**IN THE HIGH COURT OF SOUTH AFRICA**

**(GAUTENG DIVISION, PRETORIA)**

**DELETE WHICHEVER IS NOT APPLICABLE**
(1) REPORTABLE:~~YES~~/**NO**
(2) OF INTEREST TO OTHER JUDGES:
~~YES~~/**NO**
(3) REVISED

DATE:.....**3 NOVEMBER 2023**

SIGNATURE:.....

**Case No. 82618/2019**

In the matter between:

**JOHAN FRANCOIS ENGELBRECHT N.O** **FIRST APPLICANT**

**BRIAN CEYLON N.O** **SECOND APPLICANT**

And

**K & L BUILDERS (PTY) LIMITED** **RESPONDENT**

In re:

**K & L BUILDERS (PTY) LIMITED** **APPLICANT**

And

**JOHAN FRANCOIS ENGELBRECHT N.O** **FIRST RESPONDENT**

**BRIAN CEYLON N.O** **SECOND RESPONDENT**

**THE MASTER OF THE HIGH COURT, PRETORIA** **THIRD RESPONDENT**

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**Case No. 82619/2019**

In the matter between:

**JOHAN FRANCOIS ENGELBRECHT N.O** **FIRST APPLICANT**

**BRIAN CEYLON N.O** **SECOND APPLICANT**

And

**K & L BUILDERS (PTY) LIMITED** **RESPONDENT**

In re:

**K & L BUILDERS (PTY) LIMITED** **APPLICANT**

And

**JOHAN FRANCOIS ENGELBRECHT N.O** **FIRST RESPONDENT**

**BRIAN CEYLON N.O** **SECOND RESPONDENT**

**THE MASTER OF THE HIGH COURT, PRETORIA** **THIRD RESPONDENT**

**Case No. 7400/2020**

In the matter between:

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|---|---|
| **JOHAN FRANCOIS ENGELBRECHT N.O** | **FIRST APPLICANT** |
| **BRIAN CEYLON N.O** | **SECOND APPLICANT** |
| **PIETER HENK STRYDOM** | **INTERVENING PARTY** |

And

| | |
|---|---|
| **THE MASTER OF THE HIGH COURT, PRETORIA** | **FIRST RESPONDENT** |
| **ASSISTANT MASTER B MAKHAYINGI** | **SECOND RESPONDENT** |
| **K & L BUILDERS (PTY) LIMITED** | **THIRD RESPONDENT** |

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**Case No. 35192/2020**

In the matter between:

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|---|---|
| **JOHAN FRANCOIS ENGELBRECHT N.O** | **FIRST APPLICANT** |
| **BRIAN CEYLON N.O** | **SECOND APPLICANT** |
| **JOHAN VAN ROOYEN N.O** | **THIRD APPLICANT** |

**GLADYS NKATEKO N.O** **FOURTH APPLICANT**

**JOHAN FRANCOIS ENGELBRECHT N.O** **FIFTH APPLICANT**

**ANGELENE POOLE N.O** **SIXTH APPLICANT**

And

**K & L BUILDERS (PTY) LIMITED** **RESPONDENT**

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***Coram:*** Millar J

***Heard on:*** 20 September 2023

***Delivered:*** 03 November 2023 - This judgment was handed down electronically by circulation to the parties' representatives by email, by being uploaded to the *CaseLines* system of the GD and by release to SAFLII. The date and time for hand-down is deemed to be 09H00 on 03 November 2023.

***Summary:*** Application for review of rulings made by Master in insolvent estate and for declaration in terms of s 20(9) of the Companies Act 2008 in respect of associated company – Rulings made allowing *inter alia* claim neither submitted nor proven and which had prescribed together with interest – Reviewed and set aside – Various companies owned and controlled by unrehabilitated insolvent through third parties – circumstances under which corporate veil to be pierced – Evasion and concealment principles applied – Circumstances of the case demonstrate concealment applicable – Order in terms of s 20(9)

collapsing unliquidated company into estate of liquidated company.

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**ORDER**

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**It is Ordered in**:

**CASE NO: 7400/2020**

[1] Paragraphs 8.1.2, 8.1.3, 8.1.4, 8.1.5 and 8.1.6 of the Ruling made by the Second Respondent on 7 October 2019 are declared to be unlawful and are hereby reviewed and set aside.

[2] The Third Respondent is ordered to pay the costs of the Applicants.

**CASE NO: 35192/2020**

[1] That in terms of Section 20(9) of the Companies Act, 71 of 2008 it is declared that Platinum Electrical (Pty) Ltd and K & L Builders (Pty) Ltd are not separate juristic persons in respect of any right, obligation or liability of it on the basis that the incorporation of Platinum Electrical (Pty) and K & L Builders (Pty) Ltd, the use of Platinum Electrical (Pty) Ltd and K & L Builders (Pty) Ltd and the acts by and on behalf of Platinum Electrical (Pty) Ltd and K & L Builders (Pty) Ltd constitute an unconscionable abuse of their juristic personalities as separate entities.

[2] That the estates of Platinum Electrical (Pty) Ltd and K & L Builders (Pty) Ltd is one estate to be known as the Platinum Electrical (Pty) Ltd estate and which combined estate is considered as a liquidated company and that the business of each separate entity be declared to be the business of Platinum Electrical (Pty) Ltd.

[3] That the combined estate under the name of Platinum Electrical (Pty) Ltd be administered as one estate and that, for this reason, the fact that separate legal entities were incorporated be disregarded.

[4] That the order granted by this Court will not affect the rights of a creditor who proves a claim against any of the individual companies being Platinum Electrical (Pty) Ltd and K & L Builders (Pty) Ltd.

