REPUBLIC OF SOUTH AFRICA

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

CASE NUMBER: 2022/891

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED.

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A. STEIN **3 NOVEMBER 2023**

In the matter between:

BONATLA PROPERTY HOLDINGS LIMITED (in liquidation) Applicant

and

RUITERSVLEI HOLDINGS PROPRIETARY LIMITED First Respondent

and

MERCHANT COMMERCIAL FINANCE 1 PROPRIETARY LIMITED Intervening Party/Second Respondent

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JUDGMENT

STEIN, AJ:

[1] The applicant, Bonatla Property Holdings Limited (in liquidation) seeks the winding-up of the respondent Ruitersvlei Holdings (Pty) Limited in terms of sections 344(f) and 345(1)(a) and/or (c) of the Companies Act, 61 of 1973 ("the old Companies Act") read with the relevant provisions of the new Companies Act, 71 of 2008. The applicant is an erstwhile public company

which is itself in liquidation and the application is therefore brought by its Liquidators. It is convenient to refer to the applicant in the remainder of this judgment as "**Bonatla Holdings**" and the first respondent as "**Ruitersvlei**".

[2] Ruitersvlei initially opposed the application on three principal grounds, namely that:

2.1 Bonatla Holdings is not a creditor of Ruitersvlei and accordingly has no standing to bring the application. This, it contends, is by virtue of certain Deeds of Suretyship and cession entered into by Bonatla Holdings;

2.2 the relevant claims had prescribed;

2.3 that there was a pending application for business rescue in respect of Ruitersvlei.

[3] In addition, Ruitersvlei denies that it is unable to pay its debts, that it is factually insolvent or that it is just and equitable that it be wound up.

[4] At the commencement of the hearing I was informed that Ruitersvlei no longer persisted in its grounds of opposition based on prescription and business rescue. The issue of the status and effect of the cessions therefore lies at the heart of this application, and most of the argument addressed by counsel on both sides concerned this issue. Before considering it, it is necessary to dispose of certain preliminary matters.

PRELIMINARY MATTERS

[5] The Merchant Commercial Finance 1 Proprietary Limited ("**Merchant**") applied to intervene and to oppose the application. Merchant is the holder of the relevant Deeds of Suretyship and, as it explained in its intervention application, the successor-in-title to the entire business, rights and claims of Merchant Commercial Finance (Pty) Limited, which is the cessionary under the relevant Deeds of Suretyship. In its replying affidavit, Bonatla Holdings conceded that Merchant is a creditor of Ruitersvlei and did not oppose the intervention. This concession was correctly made. Merchant clearly has a direct and substantial interest in the application and is admitted as the second respondent.

[6] Bonatla Holdings did, however, oppose the admission of Merchant's replying affidavit in the intervention application. It contended that since it had not opposed Merchant's intervention, Merchant's founding affidavit in its intervention application stood as its answering affidavit in the liquidation

application and therefore it was not entitled to file a further affidavit. I disagree. Merchant was not entitled to assume that its application for intervention would be granted. That is ultimately a question for the Court. It was therefore entitled as of right to file a replying affidavit in its intervention application, whatever the attitude that Bonatla Holdings took to its application for intervention. In any event, there is no prejudice and at the hearing of the application, I did not understand Bonatla Holdings to persist in substantial opposition to the reception of this affidavit. Merchant's replying affidavit is therefore admitted.

THE CESSIONS

[7] Bonatla Holdings seeks the winding-up of Ruitersvlei on the basis that it is a creditor. It's principal allegation in this regard is to be found in paragraph 16 of its the founding affidavit, which reads as follows:

> "As is dealt with further below, Ruitersvlei is lawfully indebted to the Bonatla Holdings in the sum of R49 816 687.00 which is presently due and payable by Ruitersvlei to Bonatla Holdings, and which despite demand it is unable to pay. Ruitersvlei's indebtedness to Bonatla Holdings arises out of monies loaned and advanced by Bonatla Holdings to Ruitersvlei and fees charged by the former to the latter."

