OFFICE OF THE CHIEF JUSTICE
REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

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

7 MARCH 2023

Appeal Case No: A149/2021

Case No: 37063/2018

In the matter between:

JACARANDA HAVEN (PTY)LTD — First Appellant

THE BARBEL FOUNDATION (PTY)LTD — Second Appellant

and

JJP PROPCO (PTY)LTD	First Respondent
JJP PROPCO MEDICAL (PTY)LTD	Second Respondent
PIETER HENDRIK STRYDOM N.O.	Third Respondent
MARTHINUS JACOBUS BEKKER N.O	Fourth Respondent
AMANDA OINDOKUHLE VILAKAZI N.O.	Fifth Respondent

and

Case No: 45201/18

In the matter between:

JACOBUS PHILUPPUS GROBLER	Appellant

and

COERNRAAD HILLERBRANDS PRINSLOO	First Respondent
JACARANDA HAVEN (PTY)LTD	Second Respondent

This judgment is issued by the Judge whose name is reflected herein and is submitted electronically to the parties/their legal representatives by email. The judgment is further uploaded to the electronic file of this matter on CaseLines by the Judge or her Secretary. The date of this judgment is deemed to be 7 March 2023.

JUDGMENT

COLLIS J:

INTRODUCTION

1.The delivery of this judgment was delayed for a considerable period due to unfortunate incidents that impacted upon the preparation and delivery of the judgment. Those have been resolved one way or the other. For the delay, apologies are owed to the parties. The delay was not intended, but unfortunate.

2. The present appeal concerns two independent cases.

3.The first matter under Case No: 37063/2018, is the appeal of Jacaranda Haven, against the judgment of Davis J placing it under liquidation. The winding-up order was sought on two alternative basis, namely that it was factually and commercially insolvent and that it would be just and equitable to placed it under liquidation.

4. The second matter under Case No: 45201/2018, was only in respect of the costs order made against the three directors of Jacaranda Haven, in a delinquency application which also served before the *court a quo*.

5. On 19 April 2021, the Supreme Court of Appeal granted the appellants leave to appeal to the Full Court of the Gauteng Division of the High Court of South Africa, against the judgement and orders of his Lordship Mr. Justice Davis delivered on 30 October 2020 under the above case numbers.

6. In essence, the appellants contend, with reference to the liquidation of Jacaranda Haven, that the company should not have been liquidated either provisionally or finally in that the applicants in the liquidation application lacked the necessary *locus standi* to apply for the liquidation of Jacaranda Haven because they were not its creditors.

7. Further that if indeed the applicants had the necessary *locus standi*, then it was in any event not established that Jacaranda Haven was insolvent in either sense of the term.

8. As to the alternative grounds upon which the liquidation was sought and obtained, the appellants contend that the facts on which the just and equitable remedy was premised, was also not established before the *court a quo*.

9.The delinquency application was withdrawn prior to the hearing of the application and all that remained for decision by the court *a quo* was the issue of costs. The costs awarded in the delinquency application is also being appealed against.

BACKGROUND

10.This matter has a chequered history. The Respondent initially applied for the provisional winding-up of Jacaranda Haven on 24 May 2018.[1] The service of the application occurred on 9 June 2018.

11.The application was firstly brought in terms of section 344 of the Companies Act, 1973 on the basis that –

11.1 Jacaranda Haven was insolvent and unable to pay its debts; and/or

[1] Notice of Motion page 017-27

11.2 It is just and equitable for Jacaranda Haven to be wound up as Jacaranda Haven was being unlawfully manipulated by the persons who were then in control thereof.[2]

11.3 In the alternative, and in the event that the Honourable Court found that Jacaranda Haven was in fact solvent, the application was brought on terms of the provisions of section 81 of the Companies Act, 2008 on the basis that it is just and equitable for Jacaranda Haven to be wound up as Jacaranda Haven was being unlawfully manipulated by the persons then in control thereof.[3]

12.The application was lodged with the Registrar on 28 May 2018 and was presented to court on the basis of the provisions of section 348 of the Companies Act, 1973. Based on the aforesaid, the winding-up of Jacaranda Haven is thus deemed to have commenced on the 28 May 2018.[4]

13.On 21 June 2019, Jacaranda Haven was placed under provisional liquidation and a rule nisi was issued, with the return date set for 19 August

[2] Founding affidavit, paragraph 60, page 017-49
[3] Founding affidavit, paragraph 61 page 017-49 to 50
[4] Venter NO v Farley 1991 (1) SA 316 (W), AT 320.

