

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION,
PRETORIA

1.REPORTABLE: **NO**/YES
2.OF INTEREST TO OTHER JUDGES: **NO**/YES
3.REVISED.

.....**01 May 2023**
SIGNATURE**DATE**

CASE NO: 55256/2021

In the matter of:

DEZZO EQUIPMENT (PTY) LTD
APPLICANT
(Registration No: 2001/000819/07)

And

MODIKWA PLATINUM MINES PARTNERSHIP
(For the sequestration of a partnership)

First RESPONDENT

AFRICAN RAINBOW MINERALS MINING
CONSORTIUM LIMITED
(Registration No: 2001/001997/06)

Second RESPONDENT

RUSTENBURG PLATINUM MINES LTD
(Registration number: 1931/003380/06)

Third RESPONDENT

CASE NO. 58382/2021

DEZZO EQUIPMENT (PTY) LTD

APPLICANT

(Registration No: 2001/000819/07)

And

**AFRICAN RAINBOW MINERALS MINING
CONSORTIUM LIMITED
(Registration No. 2001/001997/06)**

RESPONDENT

CASE NO. 58997/2021

**DEZZO EQUIPMENT (PTY) LTD
APPLICANT
(Registration No: 2001/000819/07)**

And

**RUSTENBURG PLATINUM MINES LTD
(Registration number: 1931/003380/06)**

RESPONDENT

JUDGEMENT

**THIS JUDGEMENT HAS BEEN HANDED DOWN REMOTELY AND SHALL BE
CIRCULATED TO THE PARTIES BY WAY OF E- MAIL / UPLOADING ON
CASELINES. ITS DATE OF HAND DOWN SHALL BE DEEMED TO BE 1 MAY 2023**

Bam NN J

A. Introduction

1. The applicant, Dezzo Equipment (Pty) Ltd (Dezzo) brought three separate but interrelated applications. With the first application¹, Dezzo seeks to sequester the estate of a partnership known as Modikwa Platinum Mines (Modikwa) on the basis that the partnership is both factually and commercially insolvent. The partners in Modikwa are African Rainbow Minerals Mining Consortium Ltd (ARM) and Rustenburg Platinum Mines Ltd (Rustenburg). Dezzo, relying on the provisions of Section 13 of the Insolvency Act², brought the second and third applications to liquidate ARM³ and Rustenburg⁴, respectively, on the basis that the two public companies are commercially insolvent. The respondents filed a consolidated response opposing the relief sought by Dezzo against all three entities together with individual responses in which they raised defences germane to their status as incorporated partners.
2. The broad thrust of the respondents' opposition may be summarised as: Firstly, the debt on which Dezzo relies as a creditor is disputed on *bona fide* and reasonable grounds. Secondly, the written agreement between Dezzo and Modikwa sets out a regime for dispute resolution and for the latter to seek information to substantiate Dezzo's invoices; accordingly, until such time that Dezzo had provided the requested information, it was inappropriate to institute the present legal proceedings without following the dispute resolution mechanism agreed to by the parties. The respondents deny that they are insolvent. They also say the application was

1 Case 55256/2021.

2 Act 24 of 1936.

3 Case 58382/2021.

4 Case 58997/2021.

instituted for an ulterior motive, *to wit*, enforce a debt that is disputed on *bona fide* and reasonable grounds. The demands made upon the second and third respondents are ill-founded and were merely issued to create a basis for the liquidation of the two partners, say the respondents, and finally, on behalf of the second and third respondents, it is submitted that the applications for liquidation are incompetent as the partnership is in extant and trading.

3. The respondents ask that all three applications be dismissed with punitive costs along with costs *de bonis propriis* against Dezzo's attorneys, based on certain material which I canvass later in the judgement. In my assessment of the entire matter, it may not be necessary to determine all the issues raised by the parties, for the reasons appearing in this judgement. I start with an introduction of the parties followed by a brief statement of the common cause facts.