[8] Ruitersvlei and Merchant dispute that Bonatla Holdings is a creditor of Ruitersvlei, including a contingent or a prospective creditor.[1] They therefore contest Bonatla Holdings' standing to bring the winding-up application. They do so on the basis of two deeds of suretyship incorporating cessions in favour of Merchant and entered into in or about March 2013 ("**the 2013 suretyship**") and October 2016 ("**the 2016 suretyship**"). Initially a further suretyship entered into in 2012 was also relied upon. However, it was accepted that this cession pertained to Bonatla Properties (Pty) Limited, a subsidiary of Bonatla Holdings, and therefore was not applicable.

[9] I do not reproduce the 2013 suretyship and the 2016 suretyship in this judgment.[2] They are lengthy documents. Suffice it for the present purposes to observe that in effect they record Bonatla Holdings and Ruitersvlei, together with numerous other entities as co-sureties and cedents in favour of Merchant Factors, Merchant's predecessor-in-title. The 2013 suretyship names Faurie Holdings (Pty) Limited as one of the cedents, but it was accepted that this

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1 In terms of section 346 of the old Companies Act, read with item 9 of Schedule 5 of the new Companies Act, a creditor, for the purposes of winding-up includes a contingent or prospective creditor.

2 The 2013 suretyship was annexed to Merchant's intervention application as annexure M2 and the 2016 suretyship as annexure M3 and were annexed to Ruitersvlei's answering affidavit as annexures AA4 and AA5 respectively.

entity was Ruitersvlei's predecessor-in-title. Accordingly, their effect is that the named entities including Bonatla Holdings and Ruitersvlei are co-sureties and cedents in favour of Merchant.

[10] The deeds of suretyship are framed in extremely broad terms. Although they differ in certain respects, it was agreed between the parties that the relevant provisions were materially identical and that submissions made on the basis of one of the suretyships was applicable to the other. For the sake of convenience, I therefore refer to the 2016 suretyship but all of my observations are equally applicable to the 2013 suretyship, unless otherwise indicated.

[11] The parties were agreed that the central provision is clause 21 of the 2016 suretyship (which appears in almost identical terms as clause 20 in the 2013 suretyship) and provides as follows:

> "As collateral security for the discharge of the obligations by us in terms hereof, each of us does hereby cede, assign, transfer and make over unto and in favour of the CREDITOR all of our rights, title and interest ("ceded claims") in and to any amounts which are and any amounts which may hereafter become owing to any of us by the DEBTORS (or any one or more of them) from any cause of indebtedness whatsoever, including any reversionary right or interest which any of us may acquire after termination of any prior cession, assignment or transfer, and including any balance of the said amount which may remain after the discharge by satisfaction or otherwise of any such prior cession, assignment or transfer, and including any rights of action of such balance against any cessionary, assignee or transferee. No express or tacit consent or waiver by the CREDITOR permitting payment by the DEBTORS (or any one of more of them) to any one of us of any amount or claim referred to herein shall prejudice or diminish the rights of the CREDITOR in terms hereof in respect of the remainder of all amounts and claims herein referred to. If any of us holds or acquires any negotiable instrument or any document as security for or evidence of any claim herein referred to, he shall forthwith on demand made over all his rights therein, and deliver same to the CREDITOR."

[12] The first enquiry is to determine the nature of the cessions. This is because, as the court held in *Grobler v Oosthuizen,*[3] in the event that these are properly characterised as "out-and-out" or outright cessions rather than security cessions (cessions *in securitatem debiti*) then the cedent (in this case, Bonatla Holdings) would have lost all of its rights and interests under the deeds of suretyship and there could be no question of a reversionary interest or a re-cession. While the court in *Grobler v Oosthuizen* was dealing with the characterisation of the cessions for the purposes of prescription, the same

[3] *Grobler v Oosthuizen* 2009 (5) SA 500 (SCA), para [8]

considerations apply in determining whether the cedent remains a creditor for the purposes of a winding-up.

