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

CASE NO: 038511/2023

(1) REPORTABLE: ~~YES~~ / NO
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO
(3) REVISED: NO

4 January 2024 **.....**
DATE

In the matter between:

KURT ROBERT KNOOP (N.O.) First Applicant

MARGARETTA SUSANNA GOODRICH (N.O.) Second Applicant

ACCENTUATE MANAGEMENT SERVICES (PTY) LTD (*In Liquidation*)
Registration number 2003/005962/07
Third applicant

and

SAFIC (PTY) LIMITED Respondent
Registration number 1981/010263/07

JUDGMENT

NOKO J

Introduction

[1] The applicants brought an application for the liquidation against the respondent which served before Fisher J on 3 August 2023. Fisher J issued a provisional order of liquidation (*rule nisi*) returnable on 23 October 2023 calling upon any interested party to appear and show cause why the final order for winding up should be granted. The *rule nisi* having been extended and this application serves before me on the return day.

[2] The application for liquidation was brought on an urgent basis and was set down for 9 May 2023. The parties entered into an agreement on relaxing *dies* for the exchange of pleadings and the application did not therefore proceed in the urgent court. The application was then allocated to be dealt with in terms of Commercial court directives.

[3] Both parties have filed supplementary affidavits after Fisher J's order advancing and providing additional information for consideration prior to the adjudication of the final liquidation of the respondent.

Background

[4] The following factual background is in general common cause *inter partes* and is in general as eloquently set out in the judgment of the Fisher J. In view of the parties involved (i.e. directors and companies) together with third parties who entered into the sale of shares and claims agreement the background is therefore comprehensive and elaborate.

[5] The third applicant,[1] respondent and Floorworx Africa (Pty) Ltd (*Floorworx*) were all subsidiaries of Accentuate Limited (*Group of Companies*).[2] The third applicant was not trading and was performing a finance/treasury function for the group and rendered certain management and administration services to the group. Accentuate Ltd was also not trading and did not even have a bank account.

[6] The respondent is a manufacturer and supplier of cleaning chemicals, equipment, consumables, and water treatment technology. Floorworx manufactures and distributes a variety of flooring solutions. In addition, Floorworx also manufactures semi-flexible vinyl tiles and fully-flexible vinyl sheeting and tiles.

[7] The director/s of

7.1. The respondent are Eric William Plat, Donald Ernest Platt, Doughlas Murray Cutter and Luke Robert Ralph Quinn who was previously a director of Accentuate Ltd.
7.2. Third applicant are Frederick Cornelius Platt, D Henning and Wisdom Mushohwe,
7.3. Accentuate Ltd are Frederick Cornelius Platt and Wisdom Mushohwe.
7.4. Floorworx is Frederick Cornelius Platt.

[8] Within the operations of group of companies, the third applicant in its role as 'treasury' for the group will transfer monies to both the respondent and Floorworx to fund their operations and the income derived from their business activities would be paid into the bank account/loan facility held by the third applicant with FNB. The third applicant would then transfer to each subsidiary funds to pay their respective creditors

[1] Reference to the third applicant would mainly pertain to its activities and operations prior being placed under provisional liquidation.
[2] The group previously included Centurion Glass and Aluminum (Pty) Ltd which was sold in 2011, see para 37 of the Respondent's Answering Affidavit at 07-12.

and to cater for their respective overheads. The balance would be applied to the overheads of the group and to reduce the third applicant's loan facility with FNB.

[9] During 2017 FNB made available loan facility in the name of the third applicant though for the benefit of the group[3] in the sum of R16 million and R25 million as a short-term working facility in the sum of R25 million together with certain other banking facility. As this was to cater for the whole group '… *all the companies… provided cross-sureties and other collateral to secure the loan. FNB held, inter alia, a general notarial covering bond for R25 million over stock and assets situated at the Floorworx factory, a general covering bond for R25 million over the fixed property of Floorworx in East London, a cross-company suretyship in the amount of 72 million by Accentuate, Floorworx, third applicant, Respondent and a company styled Pentafloor*[4] *…, a cession of debtors, and a cession of credit bank*'.[5]

[10] In 2018, the group, fell into financial distress which ended culminate 4 years later with Accentuate Ltd and Floorworx being placed under business rescue during April 2022. The third applicant was placed under liquidation on 3 November 2022[6] and the first and second applicants were appointed on 13 December 2022.

