Reportable:	YES / **NO**
Circulate to Judges:	YES / **NO**
Circulate to Magistrates:	YES / **NO**
Circulate to Regional Magistrates:	YES / **NO**

IN THE HIGH COURT OF SOUTH AFRICA

NORTH WEST DIVISION - MAHIKENG

CASE NUMBER:

2167/2024

In the matter between:

LOUIS PETRUS LIEBENBERG — **FIRST APPLICANT**

MAGDELENA PETRONELLA KLEYNHANS — **SECOND APPLICANT**

and

TARIOMIX (PTY) LTD t/a FOREVER DIAMONDS AND GOLD (IN LIQUIDATION) — **FIRST RESPONDENT**

HERMANUS JOHANNES VAUGHN VICTOR N.O — **SECOND RESPONDENT**

JOHANNA MINNIE MAGANDELE N.O — **THIRD RESPONDENT**

VAROLINE MAMAKGOLO LEDWABA N.O — **FOURTH RESPONDENT**

(in their capacities as the duly appointed provisional Liquidators of Tariomix (Pty) Ltd t/a Forever Diamonds and Gold (In liquidation))

THE COMMISSIONER: RETIRED JUDGE CYNTHIA PRETORIUS — **FIFTH RESPONDENT**

THE MASTER OF THE HIGH COURT — **SIXTH RESPONDENT**

(Master's Ref. No. M000016/2023)

THE COMMISSIONER FOR THE SOUTH AFRICAN REVENUE SERVICES **SEVENTH RESPONDENT**

ZAHEER CASSIM N.O **EIGHTH RESPONDENT**
(from Cassim Trust (Pty) Ltd appointed as *curator bonis*)

Date of Hearing : 16 May 2024

Date of Order : 16 May 2024

Date of Reasons : 05 June 2024

These reasons were handed down electronically by circulation to the parties' legal representatives *via* email. The date and time for hand-down is deemed to be **05 June 2024** at 12h00.

ORDER – 16 MAY 2024

(1) The application is dismissed with costs on an attorney and client scale, which costs shall include the costs consequent to the employment of two Counsel.

(2) Reasons shall follow.

REASONS

PETERSEN J

Introduction

[1] The application in the matter under discussion came before me on **16 May 2024**, as an urgent application in which the first and second applicants ('the applicants') sought the following relief against the second, third and fourth respondents ('the provisional liquidators') and any other opposing respondent:

> *"1. Dispensing with the forms and service provided for in the Rules of the above Honourable Court ad disposing of the relief prayed by way of urgency in terms of Rule 6(12)(a);*
> *2. An interdict restraining the Second, Third, Fourth and Fifth Respondents from conducting any legal processes in furthering the winding-up of Tariomix (Pty) Ltd t/a Forever Diamonds and Gold (in liquidation) including but not limited to incurring further costs, convening Section 417 and 418 of the Companies Act enquiries, causing warrants of attachments in terms of Section 69(2) and 69(3) of the Insolvency Act, Act 24 of 1936, as well as*

Section 19 of the same Act attachments and removals or otherwise pending the outcome of the business rescue application brought under case number: 722.2024 in the High Court of South Africa, North West Division, Mahikeng;

3. Declaring any actions taken in respect of the furthering of the winding-up process taken by the Second, Third and Fourth Respondents invalid and/or unlawful and ordering the Second, Third and Fourth Respondents to restore any consequences to their actions;

4. Interdicting the Second, Third, Fourth and Fifth Respondents to continue the realization and sale of assets of Tariomix as empowered in paragraph 3.7 and 3.20.5 of the extended powers in Annexure "FA5.1" as well as with the aim of ultimately distributing them to various creditors;

5. The liquidation proceedings are hereby suspended, which proceedings include any action which occurred after the winding-up order to liquidate the assets and account to creditors up to deregistration of the First Respondent;

6. The Second, Third, Fourth and Fifth Respondents are hereby interdicted to continue the realization of assets of the First Respondent (in liquidation) with the aim of ultimately distributing them to the various creditors;

7. An interdict against the Second, Third, Fourth and Fifth Respondents to obtain any warrants of attachment in terms of Section 69 of the Insolvency Act, Act 24 of 1936 or to act in terms of Section 19 of the same Act to attach and/or remove any assets of any third party other than the assets of the First Respondents or in any other manner act outside their powers as provisional liquidators of the First Respondent;

8. That the Second, Third and Fourth Respondents together with any opposing Respondent to pay the costs of this application on the scale as between attorney and client jointly and severally, the one paying the other to be absolved;

9. That the operations of paragraph 3.7 and 3.17 of the extended powers of the Second, Third, Fourth and Fifth Respondents in Annexure "FA5.1" be

stayed and suspended pending the outcome of the business rescue application brought under case number: 722/2024, in the High Court of South Africa, North West Division, Mahikeng; and

10. Further and/or alternative relief."

[2] Following *viva voce* argument by the legal practitioners for the parties, an order was handed down on **16 May 2024** in the following terms:

"(1) The application is dismissed with costs on an attorney and client scale, which costs shall include the costs consequent to the employment of two Counsel.