2019. In terms of the rule *nisi* interested parties were called upon to show cause why the provisional order should not be made final.[5]

14. On 15 August 2019, prior to the return date, Barbel Foundation brought an application to intervene in the winding-up application, with a view to opposing the granting of a final order of liquidation. The intervention application was granted on 19 August 2019 by agreement. The final winding up order was granted by the *court a quo*, on 30 October 2020.

APPLICATION TO RECEIVE EVIDENCE

15. On the eve of the hearing of this appeal, the respondents under Case No: 37063/2018, brought a Notice of Application to Receive Evidence at the hearing of the appeal, in terms of Section 19(b) of the Superior Courts Act, 2013 read together with Rule 6(11) of the Uniform Rules of Court.

16. More specifically, the relief sought was that the evidence given by Dr. James Richard Botha and/or Mr Daniel Edward Nell at the insolvency enquiry convened in terms of section 417 and 418 of the Companies Act, 1973 shall be received.

[5] Judgement and order concerned at page 017-1460 to 017-1469

17. The application was opposed by the appellants. In essence the gist of the further evidence that the JJP companies requested this Court to take into account relates to the evidence tendered under oath by Dr. Botha during the section 417 and 418 enquiry, wherein he allegedly admitted that:

17.1 His previous contention that the JJP companies were not creditors of Jacaranda Haven was false; and

17.2 the JJP companies were in fact at all material times creditors of Jacaranda Haven;

17.3 it was at all material times known to Jacaranda Haven, the Intervening Creditor (Babel) and the directors of Babel (Mr. Hallowes and Mr. Kruger) that the JJP companies were creditors of Jacaranda Haven.

18. As mentioned, the appellants oppose this application on the basis that the respondents are not entitled to lead further evidence for reasons of principle and that the court should not grant the order sought for reasons of practicality or expedience. In essence the arguments advanced were the following:

18.1 In terms of section 417 (read with section 418) of the Companies Act of 1973, a liquidator is empowered to conduct an enquiry into the affairs of a

company in liquidation to clothe the liquidator with the knowledge which the directors and managers had prior to the liquidation to enable the orderly winding up of the company.[6] The purpose of such an enquiry is to established facts by the liquidator which will assist a liquidator in the winding-up process.

18.2 The use of evidence obtained in an enquiry in later proceedings is limited. The evidence of a witness who testifies at an enquiry may only be used in proceedings against that witness and may generally not be used against the company in liquidation.[7] It is on this basis therefore that the appellants oppose the application made by JJP Companies to present further evidence in this appeal, more so in circumstances where both Dr. Botha, and Mr. Nell are not litigants or parties participating in the appeal before this court.

19. Albeit further that section 19 of the Superior Court's Act provides that a court of appeal may receive further evidence on application, it was the appellants contention that an application to present further evidence can only be brought by an appellant in an appeal or a cross-appellant in a cross-appeal, where a cross-appeal has been noted. In the present instance it is common cause that no cross-appeal has been noted by the respondents. On this basis

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[6] Ferreira v Levin N.O. 1996 (1) SA 984 (CC) para 56.
[7] Roering v Mahlangu 2016 (5) SA 455 (SCA) para 40. See Henochsberg on the Companies Act

therefore the appellants contend that this court should not permit the receipt of further evidence.

20. In addition the appellants contend that the JJP Companies have not met the "materiality requirement" entitling them to lead further evidence.[8] This requirement will be assessed on whether if the further evidence is permitted it would have affected the outcome of the case in a material way.