[11] During the same year (2018), the annual financial statement of the respondent reflected a loan in favour of the third applicant in the sum of R14 122 518. The annual financial statements of both the third applicant and respondent dated 30 June 2019 recorded that the amount due in terms of the loan was R14 029 500.00. The annual

[3] See para 18.13, Applicant's Heads of Argument, at 23-13xxxx read with para 9:13 Applying's Replying Affidavit at 04-9.

[4] See para 36 of the Respondent's Answering Affidavit, at 07-12, read with para 33 of the Applicant's Replying Affidavit at 04-23.

[5] *Ibid*.

[6] See court order annexed to the Applicant's Founding Affidavit as FA3, at 07-44. The applicants were both Accentuate Ltd and Floorworx African (Pty) Ltd.

financial statement of the third applicant for the year ending 30 June 2019 recorded that the third applicant had accumulated loss of R22.2 million and its liabilities exceeded its assets by R22,1 million. The respondent's financial records at this stage reflected its indebtedness in favour of the third applicant in the sum of R14 122 518,00 pursuant to a loan which was unsecured and had no fixed term of repayment.

[12] On or about 27 March 2020, Messrs Eric Platt, Doughlas Cutter and Luke Quinn (*purchasers*) entered into a sale of shares and claims agreement. The said agreement, inter alia, provides for the acquisition of Accentuate Ltd's 100% shareholding in respondent and cession by the seller of the sale claims (which includes the third applicant's Term loan)[7] to the purchasers for the sum of R10 million only.

[13] The third applicant was not a party to the agreement. The directors[8] of the third applicant took a resolution (few days after the agreement was signed) on 4 April 2020 in terms of which they bound *"… the Company to the provisions in the Respondent Sales and Claims Agreement and accepts its responsibility to any obligations that may arise from the agreement."*[9]

[14] Pursuant to the agreement the purchase price of R10 million was paid into the third applicant's bank account to reduce the third applicant loan facility (as contended by the respondent)[10] or as a nominated account for the seller and received on behalf of Accentuate (as contended by the applicant).[11] In the subsequent annual financial statement the respondent's loan account in the sum of R21932 909.78 was recorded in

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[7] See clause 3.1 of the agreement read with clause 1.2.30. The loan amount has increased to R21 932 909.78 as of 31 December 2019, see para 57 of the Applicant's Founding Affidavit at 01-25 and para 99 of the Respondent's Answering Affidavit, at 05-28.

[8] Messrs. D Henning, FC Platt, and W Mushonwe.

[9] See annexure EWP14 at 07-327.

[10] See para 51 of the Respondent's Answering Affidavit at 07-16.

[11] See para 9.27 of the Applicant's Replying Affidavit at 04-12

the third applicant's books as paid and reflected as due to the purchasers in respondent's books. The loan amount was purported[12] to been ceded to the purchasers.

[15] The liquidators of the third applicant contend that the third applicant received no value from being divested of the loan amount which was due from the respondent. Further that the said cession was void and the third applicant's resolution purporting to ratify or adopt the said cession is invalid on the basis, inter alia, that it sought to vary the sale of shares and claims agreement which was contrary to a non-variation clause. In pursuance hereto the applicants contended that respondent is still indebted to the third applicant in the said sum.

[16] Once the aforesaid loan is added to the financial record of the respondent its liabilities will exceed its assets and therefore susceptible to liquidation. The respondent is therefore insolvent and bound to be placed under liquidation, hence the current application for liquidation.

[17] The respondent contends, inter alia, that it disputes the applicants' alleged indebtedness on reasonable and *bona fide* grounds as the third applicant is not a creditor to the respondent and therefore the applicants have no *locus standi in iudicio.* In addition, that the claim by the applicants has prescribed.