The parties

4. Dezzo (Pty) Ltd is a private company duly registered in terms of the Company laws of South Africa. Its registered office is situated in Kempton Park, Gauteng. The first respondent, Modikwa Platinum Mine, is an unincorporated joint venture between Rustenburg Platinum Mines Limited and ARM Consortium Limited in terms of a Joint Venture Agreement executed in 2002. The first respondent's chosen *domicilium et executandi* is set out in the papers as Rosebank, Gauteng. The second and third respondents are public companies incorporated in terms of the company laws of

South Africa. The second respondent's registered address is set out as Sandton, Gauteng, while the third respondent's is located in Rosebank, Gauteng. Before I look into the background, I record that the applicant and the respondents refer to Modikwa as a partnership and a joint venture respectively. In my view, nothing turns on the characterisation

Background

5. Dezzo is in the business of supplying and providing maintenance of certain earth moving equipment described in the papers as Manitou equipment. In 2013, Dezzo and Modikwa, the latter represented by Rustenburg, entered into a written agreement for the provision of maintenance services and incidental work (the agreement). The agreement commenced on 1 August 2014 and terminated on 31 March 2021 by effluxion of time. At that point, according to Dezzo, Modikwa owed an amount of approximately R 13 million. After termination of the agreement and up to about July 2021, the applicant continued to render services as and when requested by Modikwa. During the same period, various payments were made, whittling the balance owed to Dezzo to R 4 691 252.

6. While the parties continued to work with each other, the record shows that from early April up until mid-August 2021, Dezzo's and Modikwa's back offices were engaged in a lengthy exchange of e-mails. The exchange was between Ms Chantel Baxter (Baxter) of Dezzo and some employees of Modikwa. The essence of Baxter's communication may be characterised as a plea for payment of unpaid invoices and

that of Modikwa as a call for information to substantiate various items on a large number of invoices. Some progress appears to have been made by the parties as can be seen in some emails, but the calls for further information to substantiate invoices continued to grow. Invoices going as far back as 2019 can be seen in the emails with the majority of invoices having been issued during 2020 and 2021.

7. The exchanges continued. As Modikwa continued to call for information, Dezzo appears to have been going through serious financial strain as can be seen from the various emails from Baxter, in particular the one sent on 1 May 2021, at 10h45 directed to, *inter alia*, Evelinah Sigacwi and Antoinette Scheepers of Modikwa. The email is titled, 'unpaid account' and it reads:

'..Please can we have this sorted asap, as you are aware, we had to pay the retrenchments of our 29 staff and all payment terms were revoked by our suppliers....'

8. On about 16 August 2021, Andre Burger (Burger) of Bossart HPO, an entity apparently assisting Modikwa, addressed a letter to Baxter with the heading, 'Dezzo equipment unpaid invoices reconciliation'. The letter, marked final request, had several pages attached to it, in which various invoice numbers and amounts were listed. It called for information from Dezzo and ended with a caveat to the effect that:

'...all queries not answered by Dezzo within the stipulated timeframe in terms of the supply of the required supporting documentation requested or specific motivation with supporting documentation and/or correspondence will be regarded as a voided matter and will be closed.' (copied as is)

9. Dezzo had had enough. On 31 August 2021, its attorneys issued letters of demand in terms of Section 345 (1) (a) of the Companies Act⁵, to both ARM and Rustenburg. The record shows that on 3 September, one Pieter Coetzee (Coetzee) with the title of Group Executive, Legal Head, African Rainbow Minerals, wrote to Dezzo's attorneys and acknowledged receipt of the letters on behalf of ARM and Rustenburg. The letter of acknowledgement was followed by several written exchanges between Coetzee and Dezzo's attorneys. Shortly thereafter, on 22 November 2021, Dezzo issued the three applications to sequestrate the partnership and liquidate the two partners, ARM and Rustenburg. In December 2021 the respondents' attorneys wrote to Dezzo's inviting them to withdraw the applications. They asserted without equivocation that the debt is denied on *bona fide* and reasonable grounds; that whatever the issue was, it was between Dezzo and its client, Modikwa; and with reference to the arbitration clause in the agreement, that it was inappropriate of Dezzo to embark on litigation. The letter challenged the basis of the demands sent to the two partners and denied that the two public companies were insolvent.

B. Merits

10. On the question of sequestration, Dezzo went about its case by establishing its status as a creditor and that the first respondent is a partnership. Without conceding that there is a dispute over the large amount remaining of R 4 934 378.88, it confined its case to the smaller and undisputed amount of R 53 374.00. Thereafter, based on its analysis of various pieces of accounting information relied upon by the respondents, it pointed out that Modikwa owns no immovable property, has no bank

⁵ Act 61 of 1973.

account of its own, owns no mining right, has no employees of its own, has no plant and equipment and whatever plant and equipment they have is held under other parties' names with no real rights to the partnership. Modikwa, according to the applicant, incurs debt by engaging contractors and has neither signed off financial statements nor evidence from an auditor that it is solvent. It added that the excuses for non-payment do not bear scrutiny, all of which lead to the inexorable conclusion that Modikwa is insolvent. It thereafter dealt with the question of advantage to creditors and concluded that there is reason to believe that there will be a benefit to the creditors.