(2) Reasons shall follow."

Urgency

[3] In my view, the application could have been disposed of, for lack of urgency. However, the issues traversed under the rubric of urgency are such that they merited attention, since they raise important questions regarding the effect of the business rescue application *in casu*, if same has been properly "made", on the powers of the liquidators and the commissioner appointed for purposes of statutory enquiries in terms of the Companies Act 71 of 2008 ('the Companies Act') in the interest of the *concursus creditorium*.

[4] The merits of the urgent application were therefore traversed before me.

Background

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[5] The full background of the matter need not detain this Court as same is set out in the unreported judgment of Morgan AJ in *Botes and Others v Tariomix (Pty) Ltd t/a Forever Diamonds and Gold and Others* (UM29/2023) [2024] ZANWHC 106 (12 April 2024).

[6] For present purposes, it suffices to note that the first respondent ('Tariomix') was placed under provisional liquidation on 23 February 2023 by order of this Court (per Deputy Judge President Djaje). On 14 February 2024, an application for business rescue was launched in this Court under case number 722/2024. Until 4 April 2024, the application for business rescue was opposed only by the provisional liquidators who by then had filed an answering affidavit. No replying affidavit has been filed to date by the applicants in the business rescue application. On 4 April 2024, the business rescue application, now opposed, was removed from the unopposed motion roll. At that stage, the Commissioner of the South African Revenue Service filed an application to intervene in the business rescue application. No steps have been taken by the

applicants in the business rescue application to advance the application since its removal on 4 April 2024.

[7] Tariomix was placed in final liquidation on 12 April 2024 by order of this Court (per Acting Judge Morgan) in the judgment as aforesaid. An application for leave to appeal is pending against the granting of the final liquidation order, which application is to be heard on 27 May 2024.

The present urgent application

[8] The gist of the present urgent application, which the respondents dispute is two-fold, as captured at paragraph 8.1 of the Practice Note of *Mr Niedinger* for the applicants. It reads thus:

> "The Applicants approach the Honourable Court on an issue of law centering not only around the ambit of Section 131(6) of the Companies Act, Act 71 of 2008 (as amended) but also overstepping of their powers by the Second, Third and Fourth Respondents when acting in terms of Section 19 and Section 69 of the Insolvency Act, Act 24 of 1936."

[9] Save for the complaints raised by the applicants on behalf of third parties, bar two third parties and others who have not taken issue with any of the conduct of the provisional liquidators, this urgent application considering what is stated at paragraph 8.1 of the Practice Note of *Mr Niedinger*, involves questions of law.

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[10] The nub of the present application is that the applicants seek to interdict the provisional liquidators and the fifth respondent ('the Commissioner') from performing any of their duties or enquiries respectively in terms of section 417 and 418 of the Companies Act, whilst the business rescue application is said to be pending in this Court.

The leave to appeal application

[11] Before turning to the status of the business rescue application, it is prudent to deal with the status of the pending application for leave to appeal before Morgan AJ set for 27 May 2024. The applicants appear wrongly to believe that the application for leave to appeal, as it ordinarily would, stays the order placing Tariomix in final liquidation.

[12] The provisions of section 150(3) of the Insolvency Act 24 of 1936 read with section 339 of the repealed Companies Act 61 of 1973 (which remains applicable in the winding up of companies), are apposite in this regard. Section 339 of the 1973 Companies specifically "renders particular provisions of the law relating to insolvency applicable to companies being wound up and unable to pay their debts in respect of any matter not provided for in the 1973 Companies Act." Section 150(3) of the Insolvency Act provides that:

"When an appeal has been noted (whether under this section or any other law), against a final order of sequestration, the provisions of this Act shall nevertheless apply as if no appeal had been noted: **provided that no property belonging to the sequestrated estate shall be realized without the written consent of the insolvent concerned**."

(emphasis added)

[13] The pending application for leave to appeal, therefore has no effect on the winding up process. The provisional liquidators are by law to continue with their duties to attach and secure the assets of the insolvent estate pending finalization of the appeal process. The provisional liquidators are only prohibited from realizing any of the assets so attached without the permission of Tariomix. As will become clear later, the same position applies to a business rescue application.