Issues

[18] Issues for determination are to consider the respondent's points *in limine* of *locus standi* and prescription. Secondly, and if applicable, consider whether the applicants have made out a case for a final order for liquidation.

[12] As will be shown there is a dispute on the validity of the cession between the parties.

Contentions and submissions by the parties.

Points in limine

Locus standi

[19] The respondent contended that the parties (to the sale agreement) have agreed on the cession of the third applicant's loan to the respondent and therefore the third applicant was not a creditor of the respondent. The agreement was above board and was preceded by valuation of the sale by an independent third party as required by JSE regulatory prescripts.[13] The valuation took into account the loan account in favour of the third applicant. In view hereof, the argument continued, the applicants' contention that there was no value received is baseless. Though the agreement of cession was entered into between the respondent and the purchasers the third applicant's directors took a resolution in terms of which benefits and obligations arising out of the agreement were adopted. The parties to the agreement have performed in terms of the agreement[14] and the applicants' attempt to dispute the validity of the resolution is of no consequence as the horse has bolted.

[20] The respondent further argues that to the extent that the applicants have launched proceedings in this court to challenge the 'validity of that agreement', the said agreement remains extant until the said proceedings are finalised. In the premises the applicants do not have *locus standi* to institute the liquidation proceedings against the respondent.

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[13] See para 50 of the Respondent's Answering Affidavit at 07-16. See also para 62 of the Applicant's Founding Affidavit at 01-26 where it is stated that '*…the agreement came to fruition*.'

[14] See para 23.1 of the Respondent's Supplementary Answering Affidavit at 16-9.

[21] In view of the aforegoing, respondent continued, the application is being opposed on a reasonable and *bona fide* ground, as the debt in favour of the third applicant does not exist and the agreement disposed of the term loan. Furthermore, the said loan is, in the alternative, also disputed and there are no records upon which such a loan was granted bearing in mind the nature of operations between the third applicant and Accentuate (and its subsidiaries).

[22] The applicants on the other hand contended that the third applicant was not a party to the agreement and has therefore not ceded the loan debt to the purchasers. The attempt to ratify or adopt the cession through a resolution taken subsequently by the directors of the third applicant is *non pro scripto* on the basis that it sought to amend or vary the agreement which provides in terms of clause 15.1 read with 15.3[15] that the agreement constitutes the entire agreement and any amendment shall not be of any force unless reduced into writing and signed by or on behalf of the parties. It is on this basis that the applicant contends that since there was never a valid cession the loan amount remains due to the third applicant who, as a creditor, is qualified to bring a liquidation application in terms of section 346(1)(b) of the Companies Act.

[23] The applicant submitted that the action proceedings instituted against the directors in terms of the Insolvency Act which is pending is intended to recoup payment of the term loan from the purchasers which, after the agreement, was changed into a shareholder's loan in the books of the respondent. The said proceedings, so the argument proceeded, are not for the purposes of setting aside the agreement entered into between the respondent and the purchasers as alleged by the respondent.

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[15] See Sale of shares and claims agreement at 01-136 and 01-137.

[24] In addition, though the payment of R10 million effected into the third applicant's account pursuant to the agreement reduced the liability of the third applicant in favour of FNB it was received on behalf of Accentuate Ltd for the transfer of shares.

[25] In any event, so the argument continues, the respondent has stated that the applicant is, at best, a contingent or prospective creditor of the respondent.

Prescription

[26] The respondent contended that the amount upon which the claim of indebtedness is based has prescribed as it was due since 31 December 2019.[16] The period of prescription would have run from December 2019 and prescribed in December 2022. In the alternative, the agreement in terms of which the debt was ceded was from December 2019, being effective date on the agreement, meant that the period of three years would have lapsed in December 2022. In the premises the cause of action/indebtedness has prescribed as the application was only served on the respondent on 26 April 2023.