11. As to the liquidation applications, Dezzo referred to the demands in terms of Section 345 (1) (a) of the Companies Act, and recorded that neither of the partners had responded thereto nor had any partner undertaken to pay the partnership's debts. On the challenge raised by the respondents that Dezzo had failed to provide information to substantiate various invoices, Dezzo, placing reliance on the terms of the agreement, said that up until the time the contract terminated, it had never been notified, within the requisite ten days, that any of its invoices had been rejected, nor had it been asked to provide information to substantiate or justify *ex post facto* any item in its invoices. On the failure to utilise the dispute resolution mechanisms agreed to by the parties, Dezzo said the two major obstacles facing the respondents are that there was and is no dispute, at least around the smaller amount of R 53 374. And, given the first respondent's claims of existence of a dispute, it is the first respondent that failed to issue the notice of dispute in terms of Clause 24.2 of

the agreement. I propose to first dispose of the defence dealing with the referral to arbitration. The respondents had coupled this defence with that of the request for information. I do likewise in my analysis.

Relevant terms of the Services agreement

12. The following clauses of the agreement are pertinent to the resolution of the issues of information and referral to arbitration:

Clause 13.3: Other information: The supplier must provide any information required to substantiate an invoice if reasonably required by the Company representative. If the supplier fails to provide the information requested, the invoice will be rejected.

Clause 13.5 Review of Payment: The company representative must, within 10 days of receiving a valid invoice or the additional information (if any) requested under ...13.3 (a) approve the invoice; or (b) advise the supplier if all or any part of the invoice is not approved.

Clause 13.6: Payment by the company: Subject to the approval of the invoice by the company representative, the company must pay the supplier at the time specified in the agreement particulars.

Clause 24.1: Resolution of Disputes: A party may not commence court proceedings (except.. not relevant) in respect of any dispute under the agreement unless it has complied with clause 24.

Clause 24.2: If a party considers that a dispute exists in connection with the agreement, that party may give the other party notice detailing the nature of the dispute (Notice of Dispute).

Clause 24.3: Meeting of chief executive officers: Within 10 business days after the service of a notice of dispute: (a) the chief executive officers of the parties or (b) delegates of the chief executive officers who have not been directly involved in the dispute management of the agreement must confer at least once to attempt to resolve the dispute.

Clause 24.4: Arbitration: If a dispute has not been settled by the chief executive officers or their delegates 30 (thirty) business days after notice is served... then the dispute must be referred to and settled by an arbitrator in accordance with the commercial arbitration rules of the Arbitration Foundation of South Africa (AFSA)

Clause 24.6: Arbitrator's decision: The arbitrator's decision is final and binding on the parties who must give effect to the decision immediately.

(i) The information issue

13. The respondents say that Modikwa had availed itself of its rights under the services agreement and requested certain information from Dezzo. Whilst the parties were busy engaging with each other, Dezzo responded by issuing the letters of demand. It is true that the parties had exchanged e-mails from about early April, according to the record. Clauses 13.3, 13.5 and 13.6 must be read together in the context of the remainder of the clauses of the agreement. From this, a clear picture emerges that the parties had intended that, upon the supplier issuing its invoice, it must be paid within a specified time.

14. On the question of verification or validation of invoices, Modikwa had, according to the agreement, TEN (10) days from date of receipt to carry out checks or verifications and, where necessary, call for such information as may be required, with the proviso that the supplier, Dezzo, must be advised within a period of 10 days where a particular invoice has not been rejected. The intention clearly was to ensure that billing problems and requests for information on invoices would be dealt with as soon as reasonably possible, and not left till the end of the agreement. Counsel for

Dezzo was at pains to highlight that all the information reasonably necessary had long been provided to Modikwa and there was no reason for them to withhold payment.

15. The question to be answered is whether it is permissible in terms of the agreement for Modikwa to call for information, during April 2021, to substantiate invoices going as far back as 2019 and 2020? In the combined heads of argument filed on behalf of the respondents, Modikwa suddenly claimed it may not be possible to quantify what is owed to Dezzo until it had reconciled all the information going back to inception of the agreement and would therefore require various pieces of information from Dezzo. To the extent that the requested information pertained to invoices that had not been rejected within the requisite ten days from date of receipt, the right claimed by Modikwa is at best questionable.