The business rescue application

[14] This brings me to the first issue raised as a question of law by the applicants. Section 131(6) of the Companies Act 71 of 2008 provides that:

"If liquidation proceedings have already been commenced by or against the company at the time an application is made in terms of subsection (1), the application will suspend those liquidation proceedings until —

(a) the court has adjudicated upon the application; or

(b) the business rescue proceedings end, if the court makes the order applied for."

[15] The basis of the application appears to have its genesis in a letter sent by *Mr Niedinger* to the attorneys for the provisional liquidators on 15 April 2024, in which the following is recorded:

"Our clients have advised us that your clients, the liquidators of the company in liquidation convened an enquiry in terms of section 417 and 418 of the Companies Act of 1973 for the 24 to the 26th of April 2024, before a Commissioner, retired Judge Pretorius.

Subpoenas/witnesses summons were issued on the 4th of April 2024.

Your clients are well aware of the fact that a business rescue application has been brought and to which your clients filed opposing affidavits.

Section 131(6) of the Companies Act, Act 71 of 2008 states that; "if liquidation proceedings have already been commenced by or against the company at the time an application is made in terms of subsection (1)[for business rescue], the application will suspend those liquidation proceedings until –

(a) The court has adjudicated upon the application; or

…"

[16] The Supreme Court of Appeal has dealt very decisively with the issue of the appointment and powers of provisional liquidators in *GCC Engineering (Pty) Ltd and others v Maroos and others* 2019 (2) SA 379 (SCA). Paragraphs 9, 17 and 19 are apposite in this regard:

"[9] The main issues to be considered in this appeal are the following:

(a) Whether the appointment and the powers of the duly appointed provisional joint liquidators are suspended in terms of s 131(6) of Act 71 of 2008.

…

[17] In terms of s 131(6) of the Act, it is liquidation proceedings, not the winding-up order, that is suspended. What is suspended is the process of continuing with the realisation of the assets of the company in liquidation with the aim of ultimately distributing them to the various creditors. The winding-up order is still in place; **and prior to the granting or refusal of the business rescue application, the provisional liquidators secure the assets of the company in liquidation for the benefit of the body of creditors**.

…

[19] I find that the appointment, office and powers of the provisional liquidators are not suspended. In s 131(6) the legislature used the word 'suspend', which does not mean termination of the office of the liquidator. In my view the term 'liquidation proceeding' refers only to those actions performed by a liquidator in dealing with the affairs of a company in liquidation in order to bring about its dissolution. What is suspended is the process of winding up and not the legal consequences of a winding-up order."

[17] *GCC Engineering (Pty) Ltd and others v Maroos and others* dealt only with the powers and duties of provisional liquidators in the face of a pending business rescue application. Nothing is

explicitly said about any enquiries in terms of section 417 and 418 of the Companies Act, by a duly appointed commissioner.

[18] In the unreported judgment of *Muller v Bekker NO and others* (UM65/2019) 16 January 2020, this Court had the occasion to deal, *inter alia*, with the effect of a business rescue application on the powers and duties of provisional liquidators and on section 417 and 418 enquiries. In giving an extended interpretation to *GCC Engineering (Pty) Ltd and others v Maroos and others*, analogous what the applicants seek in the present application, the following was said at paragraph 19:

"In my view, the sentiments expressed at paragraphs 15 and 17 of Maroos are instructive and determinative of the dispute. The *status quo* of the close corporation (in liquidation) does not change. The Court order placing the close corporation in liquidation is not suspended. The third and fourth respondents as joint liquidators are duty bound to proceed with their duties and actions to protect the assets of the close corporation for the benefit of all the creditors of the close corporation. Even though the second respondent is a disputed creditor, **the first respondent's duties are analogous to those of the liquidators, to conduct an enquiry which is directed as with the duties of the joint liquidators, to gather information which seeks to protect the assets of the close corporation. The pending business rescue application of Mr Meintjies does not suspend the winding-up order and prior to granting or refusal of such application, the third and fourth respondents have a duty to secure the assets of the close corporation for the benefit of the body of creditors. In similar vein, the first respondent as delegated by the Master has a duty to enquire into the business affairs of the close corporation, in the interests of the body of creditors."**

-

[19] *Mr Niedinger* sought to place reliance on paragraph 21 of the judgment of *Van Staden NO and others v Pro-Wiz Group (Pty) Ltd* 2019 (4) SA 532 (SCA) to counter the reasoning in the judgment of *Muller v Bekker NO and others*. The contention being that *Van Staden NO and others v Pro-Wiz Group (Pty) Ltd* is authority that a business rescue application prevents an interrogation under section 418 and delays the winding-up process. The following is stated at paragraph 21 of the said judgment:

> "[21] It is apparent that Pro-Wiz could never have thought that a viable business rescue could be instituted in relation to Oljaco. Its failure to engage with the liquidators or the principal creditor on that subject prior to launching its application speaks volumes in that regard. The timing of the application suggested that its true purpose was to stultify the interrogation of Mr Smith. The failure to deal with any of the issues raised by the liquidators and SARS in this regard indicates that no response was possible. Finally, the withdrawal at the very last minute, without explanation, when confronted with the reality of having to argue the application in court, conveyed the impression of an absence of any bona fide belief in the merits of the case and a lack of intention genuinely to pursue it. I conclude that it was brought to provide a reason for avoiding Mr Smith's interrogation and with a view to delaying the liquidators in their enquiries as to the squirreling away of assets."