[27] The applicants' counsel in retort argued that the respondent's contention that the claim has been impeded by prescription is unsustainable since the prescription in relation to insolvent estate begin to run only after the appointment of liquidators by the Master of the High Court. The liquidators were only appointed on 13 December 2022 and '*… prescription only commenced from that date*.'[17]

[28] The counsel for the applicants submitted and made reference to the SCA judgment in *Duet and Magnum Financial Services CC (in Liquidation) v Koster 2010*[18]

[16] See para 9.26 of the Applicant's Replying Affidavit at 04-12.
[17] See para 73 of Applicant Heads of Argument, at 23-34.
[18] Duet and Magnum Financial Services CC (in Liquidation) v Koster 2010 (4) SA 499 (SCA).

(Duet and Magnum judgment) in support of the contention that '… *prescription … begins to run not later than the date of their appointment by the Master of the High Court.'*[19]

[29] I had regard to the *Duet and Magnum* judgment and noted that it does not buttress the applicants' submission that prescription in insolvent estate commences after the appointment of the liquidator by the Master of the High Court.

[30] The SCA held that where a party approaches court for a declaratory order (e.g. declarator that certain disposition is impeachable) in terms of sections of the Insolvency Act prescription will only commence to run after the order (setting aside a disposition) is made. [20] A new debt would be created. In contrast if the relief claimed is predicated on a debt, then prescription would run from the date when the debt became due.[21] The case serving before me clearly relates to a debt which according the applicants arose at least on 30 December 2019 (as per financial statements of both the third applicant and the respondent) and is not predicated on the setting aside of disposition contemplated in the

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[19] See para 72 of the Applicants' Heads of Argument at 23-34.

[20] '*[O]rders that are made by courts generally declare that a debt then exists and allow for its enforcement by ordinary process of execution. But the declarations that are sought in this case are declarations of an altogether different kind. They are declarations that have the effect of bringing into existence a debt that did not exist before. The liquidators become entitled to obtain such a declaration once certain events have occurred and that is the right that they now seek to enforce. They do not ask the court to declare Mr Koster to be an existing debtor. They ask the court to make Mr Koster into a debtor when he was not a debtor before. If they were to show that the events alleged in the particulars of claim have occurred, then they are entitled to a declaration of that kind and that is the existing right upon which they rely.'*

[21] It was held in *Trinity Asset Management (Pty) Ltd v Grindstone Investments 132 (Pty) Ltd* [2017] ZACC 32 at 105 that prescription in respect of loans payable on demand begins to run when the debt arises unless there is clear indication to the contrary.

Insolvency Act.[22] To this end the cited authority is distinguishable and does not come to the applicant's aid.

[31] That notwithstanding section 13(1)(a) read with 13(1)(i) of the Prescription Act 68 of 1969 provides that if there is an impediment restraining a party to act then the running of prescription period would be suspended and resume one year after the impediment is removed. It follows that once the company is placed under liquidation (such a company cannot act) the running of prescription would be suspended and resume one year after the appointment of the liquidator. Being placed under liquidation is an impediment as contemplated in terms of section 13(1)(a) read with section 13(1)(i). In *casu* the period of prescription was suspended on 3 November 2022 when the third respondent was placed under liquidation and would resume running 1 year after the liquidators were appointed which was on 13 December 2022. The respondent's point in limine is therefore unsustainable and bound to fail.

Insolvency

[32] The applicants aver that the annual financial statements of the respondent as of 30 June 2022 reflected that the respondent was commercially insolvent in the sum of R347 189 which was the total loss suffered by the respondent for the financial year. This

[22] It must be noted that (*a*) disposition made for no value in terms of section 26 (disposition made for no value) should have occurred ***within 2 years*** (in which case person in whose favour the disposition was made proves that the assets exceeded the liabilities immediately after the disposition and if more than two years the court can set aside if the trustee proves that immediately after the disposition the liabilities exceeded the assets. (*b*) dispositions which may be set aside for disposition in terms of section 29 of the Insolvency Act (voidable preferences) which occurred ***not more than 6 months*** before sequestration if the disposition has the effect of preferring one of the insolvent's creditors above another and immediately after the disposition was made, the liabilities of the insolvent exceed ed the value of the assets. (*c*) a disposition may be set aside in terms of section 30 (undue preference) if it was ***made any time*** before sequestration and had the effect of preferring one creditor above the other and liabilities exceeding the assets. (emphasis added).

underlies liquidation proceedings as contemplated in terms of section 344(f) read with section 345(1)(c) of the Companies Act 1973.

