the instance of a disinterested third party. This much is transparently clear; but what is not so clear is how that limited class of persons is to be defined. In this connection neither Mr. Friedman nor Mr. Grosskopf appeared to draw any positive distinction between the Rule of Court and the common-law rule, and I accept that the position as to locus standi is broadly the same under both.'

And at 415A – B:

“(A)n applicant for an order setting aside or varying a judgment or order of Court must show, in order to establish locus standi, that he has an interest in the subject-matter of the judgment or order sufficiently direct and substantial to have entitled him to intervene in the original application upon which the judgment was given or order granted.”

⁵ *Naidoo and Another v Matlala and Others* 2012 (1) SA 143 (GNP) at 153F – 154C.

See also *Parkview Properties (Pty) Ltd v Haven Holdings (Pty) Ltd* 1981 (2) SA 52 (T) at 54H – 55C.’

[8] The applicant’s loan amounts and repayment amounts are common cause, albeit that the respondents give a different colour to it. On the basis of an ordinary loan repayment, the applicant, in my view, would have a direct interest in the order which could result in a setting aside of the order that in effect makes it a concurrent creditor for the balance of its claim. It is common cause that CSMA did not comply with the second leg of the ordinary requirements of rescission, i.e, showing good cause or a bona fide defense. It can thus not rely on s 354 of the old Companies Act or common law.⁶ Counsel for the applicant submitted that this is not the type of case where that requirement needs to be met as CMSA relies on the s 20(9) order being a nullity due to it being granted in circumstances where the court lacked jurisdiction to grant such an order. Where jurisdiction is lacking, any order granted is a nullity and the rescission application is not hampered by the requirements of good cause. Firstly, the common law and Rule 42 requirement of good cause applies to applications for rescission where the judgment or order was granted erroneously. It cannot be argued that the s 20(9) order was granted erroneously as the test applied to qualify for such a rescission application was set out by Streicher JA in *Lodhi 2 Properties Investments CC and Another v Bondev Developments (Pty) Ltd*⁷ as follows:

‘Similarly, in a case where a plaintiff is procedurally entitled to judgment in the absence of the defendant the judgment if granted cannot be said to have been granted erroneously in the light of a subsequently disclosed defence. A Court which grants a judgment by default like the judgments we are presently concerned with, does not grant the judgment on the basis that the defendant does not have a defence: it grants the judgment on the basis that the defendant has been notified of the plaintiff’s claim as required by the Rules, that the defendant, not having given notice of an intention to defend, is not defending the matter and that the plaintiff is in terms of the Rules entitled to the order sought. The existence or non-existence of a defence on the merits is an irrelevant consideration and, if subsequently disclosed, cannot transform a validly obtained judgment into an erroneous judgment.’

⁶ See *Ward and Another v Smit and Others: In re Gurr v Zambia Airways Corporation Ltd* 1998 (3) SA 175 (SCA) at 181A-E.

⁷ 2007 (6) SA 87 (SCA) para 27.

[9] The case for CMSA does not fall within the category of cases that qualify for rescission based on an erroneous order under Rule 42(1)(a). What remains is the argument that the order was incompetent or falls outside of the jurisdiction of the court that granted it. In this regard I refer to what Schoeman JA said in *Travelex Limited v Maloney and Another*:⁸

'I incline to the view that if a judgment or order has been granted by a court that lacks jurisdiction, such order or judgment is a nullity and it is not required to be set aside. However, I agree with the view expressed in Erasmus Superior Court Practice, that if the parties do not agree as to the status of the impugned judgment or order, it should be rescinded. That is the position in the instant matter where the appellant applied to have the order set aside on the premise that the court did not have jurisdiction. Therefore, the usual requirements for a rescission application in terms of the common law or rule 42 do not apply.'

[10] The rescission application based on the lack of jurisdiction where the judgment was granted is consequently in my view sui generis and does not fall under the requirements of the rules regarding rescission generally. Or, as Mabuse J said in *Seleka v Fast Issuer SPV (RF) Limited* ⁹

'The power of the Registrar of the Court to grant default judgment is circumscribed. He does not have power to grant all the applications for default judgment. He can only do so where the law expressly authorises him to do so. The Registrar may therefore not grant default judgments where it is so prohibited by statute, such as s 130 of NCA. If he oversteps his powers or where contrary to the statutes, he arrogates to himself the power to grant a default judgment, such a default judgment is null and void.'