[5] That the winding-up of the combined estate be deemed to have commenced on 2 September 2014.

[6] That the Applicants must regard any claim proved against an individual company, as a claim proved against the combined estate.

[7] That the cost of this application are costs in the administration of the combined estate

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# JUDGMENT

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**MILLAR J**

[1] This judgment deals with four interrelated applications and an action that came before me for case management. A number of case management meetings were held and in consequence directions for the filing of papers in the various matters given. The directions given were predicated upon an agreement between the parties that all of the applications would be ripe for hearing before me on 20 and 21 September 2023 and that the action would stand over for determination at a later stage.

[2] The path to the doors of the court is seldom a smooth one but it suffices to state that in respect of the applications, when they were called on 20 September 2023, two of the four were now unopposed.

**BACKGROUND**

[3] The applications before this court all have as their origin the liquidation of Platinum Electrical (Pty) Ltd (in liquidation) (PE) and rulings made by the Master on 7 October 2019 in the estate of PE.

[4] The claims allowed by the Master were in favour of K & L Builders (Pty) Ltd (K&L) and were opposed by the liquidators of PE. Subsequently the liquidators of two other insolvent companies, Imali-Corp 155 CC (in liquidation) (IMALI) and T & W Electrical Contractors (Pty) Ltd (in liquidation) (T&W) also became party to some of the proceedings. The liquidators all make common cause with each other in the orders sought against both the Master and K&L and will for convenience be referred to in this judgment by the moniker of 'the Liquidators'.

[5] The Master's rulings were:

> *"8.1.1 That your intention to have claim number 99 (previously approved at a special meeting held on the 8/10/2018) rejected in terms of section 45(3) of the Insolvency Act 24 of 1936 (as amended) is hereby rejected.*
>
> *8.1.2 That what was purported to as salaries paid to employees in the tune of R 1 649 942 (inclusive of interests at 5.3%) as stipulated in the post commencement finance agreement stipulated in paragraph 5.3 which interests exceeds the capital sum, and therefore is reduced by RI below the capital sum to in duplum rule has to be repaid back to K & L within 14 days from date hereof.*

*8.1.3 That you are directed to expedite convening special meeting of creditors purposed to prove the said interests postulated in paragraph 5.3 of post commencement finance agreement.*

*8.1.4 That the joint liquidators are directed to increase the bond of security to R44 million equal to the total claim which could be between 40 and 44 million inclusive of interests which can be substantiated by vouchers.*

*8.1.5 That Henk Strydom who was the BRP is hereby directed to pay back RI Million rand to the estate within 14 days from date hereof.*

*8.1.6 That you provide me with plausible reasons within 14 days why I should not consider conducting section 381 of the Companies Act 61 of 1973 (as amended). "*

[6] This was followed a week later by the institution of an action by the Liquidators for the expungement of the claim of K&L against PE (para 8.1.1 - which had been refused by the Master).

[7] Thereafter, on 1 November 2019, K&L instituted applications to compel payment in terms of the rulings and to have the rulings made an order of court.

[8] On 2 December 2019, following upon representations made to the Master regarding the rulings, the effect of the rulings was stayed pending the outcome of all the litigation that had been instituted up to that point.

[9] On 31 January 2020 the Liquidators brought an application to review and set aside the rulings. In this application, the former business rescue practitioner (BRP) of PE, intervened and made common cause with the order sought reviewing and setting aside the ruling related to him. Subsequently on 31 July 2020 an application in terms of section 20(9) to collapse the business of K&L into the estate of PE together with Imali and T&W was made.

**THE FOUR MATTERS BEFORE COURT**

[10] The first two matters, under case numbers 82618/2019 and 82619/2019 are in respect of the applications brought by K&L against the Liquidators for payment of R3 299 883.00 (para 8.1.2) and for an order that the ruling (para 8.1.1), which refused the expungement of a claim of R6 954 431.00, be made an order of court.

[11] The third matter under case number 7400/2020 is brought by the Liquidators for the reviewing and setting aside of all the rulings. In this matter, K&L did not oppose the order sought insofar as the BRP[1] was concerned. Its opposition was directed to opposing the reviewing and setting aside of the ruling insofar as it had purported to vest rights in K&L to claim payments from PE.[2] By agreement between the parties, the dispute in respect of the ruling in para 8.1.1 is not before me and stands over for determination in the action proceedings.

[12] The fourth matter under case number 35192/2020 is brought by the Liquidators against K&L for an order in terms of section 20(9) of the Companies Act[3] to collapse the business of K&L into the insolvent estates of PE, IMALI and T&W.

[13] I intend to address each of these in turn.

**THE TWO APPLICATIONS FOR SECURITY FOR COSTS**

[14] After receiving K&L's applications for payment and to make the ruling an order of court, the Liquidators, in both of the respective applications delivered a

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1 See para [5] supra, par 8.1.5 of the Ruling.

2 *Ibid* paras 8.1.1 and 8.1.2 and para [12] *supra*. The aggregate amount of the two claims was R10 254 314,00.

3 71 of 2008.

request for security for costs. Security was not furnished and consequently application was made, and orders granted compelling K&L to furnish security.

[15] Following on a request to the Registrar, on 18 May 2023, K&L was ordered to furnish security in the sum of R200 000,00 in one of the matters. Following upon an agreement reached between the parties during case management, the amount for security in the other matter was set at the same amount. No security for costs was ever furnished in either of the two matters.

[16] The liquidators then brought applications in terms of Rule 47(4) of the Uniform Rules of Court which provides that:

> *"(4) The court may, if security be not given within a reasonable time, dismiss any proceedings instituted or strike out any pleadings filed by the party in default, or make such other order as to it may seem meet."*

[17] When the matters were called, the Liquidators moved applications to dismiss both of K&L's applications for want of furnishing security for costs. Neither application was opposed on the papers and counsel for K&L in the other matters before me confirmed this.