[13] The parties in the present application therefore correctly accepted that should this court find that the cessions embodied in the 2013 and 2016 suretyships are outright cessions, then that would be the end of the matter.

THE NATURE OF THE CESSIONS

[14] The characterisation of the nature and effect of the Cessions is a question of interpretation; the Court must ascertain the intention of the parties.[4] Since the Court decided matters like *Picardi*, the proper approach to interpretation has been reconsidered, restated and now repeatedly applied.[5] In essence and at the risk of over-simplification, my understanding of the change of emphasis in the approach to interpretation as embodied in these judgments is to recognise the centrality of context in the interpretation of language and therefore to consider context, and not only text, from the outset of the enquiry. As the Court in *Grobler v Oosthuizen*[6] found, though this case was decided before the *Natal Joint Municipal Pension Fund* case, even where the document described itself as an outright Cession, this did not entail that it was. The Court must have regard to the context of the transactions and form should not be allowed to override substance "*... if on a proper analysis of the transaction as a whole the cession was made with the purpose of securing a debt owed by the cedent to the cessionary."*[7]

[15] As appears from clause 21 of the 2016 suretyship, quoted above, the Cessions are framed in the broadest of terms. Indeed, it is difficult to imagine much more generous or absolute language. All rights, title and interest are made over to Merchant including any amounts which may in the future become owing from any form of indebtedness whatsoever.

[16] None of the parties presented a detailed account of the commercial context in which the Cessions came about. On the applicant's version they were for loans extended repeatedly to Ruitersvlei from 2014 onwards. Merchant, it appears, is a financing house which extracted the Cessions in return for loans or other advances made to Ruitersvlei, Bonatla Holdings and other related entities. On any version, therefore, it appears that the Cessions were entered

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4 *Picardi Hotels Ltd v Thekwini Properties (Pty) Ltd* 2009 (1) SA 493 (SCA), para [5]; see also *Grobler v Oosthuizen*, para [11].

5 *Natal Joint Municipal Pension Fund v Endumeni Municipality* 202 (4) SA 593 (SCA), para [18]; *Capitec Bank Holdings Ltd and Another v Coral Lagoon Investments 194 (Pty) Ltd and Others* 2022 (1) SA 100 (SCA), para [25].

6 *Grobler v Oosthuizen* 2009 (5) SA 500 (SCA).

7 *Grobler v Oosthuizen*, para [10], citing with approval *National Bank of South Africa Ltd v Cohen's Trustee* 1911 AD 235 at 246 and *Bank of Lisbon and South Africa Ltd v The Master and Others* 1987 (1) SA 276 (A) at 294D-E.

into in return for advances made in order to meet Ruitersvlei's financing requirements.

[17] In view of this, notwithstanding the extremely broad wording of the cession clause itself and the ancillary clauses of the Deeds of Suretyship, my view is that these were likely considered by the parties to be security cessions rather than outright cessions. Although, as indicated above, there is an absence of evidence proffered from any of the parties concerning the context of the arrangements which may have put this question beyond doubt.

[18] I proceed to consider the matter, and in particular the central issue of Bonatla Holdings' status as a creditor, on the basis that these are security cessions.

THE NATURE AND EFFECT OF SECURITY CESSIONS

[19] The definitive treatment of the nature of a security cession is that undertaken by the Court in *Grobler v Oosthuizen.*[8] As Brand JA observes, two distinct and competing theories can be discerned from the authorities preceding that case regarding the true nature of a security cession. The first theory understands a security cession by analogy with the pledge of a corporeal asset and is therefor generally referred to as "the pledge theory". According to this theory, the effect of a security cession is that "... the principal debt is 'pledged' to the cessionary while the cedent retains what has variously been described as the 'bare dominium' or a 'reversionary interest in the claim against the principal debtor."[9]

[20] The alternative theory conceives of the security cession as in effect an outright cession together with an ancillary agreement of *pactum fiduciae*, which is associated with, or superimposed, on the outright cession to the effect that the cessionary will re-cede the principal debt back to the cedent once the secured debt is satisfied.[10]

[21] The essential difference between the two approaches to the legal characterisation of a security cession is that in the case of the pledge theory, the cedent retains a reversionary interest of some form as a pledged incorporeal enforceable against the debtor, whereas under the latter theory all that remains is a personal right enforceable against the cessionary. Having considered the most recent authority, Brand JA concludes that, for apparently "pragmatic reasons", in light of these decision, "the doctrinal debate must, in my view be regarded as settled in favour of the pledge theory".[11]

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8 *Grobler v Oosthuizen*, para [15].

