IN THE HIGH COURT OF SOUTH AFRICA, NORTHERN CAPE DIVISION, KIMBERLEY

Reportable

Case No: 1094/2022

In the matter between:

SHANIE TALJAARD	First Appellant
CURO CONSULTANCY (PTY) (LTD)	Second Appellant
And	
DEON MARIUS BOTHA N.O.	First Respondent
JOCHEN ECKHOFF N.O.	Second Respondent
JOHANNES ZACHARIUS HUMAN MULER N.O.	Third Respondent
FUSI PATRICK RAMPOPORO N.O.	Fourth Respondent
SIMON MALEBO RAMPOPORO N.O.	Fifth Respondent
ANGELENE POOLE N.O.	Sixth Respondent
PHILEMON TATENDA MAWIRE N.O.	Seventh Respondent
And	
SHANIE TALJAARD	First Respondent
CURO CONSULTANCY (PTY) LTD	Second Respondent
THE MASTER OF THE HIGH COURT, KIMBERLEY	Third Respondent

Neutral citation: *Taljaard and Another v Botha N.O. and Others* (Case no. 1094/2022) (25 August 2023)

Heard: 17 July 2023

Delivered: 25 August 2023

Coram: Phatshoane DJP, Williams and Stanton JJ

Judgment

Phatshoane DJP

[1] The first and second appellants, Ms Shanie Taljaard and Curo Consultancy (Pty) Ltd, are on appeal before us against the declaratory order of the court a quo (Mamosebo J) dated 13 December 2022 in favour of the first to the seventh respondents, the liquidators and trustees of Project Multiply (Pty) Ltd, in liquidation, (Project Multiply), Velvetcream 15 (Pty) Ltd, in liquidation (Velvetcream), Merwede Trust (the trust), and the insolvent estate of Carel Aron Van der Merwe, essentially declaring that the liquidators and trustees' powers, as extended in terms of s 386(4)*(a)* to *(i)* of the Companies Act 61 of 1973 (the Companies Act), and ss 18(3) and 73 of the Insolvency Act 24 of 1936 (the insolvency Act), were not suspended pending the outcome of the appellants' application for leave to appeal to the Supreme Court of Appeal (SCA) dated 12 October 2022.

[2] The present appeal was brought on an urgent basis on 19 December 2022 in terms of s 18(4)(ii) of the Superior Courts Act 10 of 2013 (the Act) which accord the appellants an automatic right to appeal to this Court. The appellants did not prosecute their appeal conscientiously and promptly which effectually abated its degree of urgency.

[3] The litigation history leading to this appeal has been set out in some detail in the judgment of Mamosebo J dated 11 October 2022, a precursor to the subsequent proceedings before her which produced the order dated 13 December 2023, which is the subject of this appeal. A revisit of that history is necessary albeit in an abbreviated form.

[4] The boards of Project Multiply and Velvetcream resolved on 20 January 2021 to place the companies under business rescue. These companies, the trust and a certain Mr Carel Van der Merwe operated as a group styled "Merwede Ranching"/ "Merwede Farming", a large-scale sheep farming enterprise. Land and Agricultural Development Bank of South Africa (Landbank), a creditor which enjoyed 95% voting power, rejected the business rescue plan proposed by the business rescue practitioner. The business rescue practitioner brought an application to set aside Landbank's vote. Landbank counter-claimed for an order of winding up of Project Multiply and Velvetcream and the sequestration of the trust. The litigation resulted in an order by agreement between the parties in terms of which the resolution commencing business rescue proceedings was declared a nullity and the business rescue proceedings were terminated. Project Multiply and Velvetcream were placed under provisional liquidation with a return date of 11 October 2022. The application to declare the Landbank's vote inappropriate was withdrawn.

[5] During June 2022 the appellants brought an application (referred to as the main application) in which they sought in Part A, as employees of the insolvents and creditors for the amounts in the order of R10 000 and R160 000, respectively, leave to intervene and join in the liquidation and sequestration applications. In Part B they sought declaratory relief that the individuals and trusts fell to be placed under business rescue and that their exclusions from the protection of the business rescue statutory architecture as contained in chapter 6 of the Companies

Act 71 of 2008 was unconstitutional. In part C they sought the dismissal of the provisional liquidation and the sequestration application. They further urged that the insolvents be placed under business rescue.

[6] In the proceedings referred to in the preceding paragraph Landbank delivered a counter-application in which it sought leave that the main application and the counter-application be disposed of on an urgent basis. Landbank further sought an order dismissing the main application and declaring that the business rescue plan proposed by the first appellant was not achievable. The liquidators and trustees also brought a counter-application conditional upon the success of Landbank's application essentially seeking an order that their powers as provisional liquidators and trustees be extended in terms of s 386(4)*(a)* to *(i)* of the Companies Act and ss 18(3) and 73 of the Insolvency Act including the power to dispose of livestock and or assets necessary in the administration of the insolvent estate and the trust.

[7] The main application and the two counter-applications were heard on 13 September 2022. The appellants abandoned the relief sought in Part A. On 11 October 2022 Mamosebo J handed down judgment in which she made the following order:

"1. The main application be and is hereby dismissed with costs, including the costs consequent upon the employment of counsel where applicable. Such costs to include the costs of 5 August 2022, 2 September 2022 and 8 September 2022.

2. The Fifth, Sixth and Eighth Respondents' powers are extended in terms of section 386(4)(a) to (i) of the Companies Act, 61 of 1973.

