



**IN THE HIGH COURT OF SOUTH AFRICA
[WESTERN CAPE DIVISION, CAPE TOWN]**

Case no: 11237/20

In the matter between:

THEODOR WILHELM VAN DEN HEEVER N.O. First Applicant

JURGENS JOHANNES STEENKAMP N.O. Second Applicant

MATLOOANE JOHN MOPHETHE N.O. Third Applicant

in their capacities as joint liquidators of Bunker Suppliers (Pty) Limited (in liquidation);
Registration No: 2000/004999/07; Registered Address: 7 Transvaal Street, Paarden
Eiland, Western Cape

and

WORLD MARINE ENERGY (PTY) LTD (in liquidation) First Respondent

Registration No: 2015/189385/07; Registered Address:
1st Floor, Table Bay Building Tygerberg Park, 163 Uys Krige Drive, Platteklouf, Western
Cape

PUBLIC INVESTMENT CORPORATION SOC LIMITED Second Respondent

Registration No: 2005/009094/30 FSP No 19777

And: Case no:
6227/22

In the matter between:

PUBLIC INVESTMENT CORPORATION SOC LIMITED

Applicant

Registration No: 2005/009094/30 FSP No 19777

and

WORLD MARINE ENERGY (PTY) LTD (in liquidation) First
Respondent

Registration No: 2015/189385/07;

JOCHEN ECKHOFF N.O. Second
Respondent

BRIAN LULAMILE N.O. Third
Respondent

MARCEL EDWIN N.O. Fourth
Respondent
in their capacities as joint liquidators of World Marine Energy (Pty) Ltd (in liquidation)
Registration No: 2015/189385/07

THE MASTER OF THE HIGH COURT, CAPE TOWN Fifth
Respondent

THEODOR WILHELM VAN DEN HEEVER N.O. Sixth
Respondent

JURGENS JOHANNES STEENKAMP N.O. Seventh
Respondent

MATLOOANE JOHN MOPHETHE N.O. Eighth
Respondent
in their capacities as joint liquidators of Bunker Suppliers (Pty) Limited (in liquidation);
Registration No: 2000/004999/07; Registered Address: 7 Transvaal Street, Paarden
Eiland, Western Cape

JUDGMENT DELIVERED (VIA EMAIL) ON 19 DECEMBER 2022

SHER, J:

1. I have two applications before me. In the first one (under case number 11237/20) the liquidators of Bunker Suppliers (Pty) Ltd ('BS'), which was formerly known as World Marine and Offshore Supply (Pty) Ltd, seek an order placing World Marine Energy (Pty) Ltd ('WME'), which has been in voluntary liquidation since 26 August 2021, under 'compulsory' liquidation, together with certain ancillary relief.
2. The liquidators of WME do not oppose the application and, save for filing a report and making certain submissions for the assistance of the Court, abide the

outcome thereof. They submit that in the event that WME is placed in compulsory liquidation the Court should make an order declaring that the steps taken by them as well as the resolutions which were adopted and the claims which were proved by creditors at the 1st and 2nd creditors' meetings which were held, are valid, and that they are entitled to the costs of their administration of WME to date, including their reasonable fees and disbursements.

3. The Public Investment Corporation Soc Ltd ('PIC'), which was granted leave to intervene on 2 March 2022 and has been joined as the 2nd respondent, opposes the winding-up application. It has, in turn, made application (under case number 6227/22) for an order setting aside the voluntary liquidation of WME and the appointment of its provisional liquidators.