21. Furthermore the application to lead further evidence in this appeal, is not brought by the appellants (the unsuccessful party in the court *a quo*) but indeed brought by the respondents (the successful party in the court *a quo*). This procedure, the appellants contended is not permissible in circumstances such as the present, where the application is not brought at the instance of the appellants.

22. A further argument advanced by the appellants against the application to receive further evidence is that the respondents are requesting the selective use of evidence emanating from the enquiry as opposed to all the evidence presented before the enquiry. It was contended that this would be unfair and

[8] S v De Jager 1965 (2) SA (A) at 613B.

in breach of the guarantee of a fair process contained in section 34 of the Constitution. This is so as the evidence collected at an enquiry was not subject to cross-examination and would first have to be tested to assess its probative value. This would necessitate that the witnesses in question would have to testify during the appeal in order to allow them to be cross-examined to test the veracity of their evidence.

23. In support of the application to admit further evidence, the following arguments were presented on behalf of the respondents:

23.1. The JJP Companies are not presenting only extracts of the evidence of Dr. Botha and Mr. Nell but have provided their full evidence, with reference to the relevant portions thereof as required by law. No counter argument was however advanced that this evidence will not be subject to cross-examination to test its veracity.

23.2 On the question as to whether it was permissible for a respondent in an appeal to apply to the court sitting on the appeal to adduce further evidence when in fact the respondent was the successful party in the court *a quo* and where no cross-appeal was lodged by the respondents; Similarly, no cogent rebuttal argument was presented on its behalf. In this regard, the respondents merely contends that no such limitation exists, but failed to present before

this court authorities in support of its argument, this in circumstances where it carried the *onus* to persuade this court adjudicating the appeal that this evidence should be admitted and where this application was first brought after the leave to appeal was granted by the SCA. This latter Court as such also did not have the benefit of the basis of this application and as such could not have applied its mind to the merits of the application for leave to appeal in its entirety.

23.3 The respondents also contend that the basis on which the application to admit evidence is made in this court (sitting as the court of appeal), demonstrates mala fides on the part of Jacaranda Haven. It illuminates failure to disclose to the court *a quo* that Jacaranda Haven itself (and Barbel) admitted to being indebted to the JJP Companies-and borrowed the major part of the R12 million from Barbel to make payment thereof. The implication of the aforesaid is that Jacaranda Haven and Babel have failed to show that the indebtedness of Jacaranda Haven is disputed on *bona fide* and reasonable grounds.

23.4 The test for admissibility of further evidence is that compelling reasons must exist, justifying the evidence being received, i.e. that there should be some reasonably sufficient explanation, based on allegations which may be true, why the evidence which is sought to lead was not lead at the trial; there should be a prima facie likelihood of the truth of the evidence and the evidence

should be materially relevant to the outcome of the trial.[9] As to the late addition of this evidence, the JJP Companies contends that this evidence only became available during the section 417 and 418 enquiry and was thus not available when the affidavits in the main application was drawn. The purpose of the application, so the argument went, was to merely make available to the court sitting on appeal all available relevant admissible evidence. The respondents being aware that both Dr. Botha and Mr. Nell are not parties to the present proceedings, are silent as to why under these circumstances the evidence of these two witnesses tendered before the enquiry should be permitted.

24. As I see it, the true reason why the respondents are desirous to present this evidence before the Court sitting on this appeal, is to bolster their basis that they had the necessary *locus standi* to apply for the liquidation of the company. The evidence at best would further support the respondent's case.

25. This on its own can never make the presentation of this evidence material. More so, in the absence of a cross-appeal having been launched by the respondents.

[9] Mail and Guardian Media Ltd and Others v Chipu NO and Others 2013 (6) SA 367 (CC) para 8.

26. Consequently, the application cannot succeed and falls to be dismissed with costs including the costs consequent upon the employment of senior counsel.