3. The Fifth, Sixth and Eighth Respondents are granted leave in their capacities as the joint liquidators of the insolvent company to convene a commission of enquiry into the trade, dealings, affairs and property of Project Multiply (Pty) Ltd (in

liquidation) in terms of the provision of section 417, read with section 418 of the Companies Act, 61 of 1973, to be chaired by the retired Judge Eberhard Bertelsmann who has consented to be so appointed, the same consent has been attached to the Notice of Motion and marked annexure “E”.

4. The costs of the enquiry be borne by the insolvent estate of Project Multiply (Pty) Ltd (in liquidation), including costs of the commissioner, attorney and/or counsel and all other costs and expenses incidental to the enquiry.

5. The Fifth, Seventh and Ninth Respondents’ powers be extended in terms of sections 386(4)(a) to (i) of the Companies Act, 61 of 1973.

6. The Fifth, Seventh and Ninth Respondents are granted leave in their capacities as the joint liquidators of the insolvent to convene a commission of enquiry into the trade, dealings, affairs and property of Velvetcream 15 (Pty) Ltd (in liquidation) in terms of the provisions of section 417, read with section 418 of the Companies Act, 61 of 1973, and to be chaired by retired Judge Eberhard Bertelsmann who has consented to be so appointed, same consent has been attached to the Notice of Motion and marked annexure “E”.

7. The costs of the enquiry be borne by the insolvent estate of Velvetcream 15 (Pty) Ltd (in liquidation), including costs of the commissioner, attorney and/or counsel and all other costs and expenses incidental to the enquiry.

8. The provisional trustees’ powers are extended in terms of section 18(3) and 73 of the Insolvency Act 24 of 1936, in order to have the powers and the duties of a trustee as provided for by the Insolvency Act to bring and defend legal proceedings and to dispose of the livestock and/or other assets necessary in the administration of the insolvent estate, and to appoint legal practitioners to assist them in the investigation and/or administration of the insolvent estate.

9. The costs of this application be costs in the administration of the insolvent company and the insolvent estates."

[8] The appellants sought leave to appeal the whole judgment and order of Mamosebo J on the same date on which the judgment was delivered. The next day, 12 October 2022, Mamosebo J refused leave. They petitioned the Supreme Court of Appeal (SCA) on that date. The return date for the liquidation and sequestration application was set down for 12 October 2022. The winding-up and sequestration applications were separate from the main application and the counter-applications and are not implicated in this appeal. As more fully reflected in the judgment of the court a quo, under attack in this appeal, the appellants' legal representatives absented themselves from those proceedings. It bears emphasis that the insolvents had not filed any opposing affidavits in the winding-up and sequestration proceedings. The court a quo made orders placing the companies in final liquidation and the trust in final sequestration.

[9] Insofar as part of the order of 11 October 2022, which extended the powers of the liquidators and trustees, may potentially have been stymied by the appellants' application for leave to the SCA, the liquidators and trustees brought an urgent application for declaratory relief to the effect that the relief granted in prayers 2 to 9 of the order of 11 October 2022 was not suspended pending the outcome of the application for leave to appeal or the appeal itself. In the alternative, they sought an order for the execution of the relief in prayers 2 to 9 in terms of s 18 of the Act. The urgent application in issue was heard on 24 November 2022 and on 13 December 2022 Mamosebo J made the following order.

"1. It is declared that the orders granted in terms of paragraphs 2-9 of the written judgment of Mamosebo J dated 11 October 2022, are not suspended pending the outcome of the first and second respondent's [the appellants before us]

application for leave to appeal dated 12 October 2022, or appeal as the case may be.

2. Costs in the liquidator and trustees' application are to be costs in the administration of the estate."

[10] It is the order of 13 December 2022 above which triggered the launching of the present appeal in terms of s 18(4)*(ii)* of the Act. To put issues that arise into context s18(1) of the Act provides that unless the court under exceptional circumstances orders otherwise, the operation and execution of a decision which is the subject of an application for leave to appeal or of an appeal, is suspended pending the decision of the application or appeal. In terms of s 18(3) a court may only order operation and execution if the party who applied to the court for such an order, in addition, proves on a balance of probabilities that he or she will suffer irreparable harm if the court does not so order and that the other party will not suffer irreparable harm if the court so orders. Section 18(4) provides that if a court orders otherwise, as contemplated in subsection (1) the court must immediately record its reasons for doing so; the aggrieved party has an automatic right of appeal to the next highest court; the court hearing such an appeal must deal with it as a matter of extreme urgency; and such order will be automatically suspended, pending the outcome of such appeal.

[11] The appeal is primarily grounded on what had been a pending application for leave to appeal before the SCA. The appellants contended that their application for leave to appeal to the SCA suspended the operation of the order by Mamosebo J in its entirety including the orders in para 2 to 9 pending the outcome of the appeal. Insofar as Mamosebo J granted the declaratory order of 13 December 2022, it was argued, she effectively granted the liquidators and trustees leave to execute which is only permissible under s 18 of the Act.

[12] The appellants' leave to appeal in this Court was somewhat rendered academic on 18 January 2023, when the SCA refused them leave to appeal against the order by Mamosebo J of 11 October 2022 with costs. It is now contended for them that they approached the President of the SCA in terms of s 17(2)(f) of the Act for the reconsideration of the SCA's order refusing leave.

[13] The present appeal is assailed on two bases by the liquidators and trustees. First, it was argued for them that the appeal has been rendered moot and secondly, that the jurisdiction of this Court to determine it in terms of s18(4)*(ii)* of the Act is not engaged.