9 *Grobler v Oosthuizen*, para [15].

10 *Grobler v Oosthuizen*, para [17].

11 *Grobler v Oosthuizen*, para [17], citing with approval *Bank of Lisbon and South Africa Ltd v | The Master* 1987 (1) SA 276 (A) at 291H-294H and *Millman N.O. v Twiggs and Another* 1995

[22] Accordingly, in deciding this matter I am bound to adopt the pledge theory in approaching these security cessions. The question is: What is the effect of this in respect of a cedent (or pledgor, to use the language or pledge) that approaches the Court purporting to be a creditor, and particularly in the context of the wording of the Cessions at issue in this case.

[23] There appear to be few decided cases on point. *Holzman v Knights Engineering*, a decision of this Division, appears to be the first case to have considered the issue.[12] The Court found that the effect of the security cession was to negate the existence of a *vinculum juris* between the cedent and the debtor company and that the cedent was therefore not a creditor (whether actual, contingent or prospective) of the respondent company which was sought to be wound up. Accordingly, the Court found that the cedent had no standing to apply for the winding-up order.[13]

[24] Similarly, the Court in *Spendiff*, relying heavily on the decision in *Holzman's* case, found that the cedent had no standing as a creditor to apply for a winding-up of the alleged debtor company whose debts it had ceded.[14]

[25] The Court in *Van Zyl v Look Good Clothing*, without apparently referring to or engaging with the decisions in *Holzman* or *Spendiff*, reached the opposite conclusion.[15] Unsurprisingly, counsel for Bonatla Holdings placed heavy reliance on the *Van Zyl* case, while counsel for Ruitersvlei and Merchant strongly promoted the *Spendiff* line.

[26] I was urged, in particular, during the course of argument on behalf of Bonatla Holdings, to reject the *Spendiff* and *Holzman* line of authority on the basis that they were distinguishable in that in those cases the winding-up applications commenced before the applicant or cedent companies went into liquidation, whereas in the present case, like in the *Van Zyl* case, the applicant (the cedent company) was already in liquidation when the winding-up application was brought. This was referred to, somewhat seductively, by counsel for Bonatla Holdings, to coin a phrase, as the "liquidation anomaly". This, as I understood the argument for differential treatment, flowed from the rights and duties of liquidators, and in particular the obligation to ensure a fair distribution amongst all creditors.

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(3) SA 674 (A) at 676H.

12 *Holzman N.O. and Another v Knights Engineering & Precision Works (Pty) Ltd* 1979 (2) SA 784 (W).

13 *Holzman v Knights Engineering* at 795H-796A.

14 *Spendiff N.O. v J A J Distributors (Pty) Ltd* 1989 (4) SA 126 (C), at 137H – 138B.

15 *Van Zyl N.O. v Look Good Clothing CC,* 1996 (3) SA 533 (SE), at 528H-I.

[27] I am unable to embrace this "liquidation anomaly" approach. That is because it is difficult to appreciate how a cedent that did not enjoy rights prior to liquidation could acquire greater rights after liquidation. Put differently, if the cedent is not a creditor prior to its liquidation, then it cannot become a creditor merely by virtue of the fact of its liquidation.