MERITS OF THE APPEAL

Liquidation appeal-Case No: 37063/2018

27. In respect of the merits in the liquidation appeal (Case No: 37063/2018), the objections raised were firstly the lack of *locus standi*, i.e whether Jacaranda Haven is liable to pay any of the amounts set out in the founding affidavit to either or both of the JJP Companies. Secondly, the insolvency issue and thirdly whether it was just and equitable to liquidate Jacaranda Haven.[10]

28. In respect of the locus standi, the core issue for determination by this court is whether Jacaranda Haven's version in respect of the contract in terms of which the JPP Companies made payments as alleged in the founding

[10] Notice of Appeal Record 1448

affidavit, is implausible, far-fetched or so clearly untenable that it could safely be rejected on affidavit.

29. In this regard the *court a quo* had found that there existed a huge amount of discrepancies, contradictions and different versions contained in the different affidavits filed by the same deponent (Dr Botha), and that this constituted sufficient reason to reject such deponent's version. It is on this basis that the *court a quo* concluded that the disputes which Dr Botha sought to raise are not real disputes and that the version which he sought to put up on behalf of Jacaranda can be rejected as being untenable.[11]

30. In its judgment, the *court a quo* concluded *inter alia* that the nature and the contents of the supplementary affidavit differed markedly from the answering affidavit deposed to by the same deponent. It was almost as if a new witness was traversing the aspects already covered in the answering affidavit.[12]

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[11] Judgment Court a quo para 6.15 and 6.16 Record 1435.
[12] Judgment Court a quo para 6.8 Record 1431.

31. The court further concluded that the supplementary affidavits failed to addressed the issue alluded to in paragraph 5.13, or the questions raised in paragraph 6.2 and 6.3 of the judgment, either adequately or at all.[13]

32. On behalf of the appellants on the issue of *locus standi* the following arguments were advanced.

32.1 It was argued that the *court a quo* overlooked all the objective evidence supporting Jacaranda Haven's version of the contract between JJP Medical and Jacaranda Haven's holding company. Via Via Properties, being the fact that a share sale agreement and not a subscription agreement was drafted, albeit not signed. It reflected the contractual arrangement by Jacaranda Haven and not the contract alleged by the JJP Group companies namely a subscription agreement. This meant that all payments were made by or on behalf of JJP Medical to Via Via properties and not to Jacaranda Haven. No claim for repayment in terms of a contract would therefore lie against Jacaranda Haven. It is on this basis that counsel had argued that there as a result could only be a claim against Via Via Properties at best.

[13] Judgment Court a quo para 6.13 Record 1434.

32.2 As a result there was therefore no contractual *lis* demonstrated between the JJP Group companies and Jacaranda Haven. In this regard it was further argued that the *court a quo* in particular, overlooked the evidence of Messrs Nell, Erasmus and Van Staden in this regard.

32.3 It is on this basis so counsel contended that the *court a quo* with specific reference to paragraphs 6.13, 6.14,6.15, 6.16 as well as 6.18, made far-reaching statements rejecting the version of Jacaranda Haven on every point whilst the answering affidavits, together with the corroborating affidavits of Messrs Van Staden, Erasmus and Nell provide full answers to rebut the court's conclusions.

32.4 In addition, counsel for the appellant submitted that the court failed to consider the particularly vague, inherently contradictory and improbable nature of the version of the contracts as alleged by the JJP Group companies when the court decided to apply the robust approach.

32.5 In this regard the court in particular failed to consider the significance of the fact that the inherently contradictory version of the JJP Group companies on the contracts compelled them to put forth an alternative cause of action such as enrichment which they singularly failed to establish.

32.6 An additional argument advanced was that the *court a quo* also failed to analyze the facts from which the alternative cause of action (enrichment) arose, which condictio was relied upon or whether its requirements were indeed met.

32.7 Further that the *court a quo* had erred when concluding in its judgement that it is common cause that the JJP Group companies agreed to finance the purchase of the property and to finance development. The version of Jacaranda Haven has consistently been that the agreement was that JJP Medical would buy 90% of the shares in Jacaranda Haven from Via Via Properties.