The question of mootness of the appeal

[14] Mr Johannes Müller, the third respondent, a co-liquidator of Velvetcream (in liquidation) and a co-trustee in the insolvent estate of Merwede Trust attested to an affidavit on 13 July 2023, four days prior to the hearing of the appeal, in order to place certain supplementary facts pertinent to the appeal before us. What follows can be distilled from this. The first meeting of creditors was held on 3 May 2023 in each insolvent estate of Project Multiply, Velvetcream and Merwede Trust. All the creditors who had a right to elect a trustee or a liquidator in the insolvent estates agreed that the provisional trustees and liquidators already appointed be appointed as the final trustees and liquidators. On 10 May 2023, the first and second respondents, Mr D M Botha and Mr Jochen Eckhoff together with Ms Vimbai Angela Tsopotsa were appointed as the joint final liquidators of Project Multiply. On the same date the deponent and one Refilwe Tlhabanyane were appointed the joint final Liquidators of Velvetcream. In addition, the deponent together with Mr Jochen Eckhoff, the second respondent and the sixth respondent, Mr Philemon Tatenda Mawire, were finally appointed the joint trustees of the trust.

[15] The second meeting of the creditors in the estates of the two companies (in liquidation) and the trust took place on 12 July 2023 before the Master of the High Court, Kimberley, which had been published in the government gazette, the Citizen and the Beeld Newspapers on 23 June 2023. Notice had also been given to all known creditors and members by registered post on 27 June 2023, 14 days prior to the meeting. At the meeting in question the s 402 and s 81 reports in respect of the entities together with the proposed resolutions in each insolvent estate were tabled.[1] The resolutions were put to the vote and were accepted by the majority of creditors, both in value and in number. In relation to a trust reference is made to the "trustees" and the Insolvency Act in the relevant resolution. More pertinent to the present appeal are resolutions 2, 3, 11, 12, 21, 50, 51 and 52 which read:

"2. That the actions of the Provisional Liquidators(s) in having disposed of assets, shares, and loan accounts, prior to the date of this meeting be and are hereby approved and ratified, all costs incurred in relation thereto to be costs in the administration.

3. That the liquidator(s) be and is/are hereby authorised to collect any outstanding debts due to the estate and for the purpose thereof either to sell or compound any of these debts for such sums and on such terms and conditions as he/they in his/their sole discretion may deem fit, or to abandon any claims which he/they in his/their sole discretion, may deem to be irrecoverable, or to institute legal action and/or employ Attorneys and/or Counsel in connection with the recovery of the debts, and to proceed to the final end or determination of any legal actions instituted or to abandon same at any time as he/they in his/their sole discretion may deem fit, all legal costs so incurred to be costs in the administration.

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[1] In terms of s 402 of the Companies Act (1973), a liquidator is required as soon as practicable and, except with the consent of the Master, not later than three months after the date of his appointment, submit to a general meeting of creditors and contributories of the company concerned a report. In terms of s 81 of the Insolvency Act (1936), the trustees shall submit a full written report on the affairs and transactions [of a trust] and on any matter of importance relating to the insolvent or the estate.

11. That the liquidator(s) be and is/are hereby authorised to dispose of the immovable and movable assets of the Estate by either Public Auction or Public Tender or Private Treaty. The mode of sale for any one or more of the assets is to be at the discretion of the liquidator(s), and all costs incurred in relation thereto are to be costs in the administration.

12. That the liquidator(s) be and is/are hereby authorised to sell any immovable property as per the instruction given by the secured creditor at any given time. This includes the proceeding to the public auction by the auctioneers nominated by the secured creditor…

21. That the liquidator(s) be and is/are hereby authorised and empowered in his/her discretion to hold an enquiry into the formation and affairs of the Estate, and/or any matters relating thereto, should he/they deem it to be in the best interest of the creditors, and employ Attorneys and/or Counsel and/or Recording Agents to assist in the said enquiry, and to summons persons who he/they should deem necessary, to be present at the enquiry, all costs so incurred to be costs in the sequestration,…

50. That the further administration of the estate is left in the hands of the liquidators(s) at his/their sole discretion.

51. That all the actions of the liquidator(s) be and are hereby approved and ratified.

52. That the powers of the liquidator(s) be and is/are hereby extended to include those detailed in sections 386(1), (3) and (4) of the Companies Act, No. 61/1973, as amended."

[16] The first appellant, Ms Shanie Taljaard, deposed to an affidavit in answer to Mr Müller's supplementary affidavit. She stated that since the commencement of the litigation the liquidators and trustees had served notices on the appellants by e-mail because the appellants periodically resided on few different farms in the

Northern Cape and the North West Province. However, the liquidators and trustees failed to transmit the notices of the second meeting of the creditors by e-mail to the appellants or Mr Carel Van der Merwe, the controlling mind of Merwede Group. The appellants further claim not to have received notices dispatched by registered post. Ms Taljaard states that as a director of the companies in liquidation and Mr Van Der Merwe as a trustee of Merwede Trust, they were compelled to attend the second meeting of creditors in terms of s 64 of the Insolvency Act[2] and had material and substantial interest in the administration of the estates. The appellants claim to have suffered great prejudice because the liquidators and trustees failed to ensure that they had knowledge of the meeting.

[17] Ms Taljaard further states that the appellants already launched proceedings to set aside the liquidation and sequestration orders. They had also launched an urgent application to interdict the liquidators and trustees from disposing of the assets pending the determination of the rescission application to set aside the liquidation and sequestration orders. The latter application, we were informed, was set down for 29 July 2023. Its outcome is still pending.