[28] None of the above cases, *Holzman*, *Spendiff* and *Van Zyl's* case, appears definitively to resolve the question. All three were decided before the decision in *Grobler v Oosthuizen* considered above. The Court in *Holzman*, it appears to me, clearly applied the alternative theory of security cessions rejected by the Court in *Grobler v Oosthuizen*.[16] Similarly, while apparently engaging the pledge theory in its reasoning, the Court in *Spendiff* relied heavily of *Holzman* and apparently understood the reversionary interest of the cedent to be confined to the ownership of a personal right against the cessionary to re-cession on payment of the secured debt. This, as appears from the discussion above, is one of the elements of the alternative theory of security cessions. The Court in *Van Zyl's* case also appeared to embrace the pledge theory and the authorities that underlie this theory.[17] However, the reasoning too is somewhat incoherent in that elsewhere in the judgment, the Court exhibits express reliance on the alternative theory holding "... as I have already stated the effect of the cession, although it was in *securitatem debiti*, was as complete as an out-and-out cession and the close corporation, as cedent, retained no enforceable rights whatsoever against the respondent, being the debtor".[18] [emphasis added]

[29] In my view, it is necessary carefully to scrutinise the nature of the residual interest identified by the Court in *Grobler v Oosthuizen*. Relevant to this enquiry is the ambit of the particular security cession which is at issue in each case as well as the basis on which the cedent asserts that it is a creditor. I proceed to consider that below.

APPLICATION TO THE PRESENT FACTS

[30] It is important to have regard to the cause of action made out by Bonatla Holdings in the founding affidavit. As appears from paragraph 16 of the founding affidavit, quoted at the outset to this judgment, the winding-up application is brought on narrow grounds. The basis for Bonatla Holdings' contention that it is a creditor of Ruitersvlei is that Ruitersvlei is allegedly "... indebted to Bonatla Holdings in the sum of R49 816 687.00, which is presently due and payable by Ruitersvlei to Bonatla Holdings, and which, despite demand it is unable to pay." [emphasis added]

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16 *Holzman* v *Knights Engineering* at 791H.
17 *Van Zyl N.O. v Look Good Clothing* at 526D-I.
18 *Van Zyl N.O. v Look Good Clothing* at 531A.

[31] By way of elucidation of this statement, Bonatla Holdings proceeds to allege in its founding affidavit:

> "[27] As already mentioned, Bonatla Holdings loaned and advanced to Ruitersvlei, from time to time, certain monies to, inter alia, enable Ruitersvlei to meet its financial obligations and in particular its monthly obligations under the agreement with Merchant Finance.
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> [28] In view of the aforesaid, Bonatla Holdings was (and remains) reflected as a loan account creditor of Ruitersvlei. In this regard, I annex hereto:
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> 28.1. marked **FA4**, a copy of Ruitersvlei's annual financial statements for the period ending February 2016, from which it appears that Ruitersvlei was (and remains) indebted to:
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> 28.1.1. Bonatla Properties on loan account in the aggregate sum of R41 million;
>
> 28.1.2. Bonatla Holdings in the sum of R8.2 million (I refer to p 20 of such statements) ..."

[32] Both Bonatla Properties and Bonatla Holdings are listed cedents in the 2013 and 2016 suretyships. Moreover, as appears from the relevant clause of the suretyships quoted above and as previously observed, the cessions are in the broadest of terms. Bonatla Properties and Bonatla Holdings cede, assign, transfer and make over to Merchant all rights, title and interest (defined as the ceded claims") to any amounts which are or which may become owing to them by Ruitersvlei and any of the other debtors from any cause of indebtedness whatsoever. Accordingly, when read with the relevant clauses of the 2013 and 2016 suretyships there is simply no basis on the cause of action as pleaded, for the contention that Bonatla Holdings is a creditor. Even in the event that the amounts as alleged are due and owing, they are due and owing to Merchant (as cessionary) and not to Bonatla Holdings.

[33] Conspicuously, there is no cause of action made out based on an alleged reversionary interest. To the contrary, the cause of action made out is clearly on the basis of a debt allegedly now due and owing to Bonatla Holdings. This is in spite of the fact that in the response to Bonatla Holding's letter of demand in terms of section 345(1)(a) of the old Companies Act, it was made aware of Ruitersvlei's reliance on the cessions in express terms.