[20] In my view, a careful analysis of paragraph 21 of *Van Staden NO and others v Pro-Wiz Group (Pty) Ltd*, does not provide credence to the contention by *Mr Niedinger* that a business rescue application stays the winding up process. The summary provided

by the Supreme Court of Appeal in *Van Staden NO and others v Pro-Wiz Group (Pty) Ltd* also militates against the said contention. If anything, the interpretation this Court was called upon to give to the paragraph by *Mr Niedinger* is in stark contrast to the ratio in *GCC Engineering (Pty) Ltd and others v Maroos and others*.

[21] It is accepted therefore that even if there was a proper application for business rescue in compliance with the tenets of the Companies Act, which I will demonstrate there is not, it does not stay the powers and duties of the provisional liquidators or any section 417 and 418 enquiries. The application would have been doomed for failure on this basis alone, if there were a proper business rescue application pending in this Court.

[22] The judgment in *Lutchman N.O. and Others v African Global Holdings (Pty) Ltd and Others; African Global Holdings (Pty) Ltd and Others v Lutchman N.O. and Others* (1088/2020;1135/2020) [2022] ZASCA 66; [2022] 3 All SA 35 (SCA); 2022 (4) SA 529 (SCA) (10 May 2022) is instructive on what constitutes a business rescue application. The following paragraphs are apposite to the present application:

> "[21] The auction application and appeal are premised on two grounds: First, the liquidators were statutorily prohibited from proceeding with the auction and any subsequent sales of the assets of the Bosasa companies due to a suspension of the Bosasa liquidation proceedings in terms of s 131(6) of the Companies Act, because the application for business rescue was 'made' on 3 December 2019, which was prior to the commencement of the auction on 4 December 2019. This ground raises two questions: (a) when is a business rescue application 'made'

within the meaning of s 131(6); and (b) whether the business rescue application *in casu* was indeed 'made' within the meaning of s 131(6). These questions raise the proper interpretation of s 131(6).

…

[23] Section 131(1) of the Companies Act provides that '[u]nless a company has adopted a resolution contemplated in section 129, an affected person may apply to a court at any time for an order placing the company under supervision and commencing business rescue proceedings'. **Section 131(2) provides that '[a]n applicant in terms of subsection (1) must – *(a)* serve a copy of the application on the Company and the Commission; and *(b)* notify each affected person of the application in the prescribed manner'**. In addition, s131(3) provides that '[e]ach affected person has a right to participate in the hearing of an application in terms of this section'. Furthermore, s131(6) provides that '[i]f liquidation proceedings have already been commenced by or against the company at the time an application is *made* in terms of subsection (1), the application will suspend those liquidation proceedings until *(a)* the court has adjudicated upon the application; or *(b)* the business rescue proceedings end, if the court makes the order applied for'. Moreover, s132(1) provides that '[b]usiness rescue proceedings *begin* when- *(a)* the company-

(i) files a resolution to place itself under supervision in terms of section 129(3); or

(ii) applies to the court for consent to file a resolution in terms of section 129(5)*(b)*;

(b) an affected person *applies* to the court for an order placing the company under supervision in terms of section 131(1); or *(c)* a court makes an order placing a company under supervision in terms of section 131(7).

[24] There are conflicting high court judgments on when a business rescue application is 'made' within the meaning of s 131(6) of the Companies Act. What some considered constituting the 'making' of a business rescue application are the issue, service and prescribed notification

thereof, and others the mere lodging of the business rescue application with the registrar and the issue thereof. **For the reasons that follow, I subscribe to the interpretation that a business rescue application must be issued, served on the company and the Commission, and each affected person must be notified of the application in the prescribed manner, to meet the requirements of s 131(6) in order to trigger the suspension of liquidation proceedings that have already commenced**.