[18] Ms Taljaard submitted in addition that the resolutions carried out provide the liquidators and trustees with far too wide powers to loot the estates' properties in their sole discretion by giving them powers to dispose of the assets by public auction or private treaty. This gives the liquidators and trustees "carte blanche to sell for whatever price to whoever they wish without any oversight." She further states that there is dissipation of livestock by the liquidators and trustees and their agents and it would be difficult to calculate the losses should the application for rescission of the liquidation orders be successful. According to her, insofar as the

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[2] Section 64(1) provides that: "An insolvent shall attend the first and second meetings of the creditors of his estate and every adjourned first and second meeting, unless he has previously obtained the written permission of the officer who is to preside or who presides at such meeting granted after consultation with the trustee to absent himself. The insolvent shall also attend any subsequent meeting of creditors if required so to do by written notice of the trustee of his estate."

resolutions are to the effect that costs of the administration are to be costs in the liquidation or sequestration they are "an open book to mulct the estates with unnecessary expenses." She further impugns resolution 31 in terms of which the liquidators/trustees are indemnified against losses and/or claims for damages as a result of the continuation of the business of the estate, this she intimated, is an attempt to escape liability for disposing of the assets prematurely.

[19] The issue of the validity or otherwise of the resolutions passed at the second meeting of creditors is not before us for consideration. However, the principles that apply in that regard are well established. A court will not confirm a resolution of creditors, for if valid it requires no confirmation, and if invalid it cannot be confirmed.[3] This is what Grindley-Ferris AJ said in *Estate Nankin v Nankin*[4]:

> "(B)ut I know of no authority for holding that the Court has power, on the application of the trustee, to confirm a resolution which the trustee submits has been validly passed by the majority of the creditors present at a properly constituted meeting. If such resolution has been validly passed, there is no reason or necessity for it to be confirmed by the Court, and if it has not been validly passed, the Court has no power that I am aware of to confirm it, and so purport to validate it."

[20] Where the creditors' resolutions are binding on the trustees they are obliged to implement them and the creditors are not entitled to prevent the trustees from doing so merely because they have required the holding of a further meeting at which such resolutions may be rescinded.[5] The authors, in Meskin Insolvency Law, submit that a resolution adopted, or which is subsequently deemed to have been adopted, at the second or the adjourned second meeting, binds not only the creditors at the meeting but also a creditor who failed to attend the meeting,

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[3] Mars*: The Law of Insolvency in South Africa* – E Bertelsmann *et al,* Jutastat e-publications, 10th Ed, 2019, Ch17 para 17.3.3, p 417.

[4] 1928 WLD 128 at 130.

[5] Meskin, *Insolvency Law*, LexisNexis, Ch7 at 7-21.; See also, *Lipschitz v Estate Oliver* 1917 CPD 582 at 584.

provided it relates to a matter covered by the trustee's report.[6] As a general rule the law regards the creditors of a company as the best judges of their own interests.[7] In *Swart v Starbuck and Others*[8] Fourie AJA observed:

> "The creditors of an insolvent estate are in law the masters of the realisation of the assets of the estate. This was emphasised in *Janse van Rensburg v Muller* 1996 (2) SA 557 (A), where the trustees of an insolvent estate, contrary to s 82(1) of the Act, disposed of an asset of the estate (a claim for damages) without value, by ceding same to the insolvent's spouse. This occurred with the consent of the majority of the creditors in number and value, but in the litigation that followed the validity of the cession was put in issue. Joubert JA, writing for the court, concluded that, notwithstanding non-compliance with s 82(1) of the Act, the wishes of the creditors reigned supreme."

[21] In *Kanderssen (Pty) Ltd v Bowman NO*[9], outlining the principles that applied in that case, Franklin J said that:

> "A resolution duly passed by creditors is valid until it is set aside; and for so long as it stands unchallenged it is impossible for an applicant to question the rights of the trustee to act in accordance with its directions."

[22] Ms Fourie SC, for the liquidators and trustees, contended that in light of recent developments at the meeting of creditors, the liquidators and trustees have been granted powers they required and thus leave of court is no longer necessary in order to sell and dispose of the assets in the insolvent estates; or to bring and defend legal proceedings; or to convene an enquiry in terms of s 417 and 418 of the Companies Act and the Insolvency Act. This was the tenor of the relief granted in favour of the Liquidators and trustees on 11 October 2022 and declared not to be the subject of appeal by the court a quo on 13 December 2022. An insolvent,

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[6] Meskin, *Insolvency Law*, LexisNexis, Ch7 at 7-22.

[7] *Kanderssen (Pty) Ltd v Bowman NO* 1980 (3) SA 1142 (T) at 1146D.

[8] 2016 (5) SA 372 (SCA) para 21.

[9] Ibid, fn 7 at 1148B.

she argued, is obliged to be present at the first and second meeting of creditors, thus it is not the duty of the liquidators and trustees "to fetch him".

[23] Ms Fourie went on to argue that the declaratory order of 13 December 2022 no longer presents an existing or live controversy. Even if the declaratory order of 13 December 2022 was assailable, which is disputed, the appeal, in light of the actions of creditors at the second meeting, has been rendered moot and of no practical effect or result. The appellants were not taken by any surprise because the convening of the second meeting of creditors is a statutory step in the winding-up process and it is inevitable that such a meeting would be convened and the powers of the liquidators and trustees would be extended, the argument went.