[18] I then granted the orders dismissing the respective applications.[4]

**THE REVIEW APPLICATION**

[19] The Liquidators seek an order reviewing and setting aside the rulings of 7 October 2019 save in respect of paragraph 8.1.1. The BRP made common cause with this insofar as the ruling in paragraph 8.1.5 of affected him. Accordingly, it was the review of paragraphs 8.1.2 to 8.1.6 which were before me. The Master took the stance that he would abide the decision of the court and took no part in any of the proceedings.

[4] The terms of the orders in both case 82618/2019 and 82619/2020 were identical and provided that the applications brought by K&L were both dismissed with costs.

[20] The stance adopted by K&L in this matter is succinctly set out by its counsel in the first two paragraphs of his heads of argument as follows:

> *"1. It is common cause that this application is to review the Master's ruling, which is not opposed by the Respondent.*
>
> *2. It is further common cause that the Respondent does not dispute the grounds for review and the review of the Masters ruling, save for denying that the entire ruling must be set aside." (*footnotes omitted)

[21] The parties agreed that the present review was one which was brought and fell to be decided in terms of the Promotion of Justice Act.[5]

[22] Since the review and setting aside of all the rulings save 8.1.2 was not in dispute between the parties, I granted on an unopposed basis an order reviewing and setting aside the ruling in para 8.1.5 sought by the BRP and he took no further part in the proceedings.[6]

[23] The review of the rulings made in paragraphs 8.1.3, 8.1.4 and 8.1.6 are not in issue between the parties I do not intend to deal with them. It suffices to state that in my view a case was made out by the Liquidators for reviewing and setting aside of each of these rulings[7] and the concession of this by K&L properly made.

[24] The review turns on K&L's opposition to the setting aside of paragraph 8.1.2 of the ruling. This was in respect of a claim made against the estate of PE for the

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[5] 3 of 2000. See also *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others* 2004 (4) SA 490 (CC) at para [25].

[6] Paragraph 8.1.5 of the Ruling was reviewed and set aside, and the Master and Deputy Master ordered to pay the costs jointly and severally.

[7] In respect of para 8.1.3 it was argued that the Ruling was patently wrong as the post-commencement finance agreement had provided that such finance was interest free. In respect of para 8.14 it was argued since the purported basis to increase the security was to cover an unproven contingent debt which was disputed, there was no rational basis to order the increase given the cost implications for doing so. In respect of 8.1.6 it was argued that there was nothing on what was before the Master to justify the invocation of s 381 of the Companies Act 61 of 1973.

refund of salaries that it was asserted had been paid by K&L on behalf of PE and in respect of which it was entitled to a refund.

[25] Besides the amount of the claimed refund, the Master had also ruled that interest equal to the amount of the initial claim should be paid, and, so on the basis of the application of the *in duplum* rule, the Master had ruled PE liable to pay double the amount of the claim.

**THE RULING IN RESPECT OF THE CLAIM FOR THE REFUND OF SALARIES**

[26] PE was an electrical construction business and a preferred vendor of several large companies. Its fortunes waned and by the end of June 2014, it was put into business rescue. Notwithstanding attempts to save the business, these were unsuccessful and on 2 September 2014 PE was placed into provisional liquidation and final liquidation on 23 March 2015.

[27] On 7 October 2014, the first and second applicants together with Mr. Malcolm Schmidt (Mr. Schmidt) were appointed as the provisional liquidators of PE. It is not disputed that as between themselves, the provisional liquidators agreed that Mr. Schmidt would oversee the day to day administrative activities of PE. This he did until his passing on 13 December 2014.

[28] It was asserted on behalf of K&L that it had purportedly entered into an agreement with the late Mr. Schmidt that it would advance monies to him for the continued operations of PE and that such monies advanced would be repaid both with interest and before any other creditor in the concursus. The effect of this purported agreement was that K&L would obtain a 'super preference'. All of this was purportedly agreed between K&L and the late Mr. Schmidt, without the knowledge of either the Master, the co-provisional liquidators or the concursus.

[29] It was the case for K&L that:

> *"On or about the 12th or 13th December 2014 the Third Respondent [K&L], represented by Mr. Feinberg, telephonically contacted the First Applicant herein*

*and informed him of, inter alia, the urgent issue. The First Applicant informed Mr. Feinberg that he was on holiday in Cape Town and cannot attend the Master's to obtain singing [sic] powers on the bank account and the Master's approval. The First Applicant then requested that the Respondent pay the salaries and Platinum [PE] would refund same once he returned from Cape Town, obtained access to the bank account and obtain [sic] the master's approval.*

*At first the Respondent [K&L] rejected this as the Respondent required more clarity on when payment will be made and how this expense will be dealt with. The First Applicant then stated he will treat this expense as an administrative expense in the estate of Platinum, in [sic] contained in the PCFA, and same will be refunded no later than the end of January 2015."*

[30] It is ostensibly on this basis that payment of the salaries for the staff of PE was to be made by K&L and in respect of which the Liquidators would authorize repayment from PE.

[31] What transpired, as is evident from the documents put up by K&L, is that:

[31.1] On 15 December 2014 documents were sent by K&L to its attorneys together with the contact details of Mr. Engelbrecht. The documents purported to be an email sent to Mr. Engelbrecht – which was only read by him on 18 December 2014.