…

[29] Liquidation proceedings are strictly proceedings to constitute a *concursus creditorum*. **The liquidation process continues until the company's affairs have been finally wound up, and the company is dissolved.**

…

[38] **Each affected person** – **a shareholder or creditor of the company in liquidation, any registered trade union representing employees of that company or each of the individual employees** – is entitled to oppose or support the business rescue application. That necessarily follows from the right afforded to each of them in terms of s 131(3) to participate in the hearing of the business rescue application. **Each should have been notified of the business rescue application in terms of s 131(1)*(b)* in the prescribed manner**.

[39] The service and notification requirements set out in s 131(2) of the Companies Act are not merely procedural steps**. According to *Taboo*, [t]hey are substantive requirements, compliance with which is an integral part of making 'an application for an order in terms of s 131(1) of the Companies Act'. Strict compliance with those requirements is required because business rescue proceedings can easily be abused**. As this Court noted in *Pro-Wiz*, '[i]t has repeatedly been stressed that business rescue exists for the sake of rehabilitating companies that have fallen on hard times but are capable of being restored to profitability or, if that is impossible, to be employed

where it will lead to creditors receiving an enhanced dividend. Its use to delay a winding-up, or to afford an opportunity to those who were behind its business operations not to account for their stewardship, should not be permitted'.
See further paras 40 to 42."

(emphasis added)

[23] In the present application the papers in the business rescue application to which this Court was referred at face value fails to demonstrate compliance with regards to service of the application on **all** affected parties or proper service of the application. Whilst the business rescue application is not before this Court, it is inextricably linked to the question of law on section 131(6), which the applicants seek this Court to consider. As in *Lutchman N.O. and Others* it must be concluded that no business rescue application has been "made", which stays or suspends the winding up process within the meaning attributed to suspends in *GCC Engineering (Pty) Ltd and others v Maroos and others*.

The allegation of overstepping of powers by the provisional liquidators

[24] The applicants contend that the provisional liquidators have overstepped their powers when acting in terms of sections 19 and 69 of the Insolvency Act 24 of 1936. In this regard the complaint is mainly predicated on attachments made by the jointly appointed liquidators and certain warrants obtained to attach goods of not only Tariomix but third parties.

[25] The applicants to this end take issue with the powers of the provisional liquidators accusing them of abusing and exceeding their powers. In this regard reliance is placed on paragraph 3.10 of the powers of the provisional liquidators, which provides that they are:

> "To seize and/or attach and/or take control of any movable property of Tariomix including any form of computer, electronic device, data, wallet system, data base, website, related social media platforms, WhatsApp platform, cryptocurrency, precious metals, precious stones, mineral, diamond (polished or unpolished), vehicle, equipment, license, mining license and/or permit by public auction, public tender, private treaty or relevant platform, as the case may be, and to give delivery thereof in terms of section 386(4)(h)."

[26] Aligned with the powers of the provisional liquidators, the applicants takes issue with the powers of the Commissioner in the section 417/418 enquiries in terms of which paragraph 3.20.3 empowers the Commissioner to *"identify what assets or monies, if any, were or are likely to be recovered for the benefit of the insolvent estate in consequence of the evidence tendered at the enquiry and, in respect of the latter, give reasons for stating so."*

[27] The applicants contend that the provisional liquidators have clearly and wrongfully given themselves the right to determine whether assets belonging to third parties could be attached and seized. In

so doing, the applicants contend that the provisional liquidators are playing the role of a judge, jury and executioner akin to the pre-constitution era where basic human rights and rules of natural justice were simply trampled upon.

[28] In advancing the aforesaid contentions the applicants maintain that the modus operandi of the provisional liquidators has been to obtain section 69 warrants where they are in law required to have the utmost good faith (*uberrima fides*) to put all relevant material facts before a magistrate given the drastic and draconian relief sought in the absence of any other party. In this regard, the applicants allege that the provisional liquidators have failed to act with the utmost good faith which has resulted in the granting of the said section 69 warrants by magistrates. The narrative is further that a similar ploy was adopted when applying for their extended powers from the Master two (2) days after their appointment.

[29] Against the aforesaid claim that the assets of third parties are being attached unlawfully by the provisional liquidators, the applicants contend that they have made a case for the grant of an interim interdict. The requirements for the grant of an interim interdict is, to this end, formulated as follows in the founding affidavit:

> "14. I have been advised that the requirements for an interim interdict of the kind applied for by the First and Second Applicants are as follows:

Prima facie right

14.1 The Provisional Liquidators are abusing and exceeding their powers and are unlawfully acting to the detriment of not only the Applicants but also third parties and Tariomix. The Applicants, Tariomix and third parties have a right to be protected against such illegal conduct.

Balance of convenience

15.1 The Applicants' case is that the balance of convenience self-evidently favours it, should the relief sought be granted based on the following:-

(i) The actions by the Joint Liquidators and the Fifth Respondent are unlawful and the rights of the Applicants, Tariomix and other third parties are being infringed;

(ii) The Applicants and innocent third parties who have a right to dignity and to be treated fairly are infringed to the extreme which should not be allowed in a society of humanity.