[11] Relying on this principle, the applicant submits that the order, issued by this court, fell outside of the powers of the learned judge and is therefore null and void.

[12] In the result, two questions require answering: does the respondent's case controvert the applicant's standing or locus standi regarding the loan repayment? And secondly, did the court lack jurisdiction to issue the s 20(9) order?

⁸ [2016] ZASCA 128 para 16.

⁹ [2021] ZAGPPHC 128 para 15.

[13] The respondents resist the finding that CMSA has standing on the basis that the claims by it, against the collapsed companies, were not genuine claims but formed part of wider fraudulent conduct. It is stated that the reason why the applicant does not refer to the merits of the matter is because that it must stay away from dealing with the merits. The respondents set out in some detail the factual background of the alleged loan and repayment of both the companies that were collapsed into TMC. The liquidators dispute that the claim arose as alleged by CMSA as purely a loan and put it in context in their affidavit. I need not set out the all the paragraphs dealing with this issue.¹⁰ But, the liquidator said:

‘The Trillion constituents, particularly TMC and the subject companies, were for all intents and purposes used in synergy as one indivisible vehicle through which a highly sophisticated and multi-dimensional corruption, fraud and money laundering scheme was conducted, with Wood the controlling mind behind all of them.’

and concluded that CMSA is

‘. . . for the aforesaid reasons not a creditor in truth and in fact in the respects contended for the only reason why it advanced funds to Trillion was because CVL (Centaur Ventures Limited) could not directly do so and the CVL funding from the Gupta purse, had to be channelled through CMSA so as to avoid reporting scrutiny.’

[14] The deponent states that the TFA and TSS loans and loan agreements were, however, not a true reflection of the recordal of what had in truth and in fact transpired. They were rather agreements conjured up in an attempt to, respectively, regularise or rather ‘paper’ the flow of funds for CVL to CMSA and, ultimately, to its true intended recipient, Trillian.

[15] The liquidators set out that the alleged loans were not such. How does the CMSA deal with these allegations? The deponent for CMSA then, in reply, submits that the allegations are hearsay, vexatious and scandalous. He makes no attempt to deal with correctness of the allegations. The legal principles to apply to a matter brought on application are well settled. In *Wightman*¹¹ the court held:

¹⁰ Answering affidavit paras 35-102.

¹¹ *Wightman t/a JW Construction v Headfour (Pty) Ltd and Another* 2008 (3) SA 371 (SCA) para 13.

'A real, genuine and bona fide dispute of fact can exist only where the court is satisfied that the party who purports to raise the dispute has in his affidavit seriously and unambiguously addressed the fact said to be disputed. There will of course be instances where a bare denial meets the requirement because there is no other way open to the disputing party and nothing more can therefore be expected of him. But even that may not be sufficient if the fact averred lies purely within the knowledge of the averring party and no basis is laid for disputing the veracity or accuracy of the averment. When the facts averred are such that the disputing party must necessarily possess knowledge of them and be able to provide an answer (or countervailing evidence) if they be not true or accurate but, instead of doing so, rests his case on a bare or ambiguous denial the court will generally have difficulty in finding that the test is satisfied. I say "generally" because factual averments seldom stand apart from a broader matrix of circumstances all of which needs to be borne in mind when arriving at a decision. A litigant may not necessarily recognise or understand the nuances of a bare or general denial as against a real attempt to grapple with all relevant factual allegations made by the other party. But when he signs the answering affidavit, he commits himself to its contents, inadequate as they may be, and will only in exceptional circumstances be permitted to disavow them. There is thus a serious duty imposed upon a legal adviser who settles an answering affidavit to ascertain and engage with facts which his client disputes and to reflect such disputes fully and accurately in the answering affidavit. If that does not happen it should come as no surprise that the court takes a robust view of the matter.'