32.8 Counsel for the appellant also argued that the *court a quo* had erred in paragraphs 5.2, 5.5, 5.7 and 5.9 of its judgment by stating that it is common ground that the alleged payments were made when in fact Jacaranda Haven had no knowledge thereof, or who made them, to whom and for what purpose these payments were made. In this respect counsel had argued that the *court a quo* had either overlooked or paid inadequate attention to paragraphs 78 to 80 of the answering affidavit in answer to this these concerns.

32.9 In addition counsel had argued that the *court a quo* had erred in paragraph 5.4 of the judgement that the purchase price of the property was R10 million payable over ten years by R1 million annual payments when the answering affidavit at paragraphs 21 to 23 and the supplementary affidavit at paragraphs 42 to 76 explained the complex nature of the transaction.

32.10 With reference to paragraph 5.9 of the judgment counsel had argued that the court incorrectly had found that it is common cause that Ms. Heck instructed the change of directors whilst the correct position (which the court did not record) was at all times that the statement is not common cause. See in this regard paragraphs 94 to 99 of the answering affidavit.

32.11 The *court a quo* further erred when it stated in paragraph 5.12 of its judgment that the transfer of shared was confirmed by Dr. Botha. This is so as the court overlooked the answer in paragraphs 97 to 101 of the answering affidavit and further overlooked the evidence in the answering affidavit at paragraphs 97 to 101 and 133 to 141 providing details of the transactions.

32.12 In addition a further argument advanced was that the *court a quo* with respect erred in stating that it was common ground that a lease had been concluded on 14 September 2017 (paragraph 5.14 of the judgement) whilst

the answering affidavit explain in detail that the lease had not been entered into (paragraph 102 to 104 and 139). This aspect was also not common cause at all.

32.13 In addition, counsel had stated that the *court a quo*, misstated the evidence in paragraphs 5.16 and 6.6 that it is common cause that payment of 20 invoices were made to 28 creditors of Jacaranda Haven. This was expressly denied in paragraph 37 of the answering affidavit that the work was done, the value of the work had determined or that Jacaranda Haven had even knowledge of the work or what the actual work done might have been. This position is reaffirmed in paragraphs 195 to 198 of the supplementary answering affidavit.

32.14 Furthermore, counsel had argued that the court a quo had erred by stating in paragraph 5.17 of the judgement that the JJP Group companies found out only in November 2017 that the shares had not been transferred. This aspect was denied and fully explained (paragraph 38 to 39 and 103 to 104 of the answering affidavit and paragraphs 21 and 22 of the Grobler affidavit) to the effect that the contract had already been terminated in September 2017.

32.15 On the probabilities, the court unjustifiably concluded so counsel had argued, that Jacaranda Haven did not explain the alleged contradictions without identifying such contradictions, whilst there were no contradictions if the undisputed facts in the answering papers are considered.

32.16 Counsel in addition had argued that the *court a quo* had erred in stating in paragraph 6.2 of the judgement that the version of the share sale agreement alleged in the answering affidavit differs from that of the written agreement. This is so as Ms. Heck's gave instruction to transfer the shares in May 2017 already, together with Dr Botha's statement on 27 June 2017 that the shares has been transferred. The *court a quo* as a result could not have concluded that these questions remained unanswered as these statements were all dealt with in the answering affidavit.

32.17 Further to the above, counsel had argued that the court a quo had erred by misconstruing the position with regards to the Prinsloo "affidavit" in paragraph 6.4 (the purpose of which was to demonstrate that the JJP Group companies accepted liability to pay further amounts, thus destroying the version that there was no obligation to make the payments), misstating the evidence that Dr Botha did not ever accept the contents of the affidavit and that the agreement between the parties was cancelled soon after the affidavit

had been made. The court overlooked the fact that the affidavit did not support the version of the JJP companies as appears from paragraph 61 to 70 of the replying affidavit.

32.18 With reference to paragraph 6.5 of the judgement counsel had argued that court a quo had overlooked the evidence at paragraphs 137 to 140 of the answering affidavit.