[24] Mr Janse Van Rensburg, for the appellants, submitted that a meeting of creditors held in the absence of interested parties is irregular and stands to be set aside including its attendant resolutions. He rests his argument on *Jonker and Others v Myobizi NO and Others*[10]*.* What was before the Full Bench of the Free State Division of the High Court (Reinders, ADJP and Van Rhyn, AJ) in *Jonker* was the return date in respect of the rule nisi that had been issued for the declarator that the first and second meetings of creditors was invalid. The applicants contended inter alia that there had been a failure to comply with the provisions of s 78(1) of the Close Corporations Act 69 of 1984 because the liquidators had not convened a meeting with the creditors and members within one month from the date of the final winding-up order.

[25] In that case, the liquidators summoned the meeting of creditors more than 6 months after the date of the final liquidation order. It was held that the notice of the first and second meeting, published in the Government Gazette and a newspaper circulating in the district, was not in accordance with the peremptory provisions of the applicable legislation. The Court further held that members of the close

[10] (3076/2021) [2022] ZAFSHC 62 (30 March 2022)

corporation were to be informed of the time, place and date of the said meetings. Failure to attend the meeting, the Court reasoned, may have caused prejudice. The Court went on to hold that non-compliance with the provisions of s 78(1) of the Close Corporations Act by the liquidators could not be regarded as a formal defect which could be condoned in terms of s 157 of the Insolvency Act. Accordingly, the Court confirmed the rule *nisi* that the meeting was invalid and ordered inter alia that the process pertaining to the convening of the first meeting start afresh with proper notice and publication in accordance with the provisions of the relevant legislation.

[26] The facts in *Jonker* are manifestly distinguishable from the present matter. In terms of s 364(1) of Companies Act 61 of 1973 the Master is required to summon first meetings of creditors and members as soon as practicable after a final winding-up order has been made by the Court for the purpose of inter alia considering the statement of affairs of the company lodged with the Master under section 363; the proof of claims against the company; and nominating a person or persons for appointment as liquidator(s). Section 364(2) provides that meetings of creditors under this section shall be summoned and held as nearly as may be in the manner provided by the law relating to insolvency, and meetings of members or contributories in the manner prescribed by regulation: provided that, in the case of a meeting of creditors, the Master may direct the company concerned or the provisional liquidator to send a notice of such meeting by post to every creditor of the company.

[27] Section 40 of the Insolvency Act regulates the first and second meetings of creditors. It provides in part:

> “(1) On the receipt of an order of the court sequestrating an estate finally, the Master shall immediately convene by notice in the *Gazette*, a first meeting of the creditors of the estate for the proof of their claims against the estate and for the election of a trustee.

(2) The Master shall publish such notice on a date not less than ten days before the date upon which the meeting is to be held and shall in such notice state the time and place at which the meeting is to be held.

(3)*(a)* After the first meeting of creditors and the appointment of a trustee, the Master shall appoint a second meeting of creditors for the proof of claims against the estate, and for the purpose of receiving the report of the trustee on the affairs and condition of the estate and giving the trustee directions in connection with the administration of the estate.

(b) The trustee shall convene the second meeting of creditors by notice in the *Gazette* and in one or more newspapers circulating in the district in which the insolvent resides or his principal place of business is situate."

[28] In terms of Regulation 20:[11] "Whenever under the Act or these Regulations any notice is to be sent to a member, creditor or contributory of a company, it may be sent by registered post to-

(a) an address within the Republic supplied by such member, creditor or contributory to the company for the sending of notices to him; or

(b) if no such address has been supplied, any address within the Republic known to the liquidator or judicial manager."

[29] In terms of Regulation 7(1)[12], any separate meeting of members, contributories or debenture-holders referred to in section 364(1)*(b)*, 370(2)*(a)*, 377 or 429(1)*(b)*(ii) of the Act shall be summoned by the Master by notice in the *Gazette* on a date not less than 10 days before the date upon which the meeting is to be held and such notice shall state the time when and place where the meeting is to be held: Provided that the Master may direct the company concerned or the provisional

[11] Regulations for the Winding-Up and Judicial Management of Companies, published under GN R2490 in *GG* 4128 of 28 December 1973.

[12] Ibid.

liquidator or the provisional judicial manager to send a notice of such meeting by post to every member, contributory or debenture-holder of the company.

[30] The appellants correctly argued that in terms of s 64(1) of the Insolvency Act, they are obliged to attend the first and second meetings of the creditors and every adjourned first and second meeting, unless they had previously obtained the written permission of the officer who is to preside or who presided at such meeting. However, the appellants did not question that the liquidators and trustees published the notice of the meeting in the *Gazette* and in one or more newspapers circulating in the district in which the insolvents resided. The Citizen does circulate in the Northern Cape and North West Province. They also did not question that the liquidators and trustees dispatched the notices by registered post to all known creditors of the insolvent entities. Their only complaint is that the notices did not come to their attention.

[31] There is nothing in the Insolvency Act which places an obligation on the liquidators and trustees to forward the notices of the meeting to interested parties by e-mail. Insofar as the court a quo had confirmed the final liquidations and sequestration of the entities, the appellants knew or ought to have reasonably known that the first and second meetings of creditors loomed large on the horizon. What they do not say is what efforts they took to familiarize themselves with notices that appeared in the gazette and the newspapers circulating in the Northern Cape or the efforts made to check their postboxes for mail. This should be seen against the backdrop of the remarks made by the court a quo recorded in the judgment which is the subject of this appeal regarding the appellants' failure to attend the enquiry in terms of s 417 read with s 418 of the Companies Act 61 of 1973. The court a quo said:

> "[37] More importantly, the respondents [the appellants] continue to undermine the statutory and fiduciary duties afforded to the liquidators and trustees who bear the

responsibility to administer the insolvent estates and report to the Master of the High Court. The less said regarding the conduct of the respondents, the erstwhile business rescue practitioner and the legal team in blatantly refusing to attend the Commission of Enquiry ordered by this Court, the better*. . .*

[40] *. . .*Lastly, the refusal by the respondents, the erstwhile business rescue practitioner and the legal team to attend the Commission of Enquiry where details pertaining to these insolvent entities would finally be thrashed out, is obstructionist. The respondents and their legal team have not explained how any of them would suffer prejudice should the enquiry proceed. Inferentially it can be concluded that they are not willing to answer questions and furnish the required details."