[33] In addition, should the indebtedness in the amount of R21 932 909.78 be added and incorporated into the financial affairs of respondent for the financial years ending, 2020, 2021 or 2022 the respondent would inevitably be factually insolvent. Noting that, the argument continued, that Mr EW Platt has admitted during insolvency inquiry of the third applicant that respondent was unable to repay the amount of R21 932 909.78.

[34] The applicant contended further that the fact that the respondent cannot genuinely dispute indebtedness of the R21 932 909.78, and regard had to the provisions of section 345(1)(c) of the old Companies Act it can be concluded that the respondent is unable to pay its debts and falls to be finally wound up.

[35] The respondent in retort contended that the basis of the application for liquidation was premised on the financial statements which are outdated and had no regard to the development which took place after the 2020. The current financial statement does confirm, so the argument proceeded, that the respondent financial status is healthy. Reference was made of the financial statement of 2022 which clearly indicated that the respondent has a positive financial balance. In addition, the respondent is receiving rental from Floorworx in the sum of R49 000.00 per month plus amount of R300 000.00 for the orders on monthly basis.

[36] Furthermore, the alleged loan amount is disputed as it may have been mischaracterised bearing in mind that the income generated by subsidiaries was being

paid into the third applicant's bank account and should have then be preceded by a reconciliation of the transactions *inter partes*.

[37] In any event, so the argument continued, the applicant is not a creditor of the respondent and therefore adding the amount of R21 932 909.78 is still without any merits.

Just and equitable

[38] In the alternative, so the applicants' counsel continued, the respondent should be placed under final liquidation on the basis of the general rule of just and equitable as contemplated in section 344(h) of the Companies Act, 1973. This is premised on the following arguments, first, that the execution of the agreement was to the prejudice of the third applicant which was stripped of at least R21 932 909.78 for no value. Secondly, SARS would have received tax on the taxable income of R21 932 909.78 and the scheme amounted to defraud SARS. Thirdly, the respondent was abused as a distinct and separate legal entity and debts of the group were loaded on the respondent which is a symptom of failure to respect and appreciate the principle underpinning corporate legal personality.[23]

[39] Under the circumstances asserted above, so went the argument, it is therefore appropriate that the court should exercise its discretion and place the respondent under final liquidation.

[40] The respondent submitted that the applicant has failed to present authorities to support the submissions that under the circumstances alluded to, the court would be

[23] See para 50 of Applicant's Heads of Argument, at 23-27 to 23-30.

justified in placing the respondent under liquidation. The basis of the claim for liquidation would only be sustainable of the applicant can prove that the respondent is insolvent. In view of my finding as set out below the contention of the applicant is unsustainable and falls to be dismissed.

Abuse of court process

[41] The applicant conceded that where a sole or predominant purpose of the liquidation application is *mala fide* or for ulterior purpose the court may despite having identified ground for winding up decide to dismiss liquidation application. Furthermore, the application may also be construed as abuse where the debt is being disputed *bona fide* by the respondent. The respondent has failed, so argument continued, to demonstrate an improper motive or that the debt is *bona fide* disputed.

[42] In conclusion the applicant impresses the court to exercise the discretion to grant the application, bearing in mind that *"… the discretion of a court not to grant a winding up order upon application of an unpaid creditor is narrow and not wide".*[24] In addition, the respondent has failed to assert and prove special circumstances to persuade the court to exercise discretion in favour of the respondent.

[43] In retort the respondent persisted that the application was an abuse by the applicant and the court should after dismissing the application demonstrate its displeasure by mulcting the applicants with costs on a punitive scale. The applicants were aware that the respondent, even after receiving the answering affidavit, that the respondent had a *bona fide* and reasonable basis upon which the debt is being disputed.