[31.2] On 18 December 2014, K&L's attorney sent a letter to Mr. Engelbrecht in which it was pertinently recorded that:

> *"As discussed over the last couple of days, with the passing of Malcolm Schmidt the liquidated company has been left in the invidious position where there are numerous issues which must be urgently addressed, first and foremost that of payment of salaries which are due to be paid tomorrow (19 December 2014), and which until such time as you have received authorization from the Master, cannot be paid by Platinum Electrical.*

*As discussed this morning between the writer and yourself, it has been agreed that our client will release the salaries in an amount of approximately R1,215,000.00 (we will provide you with the exact figure shortly) and once in receipt of authorization from the Master to operate the bank account, you will immediately refund our client the amount which it is paying on behalf of Platinum Electrical for salaries, which payment will be made immediately on receipt of the Master's authorization and prior to any other payments to any other creditor of Platinum Electrical.*

*Please urgently by return mail confirm that our client can proceed to make the payment of the salaries on the basis above."*

[31.3] On 19 December 2014, an email was sent under the name of K&L's attorney [8] stating:

*"I confirm that pursuant to the agreement reached as recorded in my letter sent to you yesterday, my client has made payment of the salaries for the employees of the company in liquidation."*

[32] It is common cause that Mr. Engelbrecht did not respond during December 2014, in writing to any of the correspondence that emanated from either K&L or its attorney. It is the case for the liquidators that Mr. Engelbrecht was informed of the passing of Mr. Schmidt and indicated that he was unaware of any alleged agreement between K&L and Mr. Schmidt and that any decision taken by him would in any event have to have been authorized by the Master beforehand.

[33] Properly construed, the case on behalf of K&L that either there was an agreement between Mr. Feinberg and Mr. Engelbrecht alternatively Mr. Schwartz and Mr. Engelbrecht is nothing other than a self-serving, in the first

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[8] The email was sent from the email address of "Gitta De Necker" to Mr. Engelbrecht and K&L's attorney, Mr. David Swartz, was copied in the email. The email concluded with the words "Yours Faithfully David Swartz – Director".

instance fabrication, and in the second instance, misreading of the correspondence as to the discussions between Mr. Swartz and Mr. Engelbrecht.

[34] In elaboration, firstly, it is improbable, that if there was any agreement between Mr. Feinberg and Mr. Engelbrecht, that Mr. Swartz would not have been informed of it and he would not have recorded it in his discussion with Mr. Engelbrecht. Since K&L's answering affidavit in this matter was only filed on 29 August 2023, some 3.5 years after the application for review was served on it, I am driven to the conclusion, at least as far as this particular version is concerned that it is a recent fabrication.

[35] Secondly, in regard to the correspondence, it is quite clear from the concluding paragraph of the letter of 18 December 2014 sent by Mr. Swartz to Mr. Engelbrecht, that there was in fact no agreement reached between them. The penultimate paragraph which purports to record some agreement, does not record what would actually have to be paid and so the two paragraphs read conjunctively contain an offer in respect of which the final figure for payment still needed to be furnished and the ultimate paragraph, a confirmation, which was to be provided by Mr. Engelbrecht of his "agreement to agree".

[36] In the absence of any response from Mr. Engelbrecht, the 'agreement to agree' was then elevated by K&L without more to the status of a binding agreement in respect of which it was then said that payment was going to be made of the salaries. The amount which was subsequently alleged to have been paid was in the sum of R1 649 942.00.

[37] The contents of the documents which were purportedly sent to Mr. Engelbrecht on 15 December 2014, were asserted on behalf of K&L to have included proof of the payment of the salaries on 14 December 2014 – notwithstanding the contradictory allegation in the answering affidavit that in fact the agreement to pay on behalf of PE had only arisen on 19 December 2014 and that "*on or about the 19th of December 2014, the Respondent paid the salaries as agreed and the Respondent's Attorney, emailed the First Applicant informing him of same."*

[38] It is a matter of common sense that if the salaries were paid before there had been any agreement, then any such payment, if it was made, was made *sine causa*. The Liquidators for their part, maintained that no agreement had been reached and in fact asserted that the salaries had in any event been paid from the bank account of PE during December 2014. K&L complained in its answer filed 3.5 years later, that no proof had been furnished that this was so. There is nothing before the Court to indicate whether the provisions of Rule 35 were ever utilized in the 3.5-year period preceding the filing of the answering affidavit to obtain documents in this regard. It was in my view an afterthought.

[39] On this aspect, I am fortified in my view of this aspect by what subsequently transpired and what is set out below in regard to the conduct of K&L.

[40] It was argued by the Liquidators that even though the claim of K&L was disputed from January 2015, no claim was ever submitted in the estate of PE and no summons ever issued. This was the position both during the time that PE was under provisional liquidation as well as after it was put into final liquidation. By the time the Master made the impugned ruling on 7 October 2019, almost 5 years had passed and so in any event, any right of action to claim had long since become prescribed and unenforceable[9].

[41] I have found that there was no agreement to refund salaries, either between Mr. Feinberg and Mr. Engelbrecht or between K&L's attorney and Mr. Engelbrecht. But even if I had not found this, it is well established that Liquidators are required to act jointly and then only upon the instructions of either the creditors, the Court or the Master.[10] It is readily apparent, even from the letter of K&L's attorney of 18 December 2014 that Mr. Engelbrecht was cognizant of this.

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[9] See section 12(1) read together with section 13(1)(g) and (i) of the Prescription Act 68 of 1969.

[10] Section 382(1) of the Companies Act 61 of 1973; *Lynn NO and Another v Coreejes and Another* 2011 (6) SA 507 (SCA) at para [14].

[42] Since no claim was submitted for the refund of salaries in the estate of PE and no action was instituted timeously, the decision of the Master to make the ruling that he did is impeachable and is to be reviewed and set aside.

**THE SECTION 20(9) APPLICATION**

[43] This application engages what is referred to as 'piercing the corporate veil.'