(ii) The arbitration clause

16. Based on the parties' heads of agreement, each side says it was the other that had to issue the notice of dispute referred to in the services agreement. I start with Dezzo's case. Dezzo says that: (a) there was and is no dispute, at least on the reduced amount of approximately R 53 000, thus there was nothing to refer to arbitration; (b) Dezzo further says that Modikwa's reliance on the arbitration clause was misplaced as the clause covers, at best, only some of Dezzo's invoices which were generated during the existence of the agreement, while the balance of invoices came after termination of the agreement; (c) Dezzo also referred to statutory

prohibition, namely section 2 of the Arbitration Act⁶, against referring to arbitration matters involving status and stated that it was left with one logical avenue to pursue Modikwa's indebtedness; that is, the current applications before court.

17. I agree with Dezzo on the first contention that the trail of emails exchanged between Baxter and the employees of Modikwa during April to July 2021⁷ evidence no dispute at all, but a quest for various pieces of information. Dezzo's stance is informed in this regard by the words of Didcott J as quoted in *Telecall (Pty) Ltd v Logan* (60/98) [2000] ZASCA 8; 2000 (2) SA 782 (SCA) (23 March 2000), where the learned judge remarked:

'Arbitration is a method for resolving disputes. That alone is its object, and its justification. A disputed claim is sent to arbitration so that the dispute which it involves may be determined. No purpose can be served, on the other hand, by arbitration on an undisputed claim. There is then nothing for the arbitrator to decide...'

18. Having said that, I do not accept that Burger's letter of 16 August 2021 raised no dispute. Of course it did. The caveat appearing at the end of that letter placed the applicant's entitlement to payment in dispute, regardless of whether the agreement allowed Modikwa to conduct itself in the manner manifested in Burger's email. It was that letter too which spurred Dezzo into action. That action was the consultation of its attorneys resulting in the issuing of the two demands followed by the three applications currently before court. At the early stages of this litigation, in December 2021, the respondents' attorneys denied that the debt was owed to Dezzo. Most

⁶ Act 42 of 1965.

⁷ Caselines Pages 852 - A949 (Answering Affidavit 13 to AA20).

importantly, they drew to Dezzo's attention the arbitration clause in the agreement between Dezzo and Modikwa.

19. Briefly, the dispute resolution clause agreed to by the parties says that a party may not commence court proceedings in respect of any dispute under the agreement unless it has complied with Clause 24. There is an exception which is not relevant to the particular circumstances of this case. I also accept that a party to an agreement to subject disputes to arbitration, may, on good cause shown, apply to court that a dispute not be referred to arbitration but that is not what we are dealing with in the present case.

20. With regard to Dezzo's submission that the arbitration clause covered only a part of Modikwa's indebtedness and not the debt incurred post termination of the agreement, I have to say, I am not in agreement with Dezzo. Whether the invoices placed in issue stemmed from the period before 31 March 2021 or after, these are all matters connected to the contract, which the parties agreed to refer to arbitration. If my study of the invoice numbers and dates as set out in the parties' affidavits is accurate, simply because one invoice falls after 31 March 2021, did not give Dezzo the right to ignore the arbitration clause. Even if my reading of the invoices is wrong, Dezzo's parsing of the arbitration clause culminating in the view that the clause was of no use because some of Modikwa's indebtedness arose before and some after termination of the agreement is mistaken. I must also add that I do not understand Dezzo's submission to mean that the arbitration clause also terminated with the

services agreement at the end of March 2021 for that would be incorrect. My reasoning is fortified by the comments of the court in *Atteridgeville Town Council and Another v Costa Livanos t/a Livanos Brothers Electrical*, where it was said:

‘...The real object of that clause is to provide suitable machinery for the settlement of disputes arising out of or in relation to the contract, and as that is its object it is reasonable to infer that both parties to the contract intended that the clause should operate even after the performance of the contract is at an end. If, for example, this contract had come to an end on a date stipulated for its termination, I do not think that it could have been contended successfully that the arbitration clause was no longer operative.’⁸

21. In *Zhongji Development Construction Engineering Company Limited v Kamoto Copper Company Sarl*, the court explains the approach to the construction of an arbitration clause:

“[6] In approaching the question of construction, it is therefore necessary to inquire into the purpose of the arbitration clause. As to this, I think there can be no doubt. The parties have entered into a relationship, an agreement or what is alleged to be an agreement or what appears on its face to be an agreement, which may give rise to disputes. They want those disputes decided by a tribunal which they have chosen, commonly on the grounds of such matters as its neutrality, expertise and privacy, the availability of legal services at the seat of the arbitration and the unobtrusive efficiency of its supervisory law. Particularly in the case of international contracts, they want a quick and efficient adjudication and do not want to take the risks of delay and, in too many cases, partiality, in proceedings before a national jurisdiction.