15.2 Should an order not be granted, the Applicants, Tariomix and innocent third parties would suffer financial and economic losses apart from the infringements to their dignity.

Well grounded apprehension of harm

16.1 It has already been pointed out that the First and Second Applicants as well as Tariomix and innocent third parties have already suffered harm due to the unlawful conduct of the Joint Liquidators. Such harm is irreparable.

16.2 The Joint Liquidators have been requested in writing to cease such conduct and are simply proceeding with their destructive and unlawful actions. They refused.

16.3 The Provisional Liquidators are clearly not acting responsibly as would be expected from any person in a fiduciary position.

No alternative remedy

17.1 The First and Second applicants are further being advised that they should demonstrate by way of evidence that it has no alternative remedy available to it.

17.2 The Applicants have no alternative remedy but to approach this Court on an urgent basis for the relief claimed in the Notice of Motion. Only a court of law can halt unlawful conduct."

[30] The provisional liquidators counter the allegations of the applicants by highlighting that Tariomix has been playing a game of cat and mouse with the provisional liquidators since the initiation of the winding up process. This contention is made on the basis that Tariomix (and by implication the first applicant) has continually moved and/or hidden assets in different entities and/or different locations, so as to stultify the liquidators in conducting their business.

[31] Numerous examples are provided of the unlawful conduct perpetuated by Tariomix (under hand of the applicants). These

include the following. When the joint provisional liquidators, for example, proceeded to attach certain furniture of the business of Tariomix situated at the business premises of Tariomix and subsequent to the attachment and removal of the assets, the first applicant caused an application to be issued by an entity known as Tarioco under the hand of one of his close confidants, Mr Hannes Badenhorst, to claim that the furniture removed from the premises vested in Tarioco and not in Tariomix. Mr Badenhorst is said to have gone through a great deal to attach certain documents supporting the claim that the items of furniture were in fact purchased by Tarioco and not Tariomix. Upon receipt of the application, the jointly appointed provisional liquidators conducted their own investigations and were able to determine that Mr Badenhorst and/or persons under his command together with the first applicant had forged certain of the invoices and actually removed the names of Tariomix in a fraudulent manner. This discovery by the jointly appointed provisional liquidators was raised in an answering affidavit in that application, which resulted in the application being withdrawn on 20 November 2023 by Tarioco against the jointly appointed liquidators, with costs to be paid by Tarioco.

[32] On 5 August 2023, the first applicant during one of his live appearances on Facebook, *inter alia*, states that he is currently at his house in Bronkhorstspruit in possession of vast amounts of cash and diamonds and that he challenges the jointly appointed provisional liquidators and more particularly *Adv Hershensohn SC* to climb in his helicopter to see if he could get to the premises in

time before the assets would have been spirited away by persons close to him.

[33] The joint provisional liquidators further refer to an attachment at a premises in Bloemfontein of Mrs Desiree Liebenberg, the spouse of the first applicant, in terms of section 19(1) on 24 April 2024 which was attended by Mr Kobus Senekal of FJ Senekal Inc. It is said that shortly after the attachment and removal of various assets at the respective premises, *Mr Niedinger* requested return of the assets with similar threats of urgent applications, as the current application, should the assets not be returned. Shortly after this Mr Senekal informed that the Sheriff Bloemfontein was requested to release the attached assets to Mrs Liebenberg after receipt of an affidavit from her claiming ownership of the said assets. Notwithstanding a request from Mrs Liebenberg to disclose the funds used to purchase the assets, same has not been forthcoming. Interpleader proceedings have been brought in Bloemfontein calling on Mrs Liebenberg to provide testimony in court in respect of her alleged ownership, which Mrs Liebenberg could have utilised rather than threatening with an urgent application.

[34] The aforementioned conduct contend the joint provisional liquidators necessitated use of the provisions of section 19 to attach documents and assets that vest in the estate, and section 69(3) to obtain warrants to search for and attach assets vested in Tariomix.