[44] In the Republic, Section 20(9) of the Companies Act provides:

> *"(9) If, on application by an interested person or in any proceedings in which a company is involved, a court finds that the incorporation of the company, any use of the company, or any act by or on behalf of the company, constitutes an unconscionable abuse of the juristic personality of the company as a separate entity, the court may -*
>
> *(a) declare that the company is to be deemed not to be a juristic person in respect of any right, obligation or liability, of the company or of a shareholder of the company or, in the case of a nonprofit 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)."*

[45] The background relating to this application overlaps with that relating to the review in case number 7400/2020. Insofar as this application is concerned, there are 4 companies – PE, T&W, IMALI and K&L. PE, T&W and IMALI are already all in liquidation and the estates have all been consolidated and declared to be one and the same into one. In issue is whether or not K&L which is not presently in liquidation ought also to be dealt with similarly.

[46] Before embarking on a discussion of the facts which the Liquidators contend establish their entitlement to the section 20(9) order, it is necessary to deal with two points *in limine* raised by K&L. The first of these was that the Liquidators have no *locus standi* to bring the present proceedings and the second is that the requirements of the section are not met.

[47] It was contended on behalf of K&L that the Liquidators lacked *locus standi* to bring the application on the basis that there was no specific authority granted to them to do so by the Master in terms of section 386 read together with section 387 of the old Companies Act[11].

[48] K&L pointed to the various letters of appointment which the Liquidators had attached to their founding papers. Besides these letters of authority, each of the individual Liquidators also furnished affidavits confirming their knowledge of the proceedings and that they were all acting jointly with their co-liquidators in the respective estates of PE, IMALI and T&W.

[49] The challenge to the authority was predicated squarely on the specific powers said to have been conferred upon each set of liquidators[12] in their letters of authority. The nub of the point is that none of the prerequisites of section 386(3) had been shown to be met in order for the Liquidators to have the authority to institute the proceedings.

[50] Despite the service of the application upon K&L as long ago as 21 August 2020, neither the issue of *locus standi* nor authority on their part was raised until the delivery of the answering affidavit in August 2023.

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[11] 61 of 1973.

[12] In the case of PE this was stated as the powers in section 386(1); In the case of IMALI this was stated as the powers in section 386; and in the case of T&W this was stated as the powers in section 386(1)(a),(b),(c),(e) and (4)(f).

[51] In reply, the Liquidators demonstrated in respect of PE, that there had been a meeting of the creditors[13] on 3 July 2017[14] and that it had been resolved at that meeting to authorise them to institute legal proceedings. The authority to institute the proceedings was extant at the time of the institution of the proceedings in 2020.

[52] The subsequent attachment of the resolutions to the replying affidavit in 2023 does not detract from the fact that as a matter of fact, the Liquidators of PE were authorised to institute the proceedings in 2020 when they did[15]. The first point *in limine* is for this reason without merit and is dismissed.

[53] It was argued for K&L that whether or not the Liquidators had complied with section 20(9) or not was to be decided as a point *in limine*. The Liquidators for their part argued that this was not a point *in limine*. It is self-evident that consideration of all the facts[16] before the court and the findings made thereon are what will be determinative of whether the Liquidators are entitled to the order they seek. For this reason, the second point *in limine* is no point *in limine* at all.

[54] Turning now to the facts. The personae at the centre of the operation and control of each the companies, prior to their respective liquidations and K&L, is Mr. Aubrey Feinberg, his wife Mrs. Dianne Feinberg and Mr. Gareth Benson. Mr. Feinberg was sequestrated on 23 June 2011. He was and remained an unrehabilitated insolvent at all times relevant to the present litigation. The consequence of his sequestration left him unable to hold a directorship or to take part in the management of a company.

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[13] In terms of section 386(3).

[14] The written resolutions adopted at the meeting were reduced to writing, signed and stamped by the Master on 31 July 2017.

[15] *Sunny South Canners (Pty) Ltd v Mbangxa and Others NNO* 2001 (2) SA 49 (SCA).

[16] *Hülse-Reutter and Others v Gödde* 2001 (4) SA 1336 (SCA) at para [20].

[55] In order to circumvent the prohibition of Mr. Feinberg taking part in the management[17] of any of the companies, or holding any directorship,[18] an agreement was entered into with Mr. Benson in terms of which he would nominally hold shares in the various companies on behalf of Mrs. Feinberg. The companies concerned and relevant to the present matter are PE, T&W, IMALI and K&L. There were besides other companies listed in the agreement.

[56] The name of Mr. Feinberg appeared nowhere in the agreement although, as it was subsequently confirmed by both Mr. and Ms. Feinberg at the insolvency enquiry held into the affairs of PE, Mr. Feinberg was the person who actually ran each of the businesses.

[57] It was apparent, as early as 10 June 2014 and shortly before PE was placed in business rescue on 27 June 2014 that Mr. Feinberg together with Mr. Benson, were authorized to *inter alia* enter into agreements on behalf of and bind PE, specifically in respect of its financial and legal matters. A letter was addressed to SARS, on the PE letterhead but signed by Mr. Feinberg, requesting that imminent action be delayed by them because:

> *"We have recently entered into an agreement with a larger company than ourselves who are more financially secure to take over a majority interest in our company"*

and

> *"The company, K&L Builders CC and its director is presently assessing all our requirements in addition to assisting us in the collection of our debtors."*

and

> *"This process should be finished by approximately the end of June 2014 where after an approach will be made to SARS with a clear payment plan in respect of the entire indebtedness."*

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17 Section 47(1)(b)(i) of the Act.

18 *Ibid* section 69(8)(b)(i).