[7] If one accepts that this is the purpose of an arbitration clause, its construction must be influenced by whether the parties, as rational businessmen, were likely to have intended that only some of the questions arising out of their relationship were to be submitted to arbitration and others were to be decided by national courts.... If, as appears to be generally accepted, there is no rational basis upon which businessmen would be likely to wish to have questions of the validity or enforceability of the contract decided by one

⁸ (50/91) [1991] ZASCA 139; 1992 (1) SA 296 (AD); [1992] 1 All SA 274 (A) (27 September 1991).

tribunal and questions about its performance decided by another, one would need to find very clear language before deciding that they must have had such an intention.⁹

22. In *Lufuno Mphaphuli & Associates (Pty) Ltd v Andrews and Another*, it was said:

‘The decision to refer a dispute to private arbitration is a choice which, as long as it is voluntarily made, should be respected by the courts. Parties are entitled to determine what matters are to be arbitrated, the identity of the arbitrator, the process to be followed in the arbitration, whether there will be an appeal to an arbitral appeal body and other similar matters.’¹⁰

23. Dezzo and Modikwa chose that their disputes will be resolved by means of arbitration where their chief executives or their delegates have failed to do so and that the arbitrator’s decision will be final and binding, requiring the parties to give effect thereto. That the courts have a duty to respect the parties’ wishes as manifested in the agreement is underscored in the comments below in *Telcordia Technologies Inc v Telkom SA Ltd*, where Harms JA, as he then was, explains:

‘As international trade has expanded in recent decades, so too has the use of international arbitration to resolve disputes arising in the course of that trade. The controversies that international arbitral institutions are called upon to resolve have increased in diversity as well as in complexity. Yet the potential of these tribunals for efficient disposition of legal disagreements arising from commercial relations has not yet been tested. If they are to take a central place in the international legal order, national courts will need to “shake off the old judicial hostility to arbitration”, *Kulukundis Shipping Co v Amtorg Trading Corp* 126 F2D 1978, 985 (CA2 1942), and also their customary and understandable unwillingness to cede jurisdiction of a claim arising under domestic law to a foreign or transnational tribunal. To this extent, at least, it will be necessary for national courts to subordinate domestic notions of arbitrability to the international policy favouring commercial arbitration.’¹¹

⁹ *Zhongji Development Construction Engineering Company Limited v Kamoto Copper Company Sarl* (421/2013) [2014] ZASCA 160; 2015 (1) SA 345 (SCA); [2014] 4 All SA 617 (SCA) (1 October 2014).

¹⁰ (CCT 97/07) [2009] ZACC 6; 2009 (4) SA 529 (CC); 2009 (6) BCLR 527 (CC) (20 March 2009), paragraph 219.

24. *Telcordia* had to do with international trade, but the principle underscored is equally applicable to the present case. The principle has to do with judicial deference to arbitration where the parties have agreed to refer their disputes to arbitration.
25. Finally, as regards Dezzo's response that sequestration and liquidations are status matters and had to be pursued through the courts, Dezzo chose to institute the sequestration and liquidation proceedings and I must say there is a material dispute of fact on the issues Dezzo relies on to demonstrate the insolvency of all three entities. I expatiate further on the last mentioned issue under the heading dealing with insolvency of the three entities. For now, I propose to concentrate on the sequestration of Modikwa. The points relied upon by Dezzo to demonstrate what it calls Modikwa's factual insolvency have to do with Modikwa not having a bank account of its own; the fact of Modikwa having debt estimated at about R 924 million; that it had no staff, and no property, plant and equipment.
26. The reference to the last mentioned matters mentioned in paragraph 25 came across as though Dezzo is conducting due diligence on Modikwa after the fact. Apart from the fact that these matters demonstrate no insolvency, in the absence of information that Modikwa was structured differently at the start of the parties' relationship, Dezzo chose to go into the relationship with Modikwa with its affairs structured the way they are and, with Modikwa not having a bank account, it nevertheless ensured that Dezzo was paid tens of millions of rand if not hundreds.

11 (26/05) [2006] ZASCA 112; [2006] 139 SCA (RSA); 2007 (3) SA 266 (SCA); [2007] 2 All SA 243 (SCA); 2007 (5) BCLR 503 (SCA) (22 November 2006), paragraph 5.

The partners of Modikwa made a choice to structure Modikwa the way it is. That cannot be a basis for claims of insolvency at all in my view. In the letter dated 22 December 2021 from the respondents' attorneys, they question why Dezzo did not utilise the ordinary mechanism to recover debt, which is action or application proceedings, however, this was still not sufficient to persuade Dezzo to change its course. Dezzo was incorrect in ignoring the arbitration clause. It should have followed the dispute resolution clause in the agreement.