[24] At 23-35

Other issues

[44] The respondent has raised the argument of estoppel, and I found the reasons for invoking same in this *lis* unfathomable and without good legal basis. The liquidators cannot be considered to have been parties who have associated themselves with the sale of shares and claims agreement. If anything, they swiftly proceeded to challenge the said agreement even before the meetings of the creditors. Though this may be in favour of the liquidators it also creates an impression that the liquidators could not have awaited the meeting of creditors since one of the major creditors may have rejected the proposal to bring this court proceedings.

Legal principles and analysis

[45] It is trite that *Badenhorst* rule[25] finds application where a party approaches court for a provisional order of liquidation. In such an instance if the applicant demonstrates that the debt *prima facie* exists, the onus would be on the respondent to show that such a debt is disputed *bona fide* on reasonable grounds. On the other hand where the applicant seeks a final relief, the applicant must establish a case on a balance of probabilities but where there are disputes of fact then the court should invoke the *Plascon-Evans*[26] rule and accept the version of the respondent unless respondent's allegations do not raise a real, genuine, or *bona fide* dispute of fact or are so far-fetched or patently untenable that the court is justified in rejecting same on the papers. The SCA[27] held that both tests are not necessarily mutually exclusive. Both tests requiring the *bona fides* on the part of the

[25] *Badenhorst v Northern Construction Enterprises (Pty) Ltd* 1956 (2) SA 346 (T).
[26] *Plascon-Evan Ltd v Van Riebeck Paints Ltd* 1983(3) SA 623 (A).
[27] See *AFGRI Operations Limited v Hamba Fleet (Pty) Ltd* (542/16) [2017] ZASCA 24 (24 March 2017) and *Freshvest Investments (Pty) Ltd v Marabeng (Pty) Ltd* (1030/2015) [2016] ZASCA 168 (24 November 2016).

respondent. The *Badenhorst* test refer to a reasonable requirement for the dispute whereas *Plascon-Evans* test envisages a real, genuine dispute.

[46] With regard to the issue of cession, it '…*takes place by means of an agreement of transfer …between cedent and cessionary by virtue of a justa causa from which the cedent's intention to transfer personal right to the cessionary … and the cessionary's intention become the holder of the right of action appear or may be deduced. The agreement of transfer may concur with, or be preceded by, a justa causa which may be an obligatory agreement…*'.[28] There are generally no formal requirements for a cession agreement, except that in certain instances a cession must be writing[29] and where it is specifically required the cession documents need to be delivered.

[47] Though the respondent cannot dispute that the third applicant was not represented during the agreement it follows that at the time of signing of the agreement there was no cedent and the cession agreement would have been unenforceable. This appears to have been changed or regularised as the third applicant, whom one of its directors was present during the discussion of the sale agreement, though on behalf of the seller, resolved that the third applicant is bound by the agreement. The applicants have failed to proffer a persuasive argument buttressed by relevant authorities why the ratification or adoption of the agreement should be considered *pro non scripto*. There is also no legal basis to contend that the resolution has the effect of varying the agreement. The seller was enjoined to ensure that the term loan is ceded and the resolution by the third applicant has the effect of ensuring that indeed the loan is ceded. It is my finding

[28] See *Johnson v Incorporated General Insurances Ltd* 1983 (1) SA 318 A at 331 G-H as quoted in *Botha v Fick* 1995 (2) SA 750. 131G

[29] e.g. mortgage cession needs to be registered with the Deeds Registry.

that the resolution by the directors of the third applicant is beyond reproach and the contention by the applicants is found wanting and unsustainable.

[48] Notwithstanding the aforegoing, even if the cession agreement may be considered unenforceable and invalid the court may not reverse the effect thereof where the parties have performed in terms of the agreement. It was held in *Wilken v Kohler*[30] that '*[I]t by no means follows that because a court cannot enforce a contract which the law says shall have no force, it would be bound to upset the result of such a contract which the parties had carried through in accordance with its terms.'* [31]

[49] The parties have executed the agreement in that the shares were transferred to the purchasers; the purchase amount has been paid to the third applicant and the term loan has been ceded to the purchasers.[32] And both the applicants and the respondent have confirmed that the agreement has been given effect to. In the premises I find myself constrained not to undo the agreement as it has already been executed.