[34] Moreover, Merchant alleges that the liquidators were aware of the 2013 and 2016 suretyships since at least October 2021 as they were produced by the

liquidators in the course of the insolvency enquiry in the winding-up of Bonatla Holdings. I find this inference compelling. The liquidators aver in their founding affidavit that they have acquainted themselves with the files and records of Bonatla Holdings pertaining to Ruitersvlei and other natural and juristic persons associated with Ruitersvlei. The liquidators of Bonatla Holdings do not dispute that the suretyships were produced in the course of Bonatla Holdings' insolvency enquiry. The overwhelming probability therefore is that they were aware of the 2013 and 2016 suretyships.

[35] In spite of this there is no cause of action advanced, even in the alternative, based on a residual interest which Bonatla Holdings may have in amounts due and owing to Merchant, the cessionary. Instead, the liquidators elected to advance the winding-up application squarely on the basis of a debt allegedly due and owing directly to Bonatla Holdings. As already indicated, on the clear effect of the 2013 and 2016 suretyships, this is untenable.

[36] Against this background, it is a matter of some concern that the liquidators of Bonatla Holdings who must have been aware, or at least who ought to have been aware, of the 2013 and 2016 suretyships chose not to bring these to the attention of the Court in seeking the winding-up of Ruitersvlei, and to advance their case on that basis.

[37] In all of these circumstances, on the case as pleaded, I am unable to find that Bonatla Holdings is a creditor of Ruitersvlei or that it has made out a case for the winding-up of Ruitersvlei on the basis that it is a creditor. To the contrary, the case made out was for an immediate entitlement to payment in respect of a loan of some R49 million. In light of the 2013 and 2016 suretyships, this case is misconceived in both fact and law.

THE SECTION 44 CHALLENGE

[38] In the heads of argument filed on behalf of Bonatla Holdings, the 2013 and 2016 suretyships were challenged on an additional basis. In essence, this was that the 2013 and 2016 suretyships constituted financial assistance in terms of the new Companies Act, but that the resolutions supporting them did not comply with the relevant portions of section 44 of the new Companies Act in this regard.

[39] This challenge was not pressed in oral argument and, in my view, correctly so. The challenge is technical in the extreme. The requirements under section 44(3) of the new Companies Act are similar in all material respects to those of section 44(3) of the Act. To contend that the resolutions do not comply with the relevant portions of section 44 when they do refer to and comply with

section 45 of the new Act, would be a quintessential case of placing form above substance.

THE BELATED CHALLENGE

[40] At the hearing of the application, Bonatla Holdings raised a novel indirect challenge to the suretyships. Counsel for Bonatla Holdings was candid in conceding that this challenge was nowhere foreshadowed on the papers or in the written agreement filed prior to the hearing. The reason advanced was that the documents underlying the suretyships, and in particular the relevant meeting notices and resolutions of Bonatla Holdings, had been annexed for the first time to the replying affidavit in Merchant's intervention application, to which Bonatla Holdings had not had an opportunity to respond. In any event, the relevant legal submissions had only belatedly occurred to them.

[41] A court will not prevent a party from advancing any legal argument as it sees fit. However, in view of the fact that the other parties were admittedly taken by surprise by these submissions, I afforded the parties an opportunity to submit supplementary heads of argument in respect of this belated challenge.

[42] Before addressing the new challenges themselves, I make the following observation. The contention that this issue could not have been raised by Bonatla Holdings on the papers is not, strictly speaking, correct. First, the resolutions and supporting documentation would necessarily form part of the records of Bonatla Holdings. These would be available to the liquidators. As previously note, the liquidators alleged in the founding affidavit that they have acquainted themselves with the relevant files and records in this regard. Secondly, again as previously noted, the suretyships were provided to the liquidators during the course of the liquidation enquiry into Bonatla Holdings. One would have expected the liquidators to familiarise themselves with the documents underlying these suretyships prior to bringing the present application. Thirdly, even if it were so that they became aware of the relevant meeting notices and resolutions only when these were annexed to the replying affidavit in the intervention application, there was nothing to prevent them from seeking the leave of the court to file additional affidavits to address them as they saw fit.