33. For the above reasons counsel concluded that the *court a quo* could and should have found that seen in isolation from the answering affidavit, the founding affidavit failed to allege and prove a contract which indebted Jacaranda Haven to pay any amount to the JJP Group companies and that no enrichment was proven. In the absence of an indebtedness it follows that no locus standi could be said to have been proven.

34. On the issue of *locus standi* the respondents had advanced the following arguments:

34.1 Firstly that Jacaranda Haven is factually insolvent as its liability exceeds its assets.

34.2 In addition the winding-up of Jacaranda Haven was also sought on the basis that it will also be just and equitable to liquidate Jacaranda Haven due to the fact that its corporate existence is being abused to fraudulently deprive the Respondents of their contractual benefits.[14]

34.3 On the issue of *locus standi*, counsel on behalf of the respondent advanced the argument that in terms of the provisions of section 346(1)(b) of the Companies Act, 1973, an application for the winding-up of a company may be brought by one or more of its creditors which includes contingent or prospective creditors.

34.4 In this regard, counsel had submitted that a contingent creditor is a creditor to a liability which, by reason of an existing vinculum juris between the creditor and the company, may become an enforceable liability on the happening of some future event. In contrast a prospective creditor is a creditor in regards to liability which, by reasons of an existing vinculum juris between the creditor and the company, will become an enforceable liability on a future date or on a date determinable by reference to future events.[15] Such a creditor

[14] Founding Affidavit, paragraph 36 to 58, pages 017-42 to 017-47.
[15] Choice Holdings Ltd v Yabeng Investment Holding Company Ltd [2001] 2 ALL SA 539 (W). Paragraph [21] and the authorities quoted there.

would for instance include a creditor with a valid unliquidated claim for damages for breach of contract or a delictual claim.[16]

34.5 As per the founding affidavit counsel had argued that Jacaranda Haven is indebted to the Respondents in the amount of R9 811 662,00, which the Respondents made available and paid over to various creditors of Jacaranda Haven and this was to ensure the transfer of 90% of its shareholding to JJP Medical.[17]

34.6 That Jacaranda Haven has breached its obligations in this regard, initially by failing, and later refusing to ensure the transfer the shares concerned to JJP Medical.

34.7 Further that Jacaranda Haven seeks to avoid liability to the Respondents by postulating a preposterous alternative relationship between the parties, that fails to be rejected out of hand.[18]

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[16] Henochsberg on the Companies Act 61 of 1973, Fifth Edition. See the discussion of section 346 pages 702 to 721, and the authorities quoted there.
[17] Founding Affidavit, paragraph 21, page 001-15 to 17.

[18] Answering Affidavit, paragraph 30, page 017-2014, read with paragraph 35 on pages 017-216, and the respondents' Replying Affidavit 42 to 44, pages 017-288.

34.8 As to the version postulated by Jacaranda Haven of the purported agreement regarding the payment of the amount of R9 811 662.00 i.e that JP Medical would purchase 90% of the issued shares of Jacaranda Haven from a company called Via Via Properties, at a price equal to 90% of the municipal value of the property that Jacaranda Haven was at that time purchasing, being worth about R11,7 million. Further that the said purchase price would be payable by the time that Jacaranda Haven took transfer of the property concerned.

34.9 That only once the full purchase price for the shares had been paid to the seller (Via Viva Properties) would the shares concerned be transferred to JJP Medical.

34.10 The purchase price of the shares (or at least a part thereof) would then through the Via Viva Group be borrowed by Jacaranda Haven to enable it to pay the purchase price for the land and other expenses in developing the property.

34.11 This version counsel had argued shows that there is absolutely no commercial sense in the purported agreement suggested by Jacaranda Haven for the following reasons:

34.11.1 Jacaranda Haven was at the material time an empty shell that had just been created, without any assets or trading history whatsoever.

34.11.2 Jacaranda Haven would immediately enter into a purchase agreement with the owner of the land, for which purchase price it had no money to pay.