[16] The liquidators' version regarding the involvement of CMSA and the fraudulent scheme regarding the transfer of funds is not contested in any serious manner and its version of events does not fall to be rejected but must be accepted.¹² This is also so, because fraud (as alleged by the liquidators) results in the fact that

'No Court in this land will allow a person to keep an advantage which he has obtained by fraud. No judgment of a Court, no order of a Minister, can be allowed to stand if it has been obtained by fraud. Fraud unravels everything...once it is proved, it vitiates judgments, contracts and all transactions whatever. . . .'¹³

¹² *Plascon-Evans Paints (TVL) Ltd v Van Riebeck Paints (Pty) Ltd* 1984 (3) SA 623 (A).

¹³ *Lazarus Estate Ltd v Beasley* [1956] 1 .Q.B 702.

[17] The version furnished by the liquidators was met with an allegation that it is vexatious and hearsay. This was not argued by counsel for CMSA and the respondents counsel was not required to deal with it in his argument. Counsel for CMSA touched on the issue in reply, but did not persist with any submission or application for the striking out of evidence but left it, at most, for this court to deal ' . . . within the context of the whole case.' In the circumstances, the respondents did not deal with this aspect in their submissions, in particular, whether the provisions of the Law of Evidence Amendment Act¹⁴ would or should find application. I am not inclined to regard evidence as hearsay or vexatious without full argument, nor to disregard evidence that may be prima facie hearsay without proper argument from both sides.¹⁵

[18] CMSA is thus, on the papers before this court and due to its participation in the fraudulent conduct, not a true creditor of TFA and TSS (the collapsed companies) and could not have been lawfully affected by the s 20(9) order.

[19] In this circumstances CMSA has failed to establish locus standi to launch the present application as its fraudulent conduct, as set out in in the liquidators affidavit, can give it no legitimate interest in the s 20(9) order, based on any purported loans.

[20] On this basis, the application falls to be dismissed.

[21] The second question is whether the rescission of the order is available due to the court's lack of jurisdiction to grant it. This issue revolves around the wording of s 20(9), and particular, a judgment of the court in *Barak*¹⁶ delivered on 12 July 2022.¹⁷ That court expressed serious reservations regarding the failure of the liquidators to utilise their powers under ss 417 and 418 of the old Companies Act.¹⁸ This issue is not pertinent in the matter under consideration.

[22] *Barak* is further to be distinguished as the court found that the sole purpose of that application was

¹⁴ Act 45 of 1988.

¹⁵ See also the approach of *Dippenaar J in Malherbe v City of Johannesburg Metropolitan Municipality* [2022] ZAGPJHC 587 para 30.

¹⁶ *Barak Fund SPC Limited vs Insure Group Managers Limited (in liquidation) and Others* [2022] ZAGPJHC 469.

¹⁷ An application for leave to appeal the *Barak* judgment is pending at the time of this judgment.

¹⁸ Act 61 of 1973.

'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.' (my underlining)

[23] There is no suggestion in the matter under consideration that the purpose of the liquidators are or were other than exposing fraudulent conduct which disentitles CMSA from making claims and or resisting claims pursuant to voidable transactions due to fraud.

[24] The reference to *Barak* is because that court held that the s 20(9) application was inappropriate because the companies to be collapsed were not in winding-up.¹⁹ The learned judge held²⁰ that the liquidators failed to set out the source which permits the collapse when neither company was placed into winding-up. I see no obstacle to such an order in the wording of s 20(9). It gives a court the power to make a declaration and then to make any further order that the court considers appropriate, clearly having regard to the declaration in terms of s 20(9)(a). I am of the view that, if the facts justify piercing the corporate veil,²¹ the court is empowered to grant appropriate relief.²² The distinguishing feature relied upon by counsel for CMSA is that TMC was in liquidation and the two collapsed companies were not. It was argued, and said in *Barak*,²³ that due to the different entities being collapsed they would now be exposed to different debts. That is so, and it is so in every matter where companies are collapsed, whether they are in liquidation or otherwise and the distinguishing feature of being under liquidation or not, has no new or additional effect or cannot be a bar to the collapse. I am of the view that it is a distinguishing feature without consequence. If a court can collapse liquidated companies,²⁴ that power is contained in s 20(9). I see no reason why it cannot exercise its powers and collapse an unliquidated company that is clearly deemed not to be a separate juristic person into the liquidated company. In so far as the finding by the court stands, that TSS and TFA were deemed not to be separate juristic persons, and by implication formed part of TMC, an appropriate order would be to collapse them into TMC, whether they are in liquidation or otherwise. The effect would be that those two

¹⁹ Paragraphs 68, 71 and 74.