[43] The new challenges raised by Bonatla Holdings rest on section 62 of the new Companies Act which deals generally with the formalities governing shareholders' meetings. As indicated, the challenge is an indirect one. It is contended that as a result of certain defects in the formalities governing the shareholders' meeting at which the resolutions were passed and that authorised Bonatla Holdings to enter into the relevant suretyships, those

suretyships are tainted. Two separate grounds were identified for this attack. The first ground is based on section 61(1)(a) of the new Companies Act. It appears from the relevant notice that delivery was ten business days prior to shareholders' meeting rather than the 15 business days stipulated under the new Companies Act.[19] However, this ground ignores the fact that the Act expressly provides that a company's Memorandum of Incorporation may provide for longer or shorter minimum notice periods than the fifteen days stipulated.[20] Furthermore, the Act expressly provides that "[A]n immaterial defect in the form or manner of giving notice of a shareholders meeting ... does not invalidate any action taken at the meeting."[21]

[44] The court record simply does not address whether, for example, the Memorandum of Incorporation provides for a deviation from the minimum notice period. It is contended, in this regard, on behalf of Bonatla Holdings that to the extent that these factual issues are not traversed on the papers, the court should draw the inference that these formalities were not met. I do not agree. For the reasons expressed above, Bonatla Holdings had the opportunity to raise these issues on the papers so that they could be dealt with by the other parties to the extent that there was a factual dispute. The fact that they have chosen to do so belatedly and without laying an evidential basis, should not prejudice the other parties.

[45] The second ground of complaint under the new challenge is that the notice of the shareholders meeting and resolution referred only to a suretyship and omitted reference to a cession, which, it is contended is in violation of section 62(3)(b) of the new Companies Act which provides that the notice must be in writing and must include the general purpose of the meeting and any specific purpose if applicable.[22]

[46] Again, this is to ignore the substance of the notices and this ground too is ill-conceived. The relevant notice to shareholders annexed to Merchant's replying affidavit in the intervention application expressly provided that the purpose of the meeting was to consider the deed of suretyship between Bonatla Holdings, amongst others, and Merchant. Moreover, annexed to the notice were the Relevant Documents which included the proposed Special Resolution as well as the Deed of Suretyship. As described earlier in this judgment, the deed of suretyship was expressly entitled "Deed of Suretyship" and incorporated amongst its clauses the cession in the terms quoted above. Accordingly, it cannot be reasonably contended that proper notice regarding

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19 New Companies Act: section 62(1)(a).
20 New Companies Act: section 62(2).
21 New Companies Act: section 62(6).
22 New Companies Act: section 62(3)(b).

the purpose of the meeting, together with the relevant supporting documentation, was not provided to shareholders.

[47] In these circumstances, I find that the belated challenge to the meeting formalities underlying the suretyships cannot be sustained.

WINDING-UP IS NOT JUST AND EQUITABLE

[48] Independently of the other considerations advanced, Bonatla Holdings contends that Ruitersvlei should be wound-up on the grounds that it is just and equitable to do so.

[49] It has been held that the court's discretionary power in this regard is of a wide character and is of a judicial nature.[23]

[50] I do not agree that it is just and equitable to grant the winding-up in the present circumstances.

[51] On Bonatla Holdings' own version, Merchant is by far the largest creditor of Ruitersvlei. This appears from the very statement of assets and liabilities on which Bonatla Holdings relies, which reflects liabilities to Merchant in the amount of some R66 million.[24] Moreover, Bonatla Holdings asserts that the amount of R49.8 million reflected in the unsigned annual financial statements is due to it as creditor. Even if this amount is correct, the creditor under the deeds of surety is Merchant.[25]

[52] Despite being overwhelmingly the largest creditor, Merchant does not allege that the liabilities are due and owing. To the contrary, Merchant denies this and opposes the winding-up of Ruitersvlei. The only other debt on which Bonatla Holdings purports to rely is an alleged debt to a public entity. In its answering affidavit, Ruitersvlei states that this is a debt alleged by the Drakenstein Municipality in the amount of R471 738,03 in respect of which there is an on-going dispute with the Municipality, and that the amount will be paid once the dispute is resolved.