[32] Ms Fourie's contention, that it was not for the liquidators and trustees "to fetch" the appellants to attend the meetings once they had complied with their statutory obligations by dispatching the relevant notices to interested parties as set out in the Insolvency Act, is vindicated.

[33] The principles adverted to in *Swart v Starbuck* (supra) that the creditors of an insolvent estate are in law the masters of the realisation of the assets of the estate and that their wishes reign supreme are apposite. The appellants are not creditors with proved claims. At the second meeting of 12 July 2023 the majority of creditors both in value and in number adopted the specified resolutions which included appointing the liquidators and trustees; giving them directions and extending their powers to include those detailed in sections 386(1), (3) and (4) of the Companies Act. What this means is that leave sought from this Court by the appellants, to appeal the order by Mamosebo J, which essentially declared that the liquidators' and trustees' powers were not suspended pending the appeal to the SCA, has been rendered moot.

[34] When at the hearing of an appeal, as here, the issues are of such a nature that the decision sought will have no practical effect or result, the appeal may be dismissed

on this ground alone.[13] No cogent argument has been advanced nor could I find any factor that redounds in entertaining the appeal in the interest of justice. This would be the end of the matter. However, on the basis of the caution sounded in various decisions of our courts, that a court in exercising its inherent power in application proceedings to separate issues in limine must do so with circumspection,[14] something must be said concerning the residual question that this Court's jurisdiction is ousted because the appeal itself falls outside the ambit of s 18(4) of the Act.

The question of application of s18(4) of the Act:

[35] As stated earlier, the liquidators and trustees brought an urgent application for a declaratory order that relief which extended their powers in the administration of the insolvent estates as set out in the order of 11 October 2022 were not suspended pending the outcome of the appellants' application for leave to appeal to the SCA. In the alternative, they sought an order for the execution of the relief extending their powers in terms of s 18 of the Act.

[36] It bears repeating that on 12 October 2022 the final winding-up orders issued in respect of Project Multiply and Velvetcream. In addition, a final sequestration order was made against Merwede Trust. In the judgment of Mamosebo J dated 05 December 2022, refusing the appellants leave to appeal against the principal judgment at paragraph 12, the court a quo held that on 18 March 2022 Mr Van der Merwe was finally sequestrated in the Western Cape High Court. Having been refused leave to appeal that order he petitioned the Supreme Court of Appeal but the SCA justices Ponnan and Hughes JJA dismissed his application on 07 September 2022 on the grounds that there are no reasonable prospects of

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[13] Section 16(2)*(a)*(i) of the Act.

[14] See *Louis Pasteur Holdings (Pty) Ltd and Others v ABSA Bank Ltd and Others* 2019 (3) SA 97 (SCA) para 33; *Democratic Alliance and Others v Acting National Director of Public Prosecutions and Others* 2012 (3) SA 486 (SCA) ([2012] 2 All SA 345; 2012 (6) BCLR 613; [2012] ZASCA 15) para 49.

success and no compelling reasons to consider the appeal. Mamosebo J went on to state the following at para 23:

> "Van der Merwe is an unrehabilitated insolvent, the companies and the trust are factually and commercially insolvent and cannot repay the debt in excess of R80 million. R7.1 million derived from the sale of sheep to Carnarvon Abattoir was dissipated and no cent was paid to the Landbank which form part of its security. The money was distributed amongst Van der Merwe, Project Multiply, Velvetcream and Merwede Trust for living expenses and to fund the litigation against Landbank."

And at para 24 she observed:

> "Mr Van der Merwe has been finally sequestrated and his estate must be in the hands of the Master of the High Court who has, in turn, appointed the liquidators and the trustees. They are prevented from fulfilling their statutory and fiduciary duties."

[37] The aforesaid sentiments were echoed in the court a quo's judgment of 13 December 2022 which is the subject of the appeal. In this latter judgment the court reasoned that the liquidators and trustees must still perform their statutory and fiduciary duties to secure and preserve the assets of the insolvent entities failing which these would result in adverse consequences for them both in their official and personal capacities. There was livestock involved which is susceptible to theft, death and required maintenance. The Court further observed that there were unauthorised transactions taking place resulting in the dissipation of funds and/or dispersion thereof to other individuals or entities consequently diminishing the estate of the insolvent entities to the detriment of the general body of creditors. The court further reasoned that the liquidators and trustees could not "leave the administration of the insolvent estates in the hands of Van der Merwe, who is himself an unrehabilitated insolvent; there is dissipation of assets taking place; Van der Merwe and the applicants cannot be trusted to continue to operate the entities as if it is business as usual."

[38] The court a quo concluded that a reading of the founding affidavit in support of the appellants' application for leave to appeal the order it granted on 11 October 2022, extending the powers of the liquidators and trustees, was not the subject of appeal. Consequently, it held, the declaratory order in question was not subject to s 18 of the Act. On these bases it made a declaratory order that the order it granted on 11 October 2022 (the declarator extending the powers of the liquidators and trustees) was not suspended pending the determination of the application for leave or the appeal itself.