The relevant facts

4. BS and WME were previously in the business of the importation and sale of bulk fuel supplies. BS was established in 2000 and WME in or about 2015. WME served as a BEE vehicle to secure fuel supply contracts in the Northern Cape. It shared directors and staff with BS.
5. In 2017 a R 400 million facility was made available to WME via the PIC, acting for and on behalf of the UIF. R 100 million thereof was advanced to WME as a loan by way of a transfer of funds from the UIF between 20 July and 2 December 2017. The loan was secured by a notarial covering bond over WME's movables and a cession of shares in WME in *securitatem debiti* and guarantees that were provided by WME's shareholders. According to their respective books of account, as at 20 July 2017 WME was indebted to BS in an amount of R 16.34 million, for and in respect of fuel supplies.
6. As a result of financial difficulties on 20 October 2017 BS was placed into business rescue. In December 2017 WME distributed its entire cash reserves, totalling approximately R 4.13 million, to its shareholders as a dividend, at or about the time that journal entries were effected in the ledgers of both WME and BS reducing the amount that was owed by WME to BS by R 12.18 million on 19 December 2017, and by a further R 3.99 million two days later. Consequently, by

means of these entries the amount owing to BS in the WME books of account was reduced to R 378 560, as at 21 December 2017.

7. On 23 January 2018 the BS business rescue process was terminated and on 8 February 2018 it was placed in provisional liquidation. The order was made final on 27 March 2018. On 11 May 2018 the liquidators obtained an order authorizing them to convene an enquiry into BS's affairs and to institute action on behalf of it against WME, for the recovery of what was allegedly owing to it.
8. Subsequently, on 19 May 2020 a statutory letter of demand was delivered to WME calling upon it to make payment of the sum of R 16 005 350, which was allegedly owing by it to BS. This was met by a denial that any monies were owing and a request from the CEO of WME for time to investigate the matter and to provide proof that WME's indebtedness to BS had been discharged.
9. On 19 August 2020 the liquidators of BS launched the current application for the compulsory winding-up of WME, on the grounds that it was unable to pay BS the R 16 million odd which was owing to it. Although a notice to oppose was served, no answering affidavit was filed. On 22 September 2020 the liquidators accordingly issued a summons in terms of which they sought to claim the R 16 million+ from WME.
10. The parties then agreed to engage in a mediation process in December 2020 with a view to arriving at a determination of what was owing. To this end a forensic auditor, one Ferreira, who was engaged by the liquidators, obtained financial records and extracts from the books of account of WME, via its accountant, Kinnear. According to those records, WME's own books allegedly reflected that as at 30 September 2017 it owed BS R 13.2 million.
11. WME was requested to provide copies of the necessary supporting documentation which substantiated the writing-off in its books, in December 2017, of approximately R 16.17 million of what was owing to BS. But save for documents in respect of transactions to the value of R 1.858 million, no such documentation was forthcoming.
12. After considering the information and financial records which had been supplied by WME, Ferreira prepared 2 reports for the liquidators of BS, copies of which

are annexed to the founding affidavit in the application for the compulsory winding-up of WME.

13. Ferreira found that although WME and BS allegedly entered into an agreement whereby WME would provide BS with fuel as a form of post-business rescue finance, the value of which would be offset against the amount which was owing by WME to BS, only the supply of fuel to the value of R 1.858 million was sufficiently vouched for. For the rest, there was no supporting documentation which substantiated the write-off.
14. Consequently, according to Ferreira's two reports, which were compiled after he had reviewed the documents which had been supplied and had met with Kinnear and Opperman of WME, as at 20 October 2017 when BS was placed in business rescue, the amount owing to it by WME was in the order of R 16.5 million and as at 20 July 2021, some 4 years later, WME owed BS R 9 479 704 and R 4 941 983 i.e. a combined total of R 14 421 687.
15. On 15 July 2021 the PIC obtained an order in the Gauteng High Court *ex parte*, granting it leave to perfect its notarial covering bond by attaching WME's movables, including cash it held in certain bank accounts, and interdicting WME from operating its bank accounts. The order was in the form of a rule *nisi* which was returnable on 4 October 2021.
16. This prompted certain shareholders of WME (there is an issue as to whether the requisite shareholders properly participated), to pass a special resolution on 11 August 2021 whereby the company sought to wind itself up, voluntarily. The resolution was registered with the CIPC on 26 August 2021, from which date, in terms of the Companies Act of 1973 ('the Act'), the company is considered to have been in voluntary liquidation.
17. The PIC claims that it was unaware at the time that the company had placed itself in voluntary liquidation, and pursuant to the provisional perfection order it had obtained, on 20 September 2021 it caused the Sheriff to attach monies to the value of R 1 408 880 which were being held by WME in a Nedbank account, and between 14 and 19 October 2021 it attached and removed certain movables

which belonged to WME. On 4 October 2021 the provisional perfection order was made final.