²⁰ At para 18.

²¹ Section 20(9)(a).

²² Section 20(9)(b).

²³ At paras 54 and 55.

²⁴ As it did in *Ex parte Gore NO and Others NNO* [2013] 2 All SA 437 (WCC).

companies, which are not in fact separate entities, would collapse or integrate into the liquidated company as they were not entitled to claim to be separate juristic persons from the outset. Removing the fraudulent conduct places them squarely as part and parcel of TMC.

[25] The main attack on the s 20(9) order is the apparent lack of jurisdiction of the court to collapse the two companies into TMC. The attack does not concern the court's finding of necessity that the conduct which found the basis of the order, constituted an unconscionable abuse of the juristic personalities of those two companies as separate entities. That the requirements of s 20(9)(a) were satisfied, is a foregone conclusion and CMSA takes no issue with the factual allegations in the founding papers of the s 20(9) application. CMSA's complaint that the order that followed, i.e., the collapsing, was not permissible. I do not agree. The provisions of s 20(9) allows the court to integrate or collapse the entities and to structure its order with further orders that it considers appropriate. '[A]ppropriate means suitable or right for the situation or occasion.'²⁵ Or 'suitable, proper'.²⁶ It was found²⁷ by Binns-Ward J as follows:

'Paragraph (b) of the subsection affords the court the very widest of powers to grant consequential relief. An order made in terms of paragraph (b) will always have the effect, however, of fixing the right, obligation or liability in issue of the company somewhere else. In the current case the "right" involved is the property held by the subsidiary companies in the King Group and the obligation or liability is that which any of them might actually have to account to and make payment to the investors.'

Being faced with the conduct of the two collapsed companies and TMC, whose conduct constituted an unconscionable abuse of their juristic personalities, the appropriate order was to collapse them into the other perpetrator. The further appropriate order was to allow the Master to appoint liquidators to follow the requirements of the law regarding liquidation of the two collapsed companies.

²⁵ Cambridge Dictionary (online).

²⁶ Concise Oxford Dictionary.

²⁷ *Gore*, supra para 34.

[26] The applicant's counsel relied on *City Capital*²⁸ and *Munsamy*²⁹ for support for its submission that the order in terms of which the order requires the Master to appoint a liquidator was outside of the court's power. That is a misinterpretation of what *City Capital* and *Munsamy* held, which was that a court does not have the power to appoint a particular liquidator. But the court order that requires the Master to perform his or her duties is, in my view, unobjectionable. This would make it clear that the natural consequences of the collapse was to place TSS and TFA into liquidation.³⁰ The court order in this matter does not transgress that which is set out in *City Capital* and *Munsamy*.

[27] The submission on behalf of CMSA was that and which is aligned with the findings in *Barak*,³¹ CMSA will have to contend with an entirely new set of facts such as that it will have unsecured claims to be shared by other creditors. This aspect misses the point in this case. On the facts, it has no genuine claim under the loan agreements. The conduct of TMC and the collapsed companies was an unconscionable abuse of their juristic personalities and any claim, purportedly based on the fraudulent loans, which may be resisted if that version proves to be correct, but is the version before this court. CMSA has no genuine claim based on the alleged loan agreements and the *Barak* matter was not decided on such a basis.

[28] Counsel for the applicant submitted on the strength of *Geach*³² that the true question is whether the court did indeed have the power to issue the additional relief. I have shown that the provisions of s 20(9) are wide and would not only permit of such a power but the circumstances of the matter call for such an appropriate order.

[29] The further reliance on *Micromatica*³³ goes no further.³⁴ The court stated thus:

'Section 20(9) of the 2008 Act does not deal with the winding-up of companies. It provides a statutory basis for piercing the corporate veil of companies and empowers the

²⁸ *City Capital SA Property Holdings Ltd v Chavonnes Badenhorst St Clair Cooper and Others* 2018 (4) SA 71 (SCA).

²⁹ *Munsamy and Another v Astron Energy (Pty) Ltd and Others* 2022 (4) SA 267 (GJ).

³⁰ See *Munsamy* para 38.

³¹ At paras 54 and 55.

³² *General Council of the Bar of South Africa v Geach and Others* 2013 (2) SA 52 (SCA) at para 195.