[35] The implicated legislation under this discussion includes sections 19 and 69 of the Insolvency Act 24 of 1936, and section 354 of the Companies Act. Section 19 of the Insolvency Act provides that:

> "**19 Attachment of property by deputy sheriff**
>
> (1) As soon as a deputy-sheriff has received a sequestration order he shall attach, as hereinafter provided and make an inventory of the movable property of the insolvent estate which is in his district and is capable of manual delivery and not in the possession of a person who claims to be entitled to retain it under a right of pledge or a right of retention or under attachment by a messenger, that is to say –
>
> *(a)* he shall take into his own custody all books of account, invoices, vouchers, business correspondence, and any other records relating to the affairs of the insolvent, cash, share certificates, bonds, bills of exchange, promissory notes, and other securities, and remit all such cash to the Master;
> *(b)* he shall leave movable property other than animals in a room or other suitable place properly sealed up or appoint some suitable person to hold any movable property in his custody;
> *(c)* he shall hand to the person so appointed a copy of the inventory, with a notice that the property has been attached by virtue of a sequestration order. That notice shall contain a statement of the offence constituted by section *one hundred and forty-two* and the penalty provided therefor;
> *(d)* he shall make a detailed list of all such books and records and endorse thereon any explanation offered by the insolvent in respect thereof or in respect of any books or records relating to his affairs which the insolvent is unable to produce;
> *(e)* if the insolvent is present he shall enquire from him whether the list referred to in paragraph *(d)* is a complete list of the books and records

relating to his affairs and record his reply thereto.

(1)*bis* If an insolvent has in reply to the deputy sheriff's enquiry intimated that the list referred to in paragraph *(d)* of subsection (1) is a complete list of the books and records relating to his affairs, the books and records referred to in such list shall, unless the contrary is proved, in any criminal proceedings against him under this Act, be deemed to be the only books and records maintained by him.

(2) Any person interested in the insolvent estate or in the property attached may be present or may authorize another person to be present when the deputy-sheriff is making his inventory.

(3) The deputy-sheriff shall-

(a) immediately after effecting the attachment, report to the Master in writing that the attachment has been effected and mention in his report any property which to his knowledge is in the lawful possession of a pledgee or of a person who is entitled to retain such property by virtue of a right of retention and shall submit with such report a copy of the inventory made by him under subsection (1);

(b) as soon as possible after the appointment of the trustee, submit a copy of such inventory to him.

(4) A messenger shall transmit to the Master without delay an inventory of all property attached by him which he knows to belong to an insolvent estate…"

[36] Section 69 of the Insolvency Act 24 of 1936 provides that:

"**69 Trustee must take charge of property of estate**

(1) A trustee shall, as soon as possible after his appointment, but not before the deputy-sheriff has made the inventory referred to in sub-section (1) of section nineteen, take into his possession or under his control all movable property, books and documents belonging to the estate of which he is trustee and shall furnish the Master with a valuation of such movable property by an appraiser appointed under any law relating to the administration of the estates of deceased persons or by a person approved by the Master for the purpose.

(2) If the trustee has reason to believe that any such property, book or document is concealed or otherwise unlawfully withheld from him, he may apply to the magistrate having jurisdiction for a search warrant mentioned in sub-section (3).

(3) If it appears to a magistrate to whom such application is made, from a statement made upon oath, that there are reasonable grounds for suspecting that any property, book or document belonging to an insolvent estate is concealed upon any person, or at any place or upon or in any vehicle or vessel or receptacle of whatever nature, or is otherwise unlawfully withheld from the trustee concerned, within the area of the magistrate's jurisdiction, he may issue a warrant to search for and take possession of that property, book or document.

(4) Such a warrant shall be executed in a like manner as a warrant to search for stolen property, and the person executing the warrant shall deliver any article seized thereunder to the trustees."

[37] Section 354(1) of the Companies Act provides as following:

"*The Court may at any time after the commencement of a winding-up, on the application of any liquidator, creditor or member,* ***and on proof to the satisfaction of the Court that all proceedings in relation to the winding-***

up ought to be stayed *or set aside,* ***make an order staying*** *or setting aside the proceedings or for the continuance of any voluntary winding-up on such terms and conditions as the Court may deem fit.*"

[38] The sentiments expressed in *De Beer v Hamman NO & Others* [2005] JOL 15137 (T); (A1290 /04) [2005] ZAGPHC 71 (25 July 2005) at paragraph 33 encapsulates the essence of the powers and duties of a liquidator and/or trustee:

"A liquidator and/or trustee is obliged to ensure that goods belonging to the insolvent estate are found, secured and liquidated in accordance with the provisions of the Insolvency Act and/or the Companies Act for the benefit of the creditors of the insolvent estate."

[39] The law is clear in respect of the interplay between sections 19 and 69 of the Insolvency Act. Once an inventory has been made of the items identified in section 19 and the jointly appointed liquidators are furnished with a copy of the attachment in terms of section 19(3)(b), they may take into their possession in terms of section 69(1), the property movable or otherwise of the insolvent estate. These are duties which are entrenched in statute and which the jointly appointed liquidators are duty bound in law to comply with.

[40] Section 69(2) further enjoins the jointly appointed liquidators where they have reason to believe that any property, book or document is concealed or is otherwise being unlawfully withheld from them, to apply to a Magistrate having jurisdiction for the area

for a search warrant as referred to in the provisions of section 69(3).