[50] In addition, the respondent has demonstrated that there is a dispute which is characterised by the approach adopted by the applicant, whether there is cession(disposition) or that there is no cession. The applicants have contended that the disposition was of no value and in this regard the applicants are enjoined to proceed in terms of section 26 of the Insolvency Act.

[51] The applicants have acknowledged that the disposition, in the form of cession, offends the provisions of the Insolvency Act hence pursued directors in terms of sections

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[30] *Wilken v Kohler* 1913 AD 135. See also *MCC Bazaar v Harris and Jones (Pty) Ltd* 1954(3) SA 158 (T) and *Enocan Construction (Pty) Ltd v Palm Sixteen (Pty) Ltd* 1972 (4) SA 511 (T).

[31] Ibid at 144.

[32] The purchasers have allegedly already received R17 million in repayment of the debt.

26, 29 and 30 of the Insolvency Act. The applicant cannot at the same time be heard to be stating that there was no cession. The cession is either a disposition as contemplated in the sections of the Insolvency Act (as contended by the applicants in the action proceedings), or it is invalid or does not exist at all (as it is contended in this application). The applicant must eschew one of the positions and cannot be allowed to approbate and reprobate. This confusion should therefore also lend credence to the respondent's contention that the debt is disputed on reasonable and *bona fide* grounds as the said debt is ceded in terms of the agreement.

[52] Having decided as set out in the aforegoing paragraphs all other issues raised between the parties deserves of no further attention of this court. In conclusion the applicants have failed to prove that its *locus standi* is premised on the indebtedness and respondent's point *in limine* of lack of *locus standi* standing is sustained.

Costs

[53] The respondent submitted that the liquidators' conduct is unacceptable and should not reasonable have proceeded with the matter on the face of the position by the respondent in terms of which the debt was disputed. In addition, the proceedings though commenced in 2023 based its claim for insolvency on financial statements for 2020 and only referred to subsequent statements in the reply.

[54] I am inclined to agree with the respondent's contentions that the liquidators were vexatious in their approach. Their stance that the cession agreement does exist and need to be set aside on the other hand contending that the cession does not exist at all cannot be countenanced. The applicants needed to disavow one of the positions and not embark

on what could be construed as forum shopping. The resources of judiciary are overstretched and should not be accommodating the applicants' approach to court devoid of proper reflection. There was also no need to approach the court on urgency basis regard had to the position set out above on prescription.

[55] The issue of costs is generally within the discretion of the court which must be exercised judicially. Ordinarily costs order are granted on a party and party scale but where warranted the court should not hesitate to award costs at a punitive scale including awarding costs *de bonis propriis* as a mark of the court's displeasure.[33] There is also a duty of a litigant to avoid any course which may unduly increases legal costs.[34]

[56] I am persuaded that the cost order at a punitive scale is warranted.

Conclusion

[57] I grant the following order:

> *'The rule nisi is discharged with costs on a scale between attorney and client, including costs of two counsel where so employed'.*

Mokate Victor Noko

[33] *SA Liquor Traders' Association and Others v Chairperson Gauteng Liquor Board and Others* 2009 (1) SA 565 CC.
[34] *Scheepers and Nolte v Pate* 1909 TS 353 at 356.

Judge of the High Court

Delivered: This judgement was prepared and authored by Judge Noko and is handed down electronically by circulation to the Parties / their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date of the judgment is deemed to be 4 January 2024.

Appearances.

For the Applicants	Adv L VR van Tonder
Instructed by:	Smit Sewgoolam Inc.
For the Respondent	Adv R Du Plessis SC
Instructed by	John Walker Attorneys Inc.
Date of hearing:	24 November 2023
Date of Judgment:	4 January 2024.