³³ *Cooper NO and Others v Micromatica 324 (Pty) Ltd and Others (City Capitals a Property Holding Limited and Others (Intervening))* [2016] ZAWCHC 148.

³⁴ *Micromatica* id para 37.

court to grant consequential relief for purposes of “fixing the right, obligation or liability in issue of the company somewhere else”. That does not translate into a power to appoint a liquidator in the circumstances contemplated in chapter 14 of the 1973 Act. Chapter 14 provides a structured framework for the appointment of liquidators and the rationale for that structure, with the emphasis on the master’s power to appoint liquidators, was explained in detail in *Ex Parte Master of the High Court South Africa (North Gauteng)*. It could not have been the legislature’s intention to hide in a statutory provision for piercing the corporate veil, a power for the court to appoint a liquidator in circumstances contemplated in chapter 14 whilst express provision is made for such appointments to be made by the master within the structure provided for in chapter 14. If it were the intention of the legislature to empower the court to appoint liquidators in circumstances contemplated in chapter 14, express provision would have been made for it.’

[30] That court correctly held that s 20(9) does not deal with winding-up of companies. The court said that a court may not appoint liquidators – this the court in the s 20(9) application did not do. This it left it correctly to the Master to do. Reliance on the *Micromatica* case does not assist the applicant.

[31] Once the requirements of s 20(9)(a) are satisfied, and there is no suggestion that it was not, the court has the power to make appropriate orders. It would be untenable that a main fraudster can be liquidated and that when the co-conspirators are discovered and found to be holding the assets and being solvent,³⁵ that the court would not exercise the powers in terms of s 20(9), as it happened in this matter. In *Barak*, the court held that the liquidator had no power to assume control of the assets of the companies that were collapsed. That is indeed so, but once collapsed, the Master has certain duties to perform. That is what the order in this matter foresees and the court left it to the Master to appoint liquidators.

[32] The main reliance by counsel for CMSA is with reference to para 74 of *Barak*. I am unable to agree with that finding that, because the two companies have not been placed into liquidation, it could not be collapsed even with the clear evidence that the court had to exercise the deeming provision in s20(9)(a). I am of the view that the effect of the order (collapsing the two companies into the liquidated company) does not

³⁵ In this matter it is not disputed that both TSS and TFA are hopelessly insolvent.

support the finding that the court has no power to make the order. The power to grant the s 20(9) order must be considered without the consequences thereof as the consequences do not dictate the terms or powers of the provisions of s 20(9).

[33] Even if two or more entities under liquidation are collapsed, the separate concursus in each will fall away to become a single concursus in the liquidated entities. And I have not seen any objection to liquidated companies being integrated.

[34] Counsel for CMSA submitted that, on the strength of *Barak* and *Micromatica*, s 20(9) does not deal with liquidation. This is indeed so. It does not. Nor does it deal with all the myriad of consequences in any case of a collapse. Section 20(9)(b) leaves it to the court to make appropriate orders to give effect to the order regarding the collapse. These powers are wide and, in my view, sufficient to cater for consequential relief. What is more important is that s 20(9)(a) does not place the limitation sought to be introduced by CMSA in this matter.

[35] The further effect of this application, if successful, will be to set aside a portion of the order of the court a quo only.³⁶ The part that finds the abuse and the declaration that TSS and TFA are not separate juristic entities, will remain extant and is not under discussion. This is so because the applicant relies on the ground that the court had no jurisdiction to issue the order collapsing the companies, which does not call for it to set out a bona fide defence. It results that the existing order is only partially under attack and order 2(a)(i) will remain unaffected and there is no attempt to rescind that part of the order, despite the relief being sought in the notice of motion being that the entire order be set aside.

[36] A further point raised: it was submitted that the order requiring the Master to amend his or her records, led to the Master deregistering the companies and not reflecting them as having been liquidated. It does not affect the court order. If the Master erred, appropriate relief should be sought against the Master. I need say nothing further on this point as it does not affect the court order.

[37] In all the circumstances, the application falls to be dismissed with costs, such costs to include the costs of two counsel.

³⁶ See *Conekt Business Group (Pty) Ltd v Navigator Computer Consultants CC* 2015 (4) SA 103 (GJ).

W.L. Wepener

Judge of the High Court of South Africa

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