[58] There was no mention made of the fact that Mr. Feinberg in referring to K&L, was referring to a company in respect of which his wife, Mrs. Feinberg was the sole director and shareholder, or that putting PE into business rescue was contemplated. His own role was also similarly not disclosed, and SARS would only have been informed of the business rescue after the fact.

[59] The Liquidators asserted that the presence of the hand of Mr. Feinberg and his involvement insofar as PE and K&L are concerned was apparent from an instruction given by him while PE was under business rescue for the transfer of R1.2 million to K&L.

[60] On 1 October 2014, PE addressed a letter to Anglo American Corporation. The letter was ostensibly written by the directors of the company, notwithstanding that it was already in provisional liquidation and somewhat surprisingly, informed Anglo-American Corporation that the "*administration [was] being taken over by the Head Office of K&L"* and that K&L had "*acquired a majority share"* in T&W.

[61] On 14 November 2014, K&L addressed a letter to Impala Platinum (also a client of PE) in which it was stated that:

> "*K&L Builders is quite prepared to give you any reasonable undertaking you require insofar as Platinum's obligations to you are concerned*. *We have no intention whatsoever of allowing the business operations of Platinum to cease."*

and

> *"All key staff of Platinum Electrical have been retained as well as junior staff."*

and

*"For your information we enclose herewith a company profile of our main Black Empowerment Interest which is 51% black owned and which will give you some indication of the work we are qualified to do and have done."*

[62] The black empowerment interest referred to in the letter was IMALI, of which K&L was a 49% shareholder.

[63] On 12 December 2014, insofar as it may not already have been apparent that Mr. Feinberg was the guiding hand behind all of the companies and notwithstanding the insolvency of PE, and that he intended to simply continue trading in the way he had through another entity, addressed a further letter from K&L[19] to Impala Platinum in which it was stated:

*"As previously disclosed to you it was anticipated to have this provisional order of liquidation discharged on 5 December 2014. Unfortunately the order was not discharged as same was opposed by the previous business rescue practitioner, Mr Henk Strydom. At this stage Mr Henk Strydom has not served papers and we are accordingly unable to ascertain what his reasons are for this opposition."*

and

*"Members of K&L Builders CC own 49% of IMALI CORP 155 CC."*

*and*

*"The management committee of IMALI CORP 155 CC have reached agreement with the senior management of PE in PL [provisional liquidation]."*

*and*

*"IMALI CORP 155 CC will formally employ 100% (102 staff members) of the staff of PE in PL during January 2015."*

[19] The letter was sent on the letterhead of K&L but was signed off by "A Feinberg, K&L Builders cc and Imali Corp 155 cc."

[64] The excerpts of the letter of 12 December 2014 quoted above, make clear that it was the intention of Mr. Feinberg through K&L to take over the business, absent the liabilities, of PE.

[65] Insofar as it was alleged that Mr. Henk Strydom the BRP had opposed the discharge of the provisional liquidation order, it is simply incorrect that neither Mr. Feinberg nor K&L for that matter did not know the BRP's reasons for persisting with the liquidation.

[66] The BRP was the one who applied for the liquidation and in a letter of 13 October 2014, K&L's attorneys wrote to Ledjadja Coal and informed them that PE had been provisionally liquidated because *"Mr. Strydom, primarily due to issues experienced with the South African Revenue Services, decided to terminate the business rescue proceedings and apply for provisional liquidation as he did not want to risk the exposure of allowing Platinum to continue trading under business rescue proceedings which were at risk of being sabotaged by one creditor's lack of co-operation."*

[67] The reference to an agreement having been reached with senior management of PE in provisional liquidation, is clearly incorrect. The only persons at that stage who were authorized to act on behalf of PE were the provisional liquidators. It was never alleged that IMALI had reached such an agreement with the late Mr. Schmidt. The only agreement which it was alleged had been reached with him, was by K&L. In any event, absent the knowledge and consent of the other two Liquidators, the creditors and the Master, no such agreement could have been validly concluded.

[68] If there was any doubt about the intentions of Mr. Feinberg, these are put to rest by the following further assertions in the letter of 12 December 2014 abovementioned where it is stated:

*"After this process is complete, Platinum Electrical will henceforth trade as IMALI CORP 155 CC trading as Platinum Electrical."*

and

*"This arrangement has already been accepted by the majority of Platinum Electrical's customers including ANGLO AMERICAN and ROYAL BOFOKENG [sic] PLATINUM."*

and

*"As discussed with you we request that IMPALA formally cancels their contract with Platinum's Electrical (Pty) Ltd and replace it services with Imali-Corp 155 cc [sic] trading as Platinum Electrical; alternatively utilizes Imali-Corp 155 cc trading as Platinum Electrical as a replacement vendor as certain other large mining houses have done."*

and

*"A clear and precise cut off point must be established so that the effective date of cancellation which we suggest should be 19 December 2014 be agreed upon."*

[69] By the time the letter of 12 December 2014 had been sent to Impala Platinum, the arrangements proposed had already been accepted by Anglo American who on 7 November 2014 had replaced PE with IMALI as one of its vendors and on 5 December 2014 allocated a new vendor number to IMALI.

[70] By 27 November 2014, IMALI was now trading as Platinum Electrical. With the 'new entity' in place, and although there was a different vendor number now being used, inexplicably – if they were the separate entities as they appeared to

be - payments which related to invoices for work done by PE were now paid by Anglo American to IMALI.[20]

[71] Subsequent to the final liquidation of PE an enquiry was held in terms of sections 417 and 418 of the old Companies Act.[21] From the evidence given at the enquiry on 21 June 2017 and 7 to 8 November 2018, by both Mr. and Mrs. Feinberg, it emerged that K&L is not trading, has no assets or staff and was bereft of any audited financial statements.[22] Significantly the evidence of Mrs. Feinberg was that as the sole director she had never signed off on any financial statements. There were none.