34.11.3 Jacaranda Haven would not obtain the purchase price of the land from the Respondents, and the purchase price would accrue to Via Viva Properties.

34.11.4 At the end of the purchase of land transaction concerned, Jacaranda Haven would thus hold the land as an asset, but owe the purchase price to the previous owner of the land.

34.11.5 Jacaranda Haven would then allegedly borrow the amount of the purchase price of the land from one of the companies in the Via Viva Group of Companies, thus ending up with the land and debt equal to the purchase price of the land – resulting in Jacaranda Haven having no net value whatsoever.

34.11.6 On the Jacaranda Haven's version, JJP Medical would thus purchase a company that was an empty shell with a huge debt (the purchase price of the land) and no means whatsoever to pay the debt, from Via Viva Properties for an amount of about R10 million.

34.11.7 There is no cogent explanation as to why JJP Medical would be willing to pay almost R10 million for the shares of a company that has no net value.

34.11.8 That, Jacaranda Haven would then be obliged to obtain money from somewhere to develop the property to be able to lease it to the Via Viva Group of Companies.

34.11.9 On this version, JP Medical (or some other company in the JJP Propco Group) would spend a huge amount of money to redevelop the property concerned, all against the possible repayment of its investment from the rentals to be paid by the proposed operating company that was similarly a shell.

35. It is for these reasons that counsel contended that the version of Jacaranda Havens' of the alleged agreement is so far-fetched and fanciful that it can be rejected out of hand.

36. Jacaranda Haven bears the *onus* of proof on a balance of probabilities that it disputes the Respondents' locus standi on bona fide and reasonable grounds. This the Respondent argues Jacaranda Haven has failed to do.[19]

[19] Kalil v Decotex (Pty) Ltd and Another [1988] 2 all SA 159 (A).

37. Relying on this defence, Jacaranda Haven is unable to avoid liability for all the various components of the liability towards the Respondents, and on proper analysis of the evidence, Jacaranda Haven is forced to admit that the Respondents are creditors (actual and/or prospective and/or contingent) of Jacaranda Haven, with proper locus standi in iudicio to apply for the winding-up of Jacaranda Haven.[20]

38. Even in circumstances where Jacaranda Haven disputes a portion of the liability concerned does not affect the Respondents' locus standi in iudicio.[21]

39. For the above reasons postulated above, counsel had argued that the Respondents had proven its locus standi.

40. The *court a quo* in its judgment comprehensively dealt with its reasons on why it found that the respondent had the necessary *locus standi* to apply for the winding-up of the appellant and why in turn the *court a quo* rejected the versions proffered by the appellants in failing to discharged its *onus* on a balance of probabilities.

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[20] Founding Affidavit, paragraph 21, pages 001-15 to 001-14 read with the Answering Affidavit, paragraph 75 to 83, pages 017-233 to 017-235 and the Replying Affidavit, paragraphs 99 to 105, pages 17-304 to 17-306.

[21] Prudential Shippers SA Ltd v Tempest Clothing Co (Pty) Ltd 1976 (2) SA 856 (W).

41. In its judgment the *court a quo* had found that no real dispute was raised on behalf of the first appellant in respect of the respondents claim that it expended an amount of R 6 360 014.00 on the upgrading of the property which the first appellant sought to purchase. In this regard Dr. Botha conceded that this amount however could not have been more than R 4.5 million. It is on this basis that the *court a quo* had found that this concession clearly indicates an indebtedness to the respondents which would have resulted in the respondents having the required *locus standi* to apply for the liquidation of the appellant. It is on this basis that the *court a quo* had further found that the first appellant was factually insolvent.

42. The *court a quo* in its judgment further held the view that in the circumstances of the facts of the case before it, that it would also be just and equitable that the first appellant be finally wound-up. This was premised upon the fact that the relationship between the respondents and the first appellant had broken down irretrievably.