[39] The appellants contended that leave to appeal the principal judgment is still pending before the President of the SCA for reconsideration of the refusal of leave in terms of s 17(2)(f) of the Act. Accordingly, they argued, the declaratory order of 13 December 2022 is automatically suspended pending the outcome of the appeal in the SCA. It was contended that Mamosebo J erred when she concluded that the extension of the powers of the liquidators and trustees as contained in her order of 11 October 2022 was not the subject of the appeal in the SCA. The appeal to the SCA against that part of the judgment dismissing the appellants' main application (Part B and C also suspends the attendant orders (declarator extending the powers of the liquidators and trustees) flowing from the judgment. Therefore, it was argued, the court a quo erred in granting the declaratory order on 13 December 2022. This declarator, it was contended, constitutes an execution order which can only be granted pursuant to s 18(1) and 18(3) of the Act. Insofar as Mamosebo J granted the declarator outside the confines of s 18 of the Act, it was argued, she erred.

[40] Ordinarily, in determining whether to order execution of the decision pending an appeal in terms of s 18 of the Act, the applicant must first demonstrate exceptional circumstances which warrant immediate operation of the order pending the appeal. Secondly, the applicant would have to establish on balance of probabilities, that it stands to suffer irreparable harm if the court does not order immediate operation of

the order and the absence of irreparable harm to the respondent who seeks to appeal the order made. In addition, as Fourie AJA said in *University of the Free State v Afriforum and Another*[15], the prospects of success in the appeal are relevant in deciding whether or not to grant the exceptional relief in s 18 of the Act.

[41] What constitutes exceptional circumstances is not a matter of an exercise of a discretion, but a finding of fact.[16] In *Incubeta Holdings (Pty) Ltd and Another v Ellis and Another*[17] Sutherland J articulates this as follows:

> "Necessarily, in my view, exceptionality must be fact-specific. The circumstances which are or may be 'exceptional' must be derived from the actual predicaments in which the given litigants find themselves*…*"

[42] The liquidators and trustees argued both in the court a quo and in this Court that the appeal in the SCA did not lie against paras 2 to 9 of the order of 11 October 2022, the order granting the liquidators and trustees extension of their powers, therefore s 18 of the Act was not invoked for purposes of consideration of the application by the liquidators and trustees for leave that the orders in para 2 to 9 of the judgment of 11 October 2022 were not suspended pending the appeal. It was contended further that the appellants' own affidavit in support of their application for leave to appeal to the SCA, in particular paras 9, 14 and 44 demonstrated that the relief granted by the court a quo in paras 2 to 9 of its order of 11 October 2022 was not the subject of appeal pending in the SCA. The relevant paragraphs of the appellants' affidavit state:

> "9. This matter is, first and foremost, a matter which calls on the Supreme Court of Appeal to consider a constitutional issue of National importance.

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[15] 2018 (3) SA 428 (SCA) para 15.

[16] *MV Ais Mamas Seatrans Maritime v Owners, MV Ais Mamas, and Another* 2002 (6) SA 150 (C) at 156I-157C; *Incubeta Holdings (Pty) Ltd and Another v Ellis and Another* 2014 (3) SA 189 (GJ) paras 17-18.

[17] 2014 (3) SA 189 (GJ) paras 21-22.

14. As will be dealt with hereunder, the only relief that is sought is that the protection mechanism created by chapter 6 of the Companies Act 71 of 2008 for companies be made available to trusts and natural persons as the Minister of Justice and Constitutional Development intended back in the year 2014 already.

44. This case is about a lacuna in chapter 6 business rescue provisions of the 2008 Companies Act."

[43] The cardinal question is whether the approach adopted by the court a quo in granting the declarator of 13 December 2022 was correct as opposed to conducting an enquiry in terms of s 18(1) read with s 18(3) of the Act. If we find that the approach was correct it would follow that the jurisdiction of this Court is not engaged. It should also be established whether the declarator in issue amounted to the suspension of a decision pending appeal as contemplated in ss 18(1) and 18(3). If it does, the appeal would have to be considered in terms s 18(4)(ii) of the Act.

[44] In responding to the above key questions it should first be established whether the order of 11 October 2022, which extended the powers of the liquidators and trustees, was the subject of the application for leave to appeal to the SCA. Rule 6(5)(a)(iii) of the Rules Regulating the Conduct of the Proceedings of the Supreme Court of Appeal of South Africa[18] provides that every application for leave to appeal, answer and reply shall deal with the merits of the case only insofar as is necessary for the purpose of explaining and supporting the particular grounds upon which leave to appeal is sought or opposed.

[45] In *National Union of Metalworkers of South Africa v Jumbo Products CC*[19](NUMSA), Corbett CJ remarked:

[18] As promulgated in Government Notice R1523 of 27 November 1998.

[19] 1996 (4) SA 735 (A) at 739A–H.

> "In its petition to this Court NUMSA makes no attempt to point out or contend in what way the trial Judge erred in coming to the conclusion reached by him in his judgment on the merits. In fact that judgment is not subjected to any critical analysis, either as to its findings of fact or as to its exposition and application of the law. All that the petition states is that the aforementioned heads of argument (which as I have emphasised were prepared and submitted prior to the judgment) show how complex the matter is and how important it is to NUMSA. As regards the prospects of success, which is of course what an application for leave to appeal is all about, the petitioner merely says:
>
> > 'I am advised, and respectfully submit, that the issues of fact and law set out in detail in the heads of argument annexed hereto marked "NUMSA 6" and "NUMSA 7" are such that there is a reasonable prospect that this honourable Court might uphold an appeal.'
>
> This is not good enough..."