C. The propriety or otherwise of the liquidation applications

27. In response to the respondents' criticism that the liquidation applications are incompetent, given that the partnership is extant and trading, Dezzo responded that it was guided by the provisions of Section 13 subsections (1) and (3) of the Insolvency Act. It further added that whatever trading may be taking place is being carried under insolvent circumstances. Section 13 reads:

'(1) If the court sequesters the estate of a partnership (whether provisionally or finally or on acceptance of surrender), it shall simultaneously sequester the estate of every member of that partnership other... Provided that if a partner has undertaken to pay the debts of the partnership within a period determined by the court and has given security for such payment to the satisfaction of the registrar, the separate estate of that partner shall not be sequestered....

(3) The surrender of the estate of a partnership shall not be accepted unless and until the court is satisfied that petitions have been presented for the acceptance of the surrender of the separate estates of all the partners in the partnership concerned, and that in this regard the requirements of section four have been observed...'

28. In *Commissioner for the South African Revenue Service v Hawker Air Services (Pty) Ltd*, the *Commissioner* had applied only for the sequestration of the partnership and

not the liquidation of the partner, Manco. The court, holding that there was nothing incompetent about sequestrating the partnership alone in circumstances where there was a legal bar to sequestrating the partners, said: [NB: *The quotation is long but it is warranted in the context of this case.*]

[26] Does s 13, by requiring that the court 'shall simultaneously sequester' the estates of all the partners, render impossible a partnership sequestration where not all the members can be sequestrated? In *Partridge v Harrison and Harrison*, Greenberg JP held No. There, the estate of one of the partners could not be sequestrated because of a military service moratorium. Greenberg JP held that the partnership could nevertheless be sequestrated. He found that s.13, though imperatively expressed, must be limited to cases where the estates of the partners can be sequestrated, and that it does not apply where there is a lawful bar to sequestration. He said:

'Notwithstanding that this is couched in imperative language, there are cases where it could not be carried out. For instance if a partner has been sequestrated and has not acquired an estate as against his trustee so as to allow a second sequestration, the Court could do no more than to sequester the partnership estate and the estates of the remaining partners. The same would probably be the case if one of the partners was a limited company. It would appear therefore that the section must at least be limited to cases where the estates of the partners can be sequestrated and does not apply where there is a lawful bar to such sequestration.'

Greenberg JP also stated that the proviso to s 13 'shows that it was contemplated that sequestration of the private estates does not follow automatically in all cases upon a sequestration of the partnership estate'.

[27]...That the concursus the statute envisages is incomplete, and that it would operate incompletely where a partnership sequestration excludes the estate of one of the partners is correct. Yet the criticism is not persuasive. It proceeds on the premise that a complete concursus is imperative, when the exceptions s 13 itself creates show that this is not so. The interpretation favoured by Greenberg JP and the decisions that followed him achieve a pragmatic, if partial, result, which is compatible with the language of s 13 when interpreted, as Greenberg JP did, as requiring the sequestration of only those partners whose estates are capable of sequestration. Even though this means that in such situations the statutory concursus will be incomplete, it seems to me to offer a more

practicable and coherent approach to the difficulties that would result if s 13 were interpreted to render sequestration of a partnership impossible where one of the partners cannot be sequestrated. [28] I therefore conclude that the interpretation adopted in the Partridge case is preferable and that since ManCo is a company which is not capable of being sequestrated, s 13 did not require its sequestration. It follows that the application for the partnership's sequestration is not defective.¹²

29. To summarise, where there is a legal bar to sequestrating the partners, such as in this case, it is permissible to sequester the partnership alone and that is exactly what the Commissioner did in Hawker. Dezzo is mistaken in its conclusion when it says it was enjoined to liquidate the estates of the individual partners, based on section 13. On the authority in *Commissioner v Hawkers*, it did not need to. The conclusion I reach should not be construed as endorsing the appropriateness of sequestration proceedings against Modikwa. I have, in any event, already concluded that it was not appropriate of Dezzo to ignore the arbitration clause and launch the three applications.

D. The question of solvency of the respondents

30. Strictly speaking, the question of solvency or insolvency of the respondents does not even arise in this case and need not even be addressed given my conclusions on the arbitration clause. But I need to point out a few things to demonstrate the flaw in Dezzo's approach. In terms of the Insolvency Act, Modikwa is a debtor. A debtor is described as:

12 [2006] SCA 55 (RSA), paragraph 26.

“debtor’ , in connection with the sequestration of the debtor's estate, means a person or a partnership or the estate of a person or partnership which is a debtor in the usual sense of the word, except a body corporate or a company...’