[53] In the founding affidavit, Bonatla Holdings appears to suggest that there is some improper relationship between Ruitersvlei and Merchant. No evidence is proffered for this by Bonatla Holdings save for the suggestion that there is a similarity between the approaches adopted by Ruitersvlei and Merchant in their respective affidavits.

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23 *Sweet v Finbain* 1984 (3) SA 441 (W) at 444; *Moosa v Mavjee Bhawan (Pty) Ltd* 1967)3_ SA 131 (T) at 136.

24 Annexed to the founding affidavit as annexure FA13.

25 Annexed to the founding affidavit as annexures FA6.1 and FA6.2.

[54] Finally, Bonatla Holdings served its section 345 letter of demand on Ruitersvlei on 6 April 2021. It contends that it did not receive a satisfactory response or payment of the alleged debts within the three-week period stipulated by the Act.[26] The present application for the winding-up of Ruitersvlei was issued on 21 April 2022, more than one year after the section 345 letter. There is no explanation whatsoever on the papers for this delay between the serving of the statutory letter of demand and the launching of the present application.

[55] In all of these circumstances, and in particular where the largest creditor by a significant margin declines to seek the winding-up, and in fact vigorously opposes it, I do not consider that such an order is just and equitable.

COSTS

[56] In the event that the application is dismissed, Ruitersvlei and Merchant seek a punitive costs order, *de bonis propriis,* against the liquidators of Bonatla Holdings who have brought the present application.

[57] A special or punitive order for costs is reserved for those instances where the conduct of one of the parties deserves particular censure, such as persisting in a futile application or acting dishonestly.[27] A personal costs order is warranted where a person in a position of trust and responsibility has acted contrary to the standards which may be expected of someone in that position. In those circumstances it would be inappropriate to visit a costs order on those to whom they owe their duties and responsibilities.[28]

[58] The failure on the part of the liquidators to bring the suretyships to the attention of the court in their founding papers is certainly a troubling feature of the application. Moreover, they do not fully explain this omission. However, the suretyships are referred to, at least in passing, in the founding affidavit and I am unable to find on the papers before me that the suretyships were deliberately withheld. Moreover, as appears from this judgment, the status and effect of the suretyships, and the cessions which they contain, raise genuine issues of law and fact. Accordingly, I am disinclined to order the punitive and/or personal costs order against Bonatla Holdings or the liquidators that is sought by Ruitersvlei and Merchant.

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26 Old Companies Act: section 345(1)(a).

27 *Public Protector v South African Revenue Bank* 2019 (6) SA 253 (CC), para [34] and following.

28 *Multi-Links Telecommunications Ltd v Africa Prepaid Services Nigeria Ltd* 2014 (3) SA 265 (GP) at 289B-D.

ORDER

[59] In the circumstances I make the following order:

1. The intervening party is granted leave to intervene as co-respondent in the main application for the winding-up of the first respondent under case no. 891/2022;

2. The intervening party is joined and cited as the second respondent in the winding-up application;

3. The second respondent's replying affidavit in the intervention application, dated 15 July 2022, is admitted;

4. The application for winding-up of the first respondent (under case no. 891/2022) is dismissed with costs including the costs of senior counsel and the costs of two counsel, where employed.

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A. STEIN
Acting Judge of the High Court
Gauteng Division, Johannesburg

Heard:	23 February 2023
Judgment:	03 November 2023

Appearances:

For Applicant:	M de Oliveira and N Nyembe
Instructed by:	KWA Attorneys
For First Respondent:	A M Smalberger SC
Instructed by:	Rubensteins Attorneys
For Second Respondent:	J G Dickerson SC and L VR van Tonder
Instructed by:	Werksmans Attorneys