[46] The Notice of Motion in respect of the application for leave to appeal professes to be in respect of the whole of the judgment and order of Mamosebo J. However, a careful reading of its supporting affidavit suggests that the appeal itself was directed only at the constitutional challenge, prayer 1 of the order. The striking feature of this case is that the counter-application extending the powers of the liquidators and trustees was not seriously challenged in the court a quo. Allied to this, nowhere in the founding affidavit seeking leave to appeal to the SCA did the appellants question any of the factual findings and legal conclusions made by the court a quo on the liquidators and trustees' application for the extension of their powers or challenge the order that was made. Surely under these circumstances the criticism levelled against the approach adopted by the court a quo, in not considering the application in terms of s 18 of the Act, cannot be sustained.

[47] There were simply no grounds of appeal which lay against that part of the judgment which extended the powers of the liquidators and trustees. The court a quo was thus justified in granting a declaratory order for the execution of its order of 11 October 2022 extending the powers of the liquidators and trustees without

resorting to the provisions of s 18 of the Act. Insofar as the court a quo did not invoke s 18 of the Act the ineluctable conclusion is that the jurisdiction of this court to determine the appeal in terms of s 18(4)(ii) is ousted.

[48] In a quest to further persuade us that the declaratory order of 13 December 2022, which authorised execution of the orders in paras 2 to 9 of the judgment of 11 October 2022, amounted to execution pending the appeal as contemplated in s 18 of the Act, counsel for the appellants argued that should the appellants succeed in the SCA, particularly on Part C of the relief they sought before the court a quo, which was the dismissal of the winding-up and sequestration order, it would render brutum fulmen the order which extended the powers of the liquidators and trustees. That may well be. However, the appellants have difficulties on this path too. It is important to remember that the appellants filed no opposing papers in the liquidation and sequestration proceedings. No appeal in the SCA lies against those proceedings.

[49] Even if it were to be accepted that the declaratory order of 13 December 2022 amounted to an execution order in terms of s 18(3) of the Act the appellants would still be faced with some obstacles. The judgment of the court a quo is replete with references to the appellants' lack of prospects of success on appeal. The court a quo demonstrated in its reasoning that the liquidators, trustees and creditors in the insolvent estates stood to suffer greater irreparable harm in comparison to the appellants if the court did not order execution. I say this because the findings by Mamosebo J in her main judgment that there had been dissipation of the assets in the insolvent estates, at the behest of the appellants, were not assailed in the application for leave to appeal that is pending in the SCA. In my view, the fact that the evidence points to the dissipation of the insolvent estates' assets is sufficiently indicative of the exceptionality of the relief the liquidators and trustees sought.

[50] At para 53 of the appellants' founding affidavit, in their petition for leave in the SCA, they state:

> 'Much has been said and found by the court a quo in regard to the so-called dissipation of assets, and I respectfully submit that might have unduly clouded the judgment of the court a quo.'

In paras 85.1 to 85.20 of its judgment, the court a quo traversed the evidence at considerable length and made findings on the dissipation. This is what the appellants had to say in para 58 of their application for leave to appeal on this score:

> 'Due to the amount of limited pages allowed for this affidavit, I have not dealt with each item at paragraphs 85.1 to 85.20 of the court a quo's judgment, which I will address on appeal, if leave to appeal is granted.'

To borrow from Corbett CJ in *NUMSA* (supra) – this is simply not good enough.

[51] On the aforegoing exposition, the jurisdiction of this Court is not engaged. Even if we were to find otherwise the appellants' argument on the merits of the appeal is not persuasive. It follows that the appeal ought to fail.

The question of costs

[52] The liquidators and trustees sought costs on a punitive scale consequent upon the appointment of two counsel and such costs to include costs that were reserved on 17 April 2023, when the appeal was struck off the roll due to the appellants' failure to provide the proper record of appeal and the Notice of Appeal. The attorney for the liquidators and trustees, Ms K Van der Westhuizen, traverses at length, in an affidavit addressing the question of costs, how the appellants' attorneys had been remiss in the preparation of the record and the prosecution of the appeal. The

appellants conceded that when their new attorneys of record took over the matter they found the court file in a state of "disarray, several bundles were misplaced and had to be located or replaced with duplicates". The appellants did not provide any reasonable explanation for the ill-prepared record of appeal. Consequently, I am driven to the conclusion that they ought to bear the wasted costs of 17 April 2023 on a punitive scale as a mark of this Court's displeasure. With regard to the costs of the appeal itself, I am unpersuaded that sufficient basis has been established that they be awarded on a punitive scale. They shall follow the results on party and party scale. An order is therefore made:

Order:

1. The appeal is dismissed with costs, such costs to include costs consequent upon the employment of two counsel.

2. The appellants are to pay the wasted costs of the proceedings of 17 April 2023 on an attorney and client scale, such costs to include costs consequent upon the employment of two counsel.

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PHATSHOANE DJP

Williams and Stanton JJ concur in the judgment of Phatshoane DJP

Appearances:

For the first and second appellants:	Adv Janse Van Rensburg
Instructed by:	Haarhoffs Inc, Kimberley
For the first to the seventh respondents:	Adv HR Fourie SC (with Adv U van Niekerk)
Instructed by:	JI Van Niekerk Inc Attorneys, Johannesburg.

Majiedt Swart Incorporated, Kimberley.