31. In terms of section 8, a debtor commits an act of insolvency if:-

(a) if he leaves the Republic or being out of the Republic remains absent therefrom, or departs from his dwelling or otherwise absents himself, with intent by so doing to evade or delay the payment of his debts;

(b) if a court has given judgment against him and he fails, upon the demand of the officer whose duty it is to execute that judgment, to satisfy it or to indicate to that officer disposable property sufficient to satisfy it...;

(c) if he makes or attempts to make any disposition of any of his property which has or would have the effect of prejudicing his creditors or of preferring one creditor above another;

(d) if he removes or attempts to remove any of his property with intent to prejudice his creditors or to prefer one creditor above another;

(e) if he makes or offers to make any arrangement with any of his creditors for releasing him wholly or partially from his debts;

(g) if, after having published a notice of surrender of his estate which has not lapsed or been withdrawn in terms of section six or seven, he fails to comply with the requirements of subsection (3) of section ...

(h) if he gives notice in writing to any one of his creditors that he is unable to pay any of his debts;

32. The submissions made by the parties on the question of solvency or otherwise of Modikwa were wide and varied. Despite the audit opinions in the annual reports containing the consolidated financial statements of the groups to which ARM and Rustenburg each belong, that the entities were well able to continue as going concerns and are solvent, Dezzo, chose not to utilise the acts of insolvency set out in Section 8 and instead relied on its own analysis of the accounting information,

including the detail regarding Modikwa that it has no bank account whilst having debt of about R 924 million. The respondents as I had said, refuted Dezzo's claims. Given that these are motion proceedings, and taking guidance from the well-established *Plascon Evans*¹³ rule, this court is unable to overcome the material disputes of fact around the solvency or otherwise of Modikwa. In any event, the question need not even be resolved, in light of my conclusions that Dezzo was not entitled to ignore the arbitration clause.

E. Conclusion and discussion on costs

33. Based on the reasoning in this judgement, Dezzo's applications to sequester and liquidate the first respondent and the second and third respondents, respectively, must fail. Dezzo was obliged to adhere to the arbitration clause to overcome the impasse that had arisen concerning the non-payment of its invoices. There remains the question of costs sought by the respondents based on what they claim was an ulterior motive on the part of Dezzo, namely, to extract payment on a debt disputed on *bona fide* and reasonable grounds, on the basis that by giving publicity to its claims, the respondents would bow down to pressure and pay. The suggestion is that Dezzo wanted to embarrass the respondents. There is also the reference to the falsehoods and failure to heed the various warnings sounded in the letter issued by the respondents' attorneys in December 2021. Dezzo says in its founding affidavit

¹³ *Plascon-Evans Paints (TVL) Ltd. v Van Riebeck Paints (Pty) Ltd.* (53/84) [1984] ZASCA 51; [1984] 2 All SA 366 (A); 1984 (3) SA 623; 1984 (3) SA 620 (21 May 1984) The rule says: where in proceedings on notice of motion disputes of fact have arisen on the affidavits, a final order, whether it be an interdict or some other form of relief, may be granted if those facts averred in the applicant's affidavits which have been admitted by the respondent, together with the facts alleged by the respondent, justify such an order.

there had been no reply to the Section 345 (1) (a) demands, when there were, in fact, replies. Nonetheless, the applicant opposes the calls for punitive costs.

34. If one carefully peruses the record, the statements that Dezzo had an ulterior motive in launching these proceedings and wanting to embarrass the respondents does not find support. Dezzo wanted its invoices paid. It was undergoing severe financial strain. If the e-mails exchanged by Modikwa and Dezzo are anything to go by, Dezzo had retrenched employees and had to pay retrenchment packages. These are statutory obligations that Dezzo was confronted with. Its payment terms had been revoked by its suppliers. The economic conditions at the time, fuelled by COVID-19 cannot be ignored in assessing Dezzo's conduct. It was frustrated by Modikwa's conduct. No matter how many times Baxter sent the various pieces of information sought, the calls for more information from Modikwa were unrelenting. It appears that someone or some people in Modikwa had not done their work and only woke up towards the end of the contract and then the race to reconcile the invoices began with undue pressure being placed on Dezzo to provide information going back to two or three years ago. This was simply not right. Modikwa was unreasonable.