[41] Section 69(3) provides for judicial oversight over such an application before a warrant is issued. The applicants as indicated above cry foul over the *uberrima fides* of the applicants in applying for numerous warrants to magistrates, which warrants were in fact issued. In the absence of any challenge to the grant of such warrants, this Court cannot be called upon to engage in conjecture or speculation or a broad allegation by the applicants. The applicants purport to raise this complaint in the interest of third parties who, save for Mr Badenhorst and Mrs Liebenberg, remain silent on the alleged violation of their constitutional rights.

[42] Third parties aggrieved by warrants issued and executed pursuant to section 69 are vested with remedies in their own right to challenge same. If what the applicants allege is true that the jointly appointed provisional liquidators acted in bad faith in applying for such warrants, the law is clear on what the effect thereof would be. By way of analogy in *Ivanov v North West Gambling Board* (312/2011) [2012] ZASCA 92 (31 May 2012), the Supreme Court of Appeal decisively dealt with the question of spoliation predicated on a search warrant which was invalid. See paragraphs [11] - [12], [15] - [17].

[43] The applicants simply have no *locus standi* to raise complaints on behalf of third parties who remain supine, or as they seek an

interdict for future conduct to engage on speculation that future attachments pursuant to section 69 warrants will be unlawful or unchallenged for that matter by affected parties. Such affected parties have an array of remedies at their disposal including but not limited to interpleader proceedings, or otherwise to seek the return of the goods. What remains is to consider whether the applicants have made a case for the grant of an interim interdict.

Interim Interdict

[44] The requirements for the grant of an interim interdict are trite: a *prima facie* right; an apprehension of harm which may be irreparable; a balance of convenience; and the absence of a satisfactory alternative remedy.

[45] Under the requirement of a *prima facie* right, the applicants contend that the relief sought is competent since the liquidation proceedings have been suspended in terms of section 131(6). As indicated above that contention is misplaced as there is no proof that the business rescue application has been served on all the affected parties, to trigger section 131(6) of the Companies Act.

[46] Under the requirement of irreparable harm the case for the applicants is predicted on broad allegation that they as well as Tariomix and third parties (who remain supine) have already

suffered harm. Save for this broad allegation, there is a dearth of cogent evidence to sustain the allegation. Mere fears of suffering harm is not a basis to grant an interim interdict. In the recent judgment of *Met Import CC t/a Metro Oriental Import & Export v Master of the High Court, Johannesburg and Others* (122962/2023) [2024] ZAGPJHC 61 (29 January 2024) at paragraph 16, the Court in dealing with the requirement of apprehension of harm, held as follows:

> "The second requirement for an interim interdict is that of harm. For this purpose, the applicant must demonstrate either a continuing infringement of the right in issue or a well-grounded apprehension of infringement. In casu the applicant's papers were hopelessly deficient. While the deponent to the founding affidavit stated that a "travesty of justice" would occur and that "it could have grave and dire consequences to the effectual and proper winding up of…. the eighth respondent" none of those allegations were underpinned by averments of primary facts supportive of those assertions or concerns. The high-water mark of the applicant's case on this issue was that the third and fourth respondents might not deal appropriately with claims advanced by creditors and that they might sell some or all of the eighth respondent's assets. No proper basis was laid for the first concern (I deliberately put it no higher than that). To this I would add that the third and fourth respondents, as liquidators, would be bound to carry out their duties in accordance with the law and with due regard to the interests of creditors – all under the eye of the first respondent. In the absence of any evidence of prior wrongdoing, I cannot properly conclude that there is any likelihood that the third and fourth respondents will not discharge their obligations in a proper manner.

[47] The provisional liquidators have, to mitigate the concerns of the applicants, provided an undertaking not to sell any of the attached

assets vesting in the insolvent estate of Tariomix. This should put paid to the issue of irreparable harm.

[48] Absent irreparable harm, the balance of convenience does not favour the granting of an interim interdict. Under the requirement of a balance of convenience, the Constitutional Court held in *Tshwane City v Afriforum and Another* 2016 (6) SA 279 (CC) at paragraph 62 that:

> "..interests are inextricably linked to the harm a respondent is likely to suffer in the event of the order being granted and the harm likely to be suffered by an applicant if the relief sought is not granted."

[49] The applicants, aside from the remedies available to the absent third parties, have an alternative remedy under section 354 of the Companies Act which provides similar protection to the applicants if sustained on evidence justifying the grant of such relief.

[50] These constitute the reasons for the order handed down on 16 May 2024.

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A H PETERSEN

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

NORTH WEST DIVISION, MAHIKENG

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