[72] Insofar as Mrs Feinberg is concerned, she failed to discharge her duties in terms of section 76[23] of the Act and in so doing empowered and facilitated the conduct of Mr. Feinberg.

[73] Did the conduct of Mr. Feinberg in his use of all the associated entities and in particular K&L amount to an "unconscionable abuse" justifying an order in terms of section 20(9) of the Act?

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[20] The payments related to two invoices that were due on 6 November 2014 in the aggregate R453 048.29.

[21] 61 of 1973 read together with item 9(1) of Schedule 5 of the Companies Act 71 of 2008.

[22] The evidence of Mrs. Feinberg at the enquiry was that she had never and has never signed off on any financial statements – a situation which it would appear persists to this day.

[23] The section prescribes the standard of conduct expected of directors**.** See also *Gihwala and others v Grancy Property Ltd and Others* [2016] 2 All SA 649 (SCA) para 143 in which it was held: *"…Next is taking personal advantage of information or opportunity available because of the person's position as a director. This hits two types of conduct. The first, in one of its common forms, is insider trading, whereby a director makes use of information, known only because of their position as a director, for personal advantage or the advantage of others. The second is where a director appropriates a business opportunity that should have accrued to the company. Our law has deprecated that for over a century. The third case is where the director has intentionally or by gross negligence inflicted harm upon the company or its subsidiary…"*

[74] In *Cape Pacific Ltd v Lubner Controlling Investments (Pty) Ltd* [24] it was held that:

> *"It is undoubtedly a salutary principle that our courts should not lightly disregard a company's separate personality but should strive to give effect to and uphold it. To do otherwise would negate or undermine the policy and principles that underpin the concept of separate corporate personality and the legal consequences that attach to it. But where fraud, dishonesty, or other improper conduct (and I confine myself to such situations) are found to be present, other considerations will come into play. The need to preserve the separate corporate identity would in such circumstances have to be balanced against policy considerations which arise in favour of piercing the corporate veil…And a court would then be entitled to look to substance rather than form in order to arrive at the true facts, and if there has been a misuse of corporate personality, to disregard it and attribute liability where it should rightly lie. Each case would obviously have to be considered on its own merits."*

[75] When the legislature enacted section 20(9) of the Act, it provided for the piercing of the corporate veil where there was an 'unconscionable abuse' of a company's juristic personality. In *Botha v van Niekerk* [25] this was aptly characterized as conduct which "*to right minded persons, was clearly improper conduct*"[26].

[76] Section 20(9) is widely framed. It affords "any interested" person the right to apply for the relief it provides and encompasses not only the acts of the company concerned but also acts done on its behalf. The determination of its applicability follows an assessment of the conduct – by or on behalf of the

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[24] 1995 (4) SA 790 (A) at 803G – 804A. See also *Littlewoods Mail Order Stores Ltd v McGregor (Inspector of Taxes), Littlewoods Mail Order Stores Ltd v Inland Revenue Commissioners* [1969] 3 All ER 855 at 861 where Lord Denning said: *"The doctrine laid down in Salomon v Salomon has to be watched very carefully. It has often been supposed to cast a veil over the personality of a limited company through which the courts cannot see. But that is not true. The courts can and often do draw aside the veil. They can, and often do, pull off the mask. They look to see what really lies behind. The legislature has shown the way with group accounts and the rest. And the courts should follow suit."*

[25] 1983 (3) SA 513 (W).

[26] *Ibid* at 517C-D.

company and whether or not that conduct, objectively construed is to right minded persons improper.

[77] In assessing conduct, in *Prest v Petrodel Resources Ltd*[27], a decision of the Supreme Court of the United Kingdom, Lord Sumption identified two distinct categories for consideration, the first being one of evasion and the second being one of concealment in order to categorize the relevant wrongdoing and pierce the corporate veil thereafter.

[78] The evasion principle was expressed as follows:

> *"The evasion principle…the court may disregard the corporate veil if there is a legal right against the person in control of it which exists independently of the company's involvement, and a company is interposed so that the separate legal personality of the company will defeat the right or frustrate its enforcement…"*[28]

[79] The evasion principle calls for the actual and pure piercing of the corporate veil where a company is used as a sham or façade to evade an existing duty. In the present matter, IMALI, T&W and K&L were all in existence at the time that the agreement with Mr. Benson was concluded in June 2014 and so it cannot be said that they were established in order to defeat or frustrate the enforcement of any right.

[80] The principle that finds application in the matter before this court, is the concealment principle which was expressed as follows:

> *"The concealment principle is legally banal and does not involve piercing the corporate veil at all. It is that the interposition of a company or perhaps several companies so as to conceal the identity of the real actors will not deter the courts from identifying them, assuming that their identity is legally relevant. In these*

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[27] [2013] UKSC 34.

[28] *ibid* para 28.

*cases, the court is not disregarding the "facade", but only looking behind it to discover the facts which the corporate structure is concealing."*[29]

[81] The concealment principle calls for the lifting rather than the piercing of the corporate veil, where the court looks behind the structure of the company to identity and reveal the true actors of the company. This is achieved by looking at the nature of the company's transactions where the company had 'acted' as an agent or nominee of its controller(s).[30] In circumstances where the company acted as an agent or nominee or even a "puppet" the court need not pierce or disregard the corporate veil, it can simply circumvent the corporate veil to uncover the true facts.