43. From the record it appeared that the relationship between the first appellant and the second respondent originated from an alleged agreement that the second respondent would acquire a 90% shareholding in the first appellant. On that premise, the respondents expended the amounts in

question. The first appellant breached its obligations in this regard, by initially failing to transfer the shares and later by refusing to do so. The respondents have in my view clearly demonstrated that the version by the first appellant in respect of the relationship with the respondents, was untenable and made no commercial sense and stood to be rejected.

44.This court could find no criticism to be levelled at the reasoning employed by the *court a quo.* These reasons were comprehensive, detailed and properly motivated.

45. For the above reasons the appeal on the liquidation application cannot succeed and falls to be dismissed with costs, including the costs resulting from the employment of senior counsel.

Costs on the Delinquency Appeal -Case No: 45201/2018

46. In respect of the merits of the second delinquency appeal (Case No: 45201/2018, the ground raised was that the court erred in ordering Jacaranda Haven to pay the costs of the dispute between individuals without it being a party to the case and in breach of the normal rule that costs will follow the

event, in circumstances such as the present where the application was abandoned.

47. In its judgment the *court a quo* set out the basis upon which it found that Jacaranda Haven should be ordered to pay the costs for the abandoned application. In paragraph 7.10 the *court quo* found that as Jacaranda Haven is the actual entity about whose control the purported removal turned and whose liquidation resulted in the application not being proceeded with and in exercising its discretion on costs, the *court a quo* considered it fair for Jacaranda Haven to be ordered to pay the costs.[22]

48. On point, the argument advanced by the appellants was to the effect that the delinquency application was abandoned by Mr. Prinsloo Jnr. The application having been abandoned by him had thus become moot, save for the issue of costs and at best the *court a quo*, should have ordered Mr. Prinsloo Jnr. to pay the costs.

49. In contrast the argument advanced by the respondents essentially focused on how the removal of Mr. Prinsloo Jnr as director had occurred and that such

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[22] Judgment Court a quo para 7.10 Record 1439.

removal was in clear contravention of the provisions of section 71 of the Companies Act 2008.

50. Where an application is not being proceeded with and costs have been incurred it follows that the party responsible for such withdrawal or abandonment of the application should be ordered to pay the costs occasioned by such withdrawal or abandonment. A court would only detract from this position if facts are placed before a court that warrants such departure from this rule of practice.

51. To the matter at hand it matters not who stood to benefit by such abandonment of the application as this seems to be the focus of the *court a quo*. The party who was responsible for the abandonment was Mr. Prinsloo Jnr and at the very least he ought to have been ordered to pay the costs occasioned by the abandonment of his application. Jacaranda Haven was never a party these proceedings and in my view no costs order could have been granted against a party that was not before the court.

52. The *court a quo* having ordered Jacaranda Haven to pay the costs of the abandoned application, I am of the view that the *court a quo* erred in ordering Jacaranda Haven to pay the costs of the abandoned delinquency application

and the costs order that was granted stands to be set aside. It then must follow that in respect of this second delinquency appeal, the appeal must succeed.

ORDER:

53. In the result I propose the following order:

53.1. In respect of the Application to Receive Further Evidence, the application is refused with costs, including costs consequent on the employment of senior counsel.

53.2 In respect of the Liquidation Appeal, the appeal is dismissed with costs, including costs of senior counsel.

53.3 The final winding-up of the First Appellant is confirmed.

53.4 In respect of the costs of the Delinquency Application, the appeal succeeds with costs consequent upon the employment of senior counsel.

53.5 The order awarding costs under case number 45201/2018 is set aside and substituted with the following order:

"No order as to costs"

C.J COLLIS
JUDGE OF THE HIGH COURT

C.J VAN DER WESTHUIZEN
JUDGE OF THE HIGH COURT

P PHAHLANE
JUDGE OF THE HIGH COURT

APPEARANCES AS FOLLOWS:

For the Appellants	: Adv. P F Louw SC
Instructed by	:KOKINIS INC
	:C/O COUZYN, HERTZOG & HORAK
For the Respondent	:Adv. S D Wagner SC
Instructed by	:COETZER & PARTNERS
Date of Hearing	:27 July 2022
Date of Judgment	:07 March 2023