35. The failure on the part of Modikwa to timeously reject the invoices or seek the necessary information to substantiate whatever line items on the invoices should not have been visited on Dezzo. The e-mails record numerous pleas by Baxter calling for a simple answer as to whether Modikwa was going to be late in making its payment to Dezzo for the month of April; those calls were simply never responded

to. Instead more and more information was called for, at the end of the agreement. Burger's letter simply brought matters to a head. The statements about availing the letters of demand to the JSE in Dezzo's letters of demand cannot be justified; that threat was unwarranted. Dezzo also made an error when it said there was no reply to the demands. Having said, I am not persuaded that Dezzo wanted anything other than payment of its invoices. The record refutes any suggestions of malice or reprehensible conduct on the part of Dezzo. In fact, Dezzo volunteered to assist in some investigation that had been suggested by the respondents. Follow up emails from Baxter enquiring on the respondents' plans in pursuing such investigation were not answered. In *Chithi and Others; In re: Luhlwini Mchunu Community v Hancock and Others*, the SCA said:

'... In *Multi Links Telecommunications Ltd v Africa Prepaid Services Nigeria Ltd 2014* (3) SA (GP), the court remarked (para 34):

'[A]ttorneys and counsel are expected to pursue their clients' rights and interest fearlessly and vigorously without undue regard for their personal convenience. In that context they ought not to be intimidated by their opponent or even, I may add, by the Court. Legal practitioners must present their case fearlessly and vigorously, but always within the context of set ethical rules that pertain to them. ...'¹⁴

36. In *Plastic Converters Association of South Africa (PCASA) v National Union of Mineworkers Union of South Africa and Others*:

'... the appellant prayed for costs on an attorney and own client scale against the respondents jointly and severally, the one paying the others to be absolved, in the event of it being successful. The motivation for such a special award is based on the submission that by pushing the appellant to re-join the bargaining council and later obstructing the promised establishment of the PNF as an exclusive collective bargaining forum for the

¹⁴ (Case No. 423/2020) [2021] ZASCA 123 (23 September 2021), paragraph 22.

plastic industry, the respondents acted in bad faith that falls a little short of an industrial fraud. I am not convinced that a special award of costs is warranted. The scale of attorney and client is an extra-ordinary one which should be reserved for cases where it can be found that a litigant conducted itself in a clear and indubitably vexatious and reprehensible conduct. Such an award is exceptional and is intended to be very punitive and indicative of extreme opprobrium.¹⁵

37. Finally, in *Public Protector v South African Reserve Bank*, it was said:

‘...In any event, whether the punitive aspect of the costs order was challenged separately to the personal aspect, or jointly with the personal costs order, the five grounds on which the appeal is based do not hold any water, as set out in detail above...Regard must be had to the higher standard of conduct expected from public officials, and the number of falsehoods that have been put forward by the Public Protector in the course of the litigation. This conduct included the numerous “misstatements”, like misrepresenting, under oath, her reliance on evidence of economic experts in drawing up the report, failing to provide a complete record, ordered and indexed, so that the contents thereof could be determined, failing to disclose material meetings and then obfuscating the reasons for them and the reasons why they had not been previously disclosed, and generally failing to provide the court with a frank and candid account of her conduct in preparing the report. The punitive aspect of the costs order therefore stands.’¹⁶

38. I do not consider that Dezzo was malicious, vexatious, or had conducted itself in a manner that can be said to be unethical in bringing and during the course of these proceedings. At worst, it may have been misguided in its approach to the arbitration clause. It was pointed out in *Mkhatshwa and Others v Mkhatshwa and Others*¹⁷ that costs are a matter for the court. Clearly, I am vested with a discretion. I have

¹⁵ (JA112/14) [2016] ZALAC 39; (2016) 37 ILJ 2815 (LAC) (6 July 2016), paragraphs 46-47.

¹⁶ (CCT107/18) [2019] ZACC 29; 2019 (9) BCLR 1113 (CC); 2019 (6) SA 253 (CC) (22 July 2019), paragraphs 236-237.

¹⁷ (CCT 220/20) [2021] ZACC 15; 2021 (5) SA 447 (CC); 2021 (10) BCLR 1182 (CC) (18 June 2021), paragraphs 17 -26.

considered all the submissions made by the respondents and those of the applicant and I come to the conclusion that punitive costs are unwarranted. As for the costs *de bonis propriis*, that too has no place in the circumstances of this case.

F. Order

39. The application is dismissed with costs. Such costs include the costs of two counsel.

BAM NN

JUDGE OF THE HIGH COURT,

PRETORIA

Appearances:

Applicant's counsel:

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Instructed by: on cases 55256 & 58382

Bowman Gilfillan Inc,

Johannesburg

Case Number 58997

Webber Wentzel,
Johannesburg

Date of Hearing:

17 October 2022

Date of Judgement:

01 May 2023