[82] The provisions of section 20(9) accommodate circumstances which fall within the ambit of both principles. In *Ex Parte Gore and Others NNO*[31] it was held that unconscionable abuse:

*"postulates conduct, in relation to the formation and use of companies, diverse enough to cover all the descriptive terms like 'sham', 'device', 'stratagem' and the like used in that connection in the earlier cases, and – as the current case illustrates – conceivably much more. The provision brings about that a remedy can be provided whenever the illegitimate use of the concept of juristic personality affects a third party in a way that reasonably should not be countenanced.*"[32]

[83] In the present matter Mr. Feinberg being an unrehabilitated insolvent who could not be seen to be involved in the ownership or running (as a director) of any company until rehabilitation, used his wife in her capacity as a shareholder and then through the mechanism of the secret agreement, to distance, at least as far as any official records were concerned, the surname of Feinberg from the official ownership and control of the companies.

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29 *ibid*

30 *Ibid* para 32.

31 2013 (3) SA 382 (WCC). *Airport Cold Storage (Pty) Ltd v Ebrahim and Others* 2008 (2) SA 303 (C).

32 *Ibid* para 34.

[84] The conduct of Mr. Feinberg from the time of the conclusion of the secret agreement through the business rescue of PE and then subsequently after its liquidation was plainly directed to procuring and maintaining for his own benefit the business of PE.

[85] Without the knowledge of the liquidators of PE and misrepresenting the reasons for it having been put into business rescue and thereafter liquidated, he then proceeded to represent to the various debtors of PE that the transfer of contracts and their benefits from PE to IMALI was a legitimate transaction which he was authorised to enter into – he used K&L which had a controlling interest in IMALI to facilitate this.

[86] By all accounts, there is no doubt in my mind that IMALI, T&W and in particular K&L were used by Mr. Feinberg as 'fronts' for the furtherance of his stratagem to be able to continue in business through companies when as a matter of law he was disqualified from doing so. The present case is demonstrative of the concealment principle. The use of K&L was an "unconscionable abuse" of it and its juristic personality.

[87] Regarding the order sought by the applicants, *Centaur Mining South Africa (Pty) Ltd v Cloete Murray N.O and Others*[33] held the following in respect of collapsing an unliquidated company or estate into a liquidated estate:

> *"…The provisions of s 20(9) allow 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.' Or 'suitable, proper'. It was found 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,*

[33] 2023 (1) SA 499 (GJ) at para [25].

*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."*

[88] Inasmuch as section 20(9) of the Act does not deal with the winding-up of companies, it is permissible to order an unliquidated company be collapsed into the estate of a liquidated one. This is permitted by section 20(9)(b) which allows the grant of consequential relief.

[89] The Liquidators sought an order that the costs be costs in the administration of the combined estate and that is the costs order I intend to make.

[90] A final matter requires mention and that is the role of Mrs. Feinberg and Mr. Benson in making themselves party to the agreement of October 2014 and thereby facilitating the use of the various companies and in particular K&L by Mr. Feinberg. It requires further investigation as besides the companies forming the subject of this litigation, there were others referred to in the agreement. A copy of this judgment should be furnished to the Companies and Intellectual Property Commission (CIPC) for their attention.

[91] In the circumstances it is ordered:

[90] Paragraphs 8.1.2, 8.1.3, 8.1.4, 8.1.5 and 8.1.6 of the Ruling made by the Second Respondent on 7 October 2019 are declared to be unlawful and are hereby reviewed and set aside.

[91] The Third Respondent is ordered to pay the costs of the Applicants.

**CASE NO: 35192/2020**

[93] That in terms of Section 20(9) of the Companies Act, 71 of 2008 it is declared that Platinum Electrical (Pty) Ltd and K & L Builders (Pty) Ltd are not separate juristic persons in respect of any right, obligation or liability of it on the basis that the incorporation of Platinum Electrical (Pty) and K & L Builders (Pty) Ltd, the use of Platinum Electrical (Pty) Ltd and K & L Builders (Pty) Ltd and the acts by and on behalf of Platinum Electrical (Pty) Ltd and K & L Builders (Pty) Ltd constitute an unconscionable abuse of their juristic personalities as separate entities.

[94] That the estates of Platinum Electrical (Pty) Ltd and K & L Builders (Pty) Ltd is one estate to be known as the Platinum Electrical (Pty) Ltd estate and which combined estate is considered as a liquidated company and that the business of each separate entity be declared to be the business of Platinum Electrical (Pty) Ltd.

[95] That the combined estate under the name of Platinum Electrical (Pty) Ltd be administered as one estate and that, for this reason, the fact that separate legal entities were incorporated be disregarded.

[96] That the order granted by this Court will not affect the rights of a creditor who proves a claim against any of the individual companies being Platinum Electrical (Pty) Ltd and K & L Builders (Pty) Ltd.

[97] That the winding-up of the combined estate be deemed to have commenced on 2 September 2014.

[98] That the Applicants must regard any claim proved against an individual company, as a claim proved against the combined estate.

[99] That the cost of this application are costs in the administration of the combined estate.

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**A MILLAR**

**JUDGE OF THE HIGH COURT**

**GAUTENG DIVISION, PRETORIA**

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| HEARD ON: | 20 SEPTEMBER 2023 |
| JUDGMENT DELIVERED ON: | 03 NOVEMBER 2023 |

**CASE NOS: 82618/2019 & 82619/2019 – SECURITY FOR COSTS APPLICATIONS**

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| REFERENCE: | MS. J VAN DEN BERG |

NO APPEARANCE FOR THE RESPONDENTS

**CASE NO: 7400/2020 – REVIEW OF MASTERS' DECISION**

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NO APPEARANCE FOR THE FIRST OR SECOND RESPONDENTS

**CASE NO: 35192/2020 – SECTION 20(9) APPLICATION**

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