18. The PIC further claims that it first became aware of the application by BS to place WME under compulsory liquidation (the 'principal application'), on 5 November 2021. Four days later it made application for leave to intervene therein. When the matters came before me I made an order on 29 November 2021 whereby I directed that the application to intervene should be heard on 2 March 2022 and the principal application on 21 April 2022, and to this end the parties were directed to file their respective affidavits on dates which had been agreed.
19. On 25 February 2022 the PIC filed its application to set aside the voluntary winding-up and to interdict WME's liquidators from proceeding therewith.
20. On 2 March 2022 Saldanha J granted the PIC leave to intervene and confirmed the dates that had previously been set for the filing of affidavits in the principal application. The PIC was accordingly supposed to have filed its answering affidavit in the principal application by 14 March 2022. It failed to do so. As a result, BS's liquidators were unable to file its replying affidavit by 22 March 2022.
21. On 19 April 2022 the PIC filed an application for the postponement of the applications, which were due to be heard in 2 days' time. Because of these circumstances the applications could not be heard on 21 April 2022 and had to be postponed for hearing in June 2022, and the issue of the wasted costs which had been occasioned thereby stood over for later determination.

An evaluation

22. As was pointed out by WME's counsel the position which has been adopted by the PIC is puzzling, to say the least. Although it appears, on its own version, to have a claim against WME for the repayment of the R 100 million+ which was loaned to it at the instance of the UIF, it did not lodge such a claim against WME after it was placed in voluntary liquidation. Instead, it seeks to set aside the voluntary liquidation and to oppose the application for compulsory liquidation. It has adopted the stance that inasmuch as WME breached the facilities agreement it had in numerous respects, *inter alia* by declaring and paying out dividends to its shareholders other than in the ordinary course of business and placing itself in

voluntary liquidation without the prior written consent of the PIC, the PIC is at liberty to have the voluntary liquidation set aside, and by virtue of the notarial covering bond and perfection order which it obtained it is a secured creditor and can therefore dictate whether or not WME should be wound up.

23. In the circumstances, as was pointed out by counsel for the liquidators of WME, it is hard not to conclude that the PIC's objective is solely aimed at freeing WME from the strictures of the liquidation process so that that it can lay claim to whatever residual, movable assets are left, for itself, to the exclusion of any other creditors and to avoid any insolvency enquiry being held, at which the circumstances which gave rise to the grant of the loan and its administration can be examined. In this regard the PIC complained, tellingly, that an order for the compulsory winding-up of WME would frustrate the implementation of the perfection order which it had obtained.
24. In order to be able to lay sole claim to the residual, movable assets of WME (and to avoid an insolvency enquiry) the PIC needs to succeed in setting aside the voluntary liquidation, which commenced on 26 August 2021 and to fend off the compulsory liquidation which, if it succeeds, would be deemed to have commenced a year earlier on 19 August 2020, at the time of the filing of such application, because the attachments which the PIC effected occurred after the commencement of both the voluntary as well as the compulsory winding-up processes and would accordingly be void in terms of s 359 of the Act. Without the attachments the PIC would not rank as a secured creditor and may be no more than a preferent one, if at all.¹
25. As was pointed out by counsel for BS and WME, the fact that WME may have breached the terms of the facilities agreement it had with the UIF/PIC by passing a resolution placing itself under voluntary liquidation, whilst constituting a breach of contract did not necessarily bar its shareholders, as a matter of law, from seeking to wind it up. And even if it did, this is no answer to the application for its compulsory winding-up, at the instance of BS, if it is established that WME is

¹ If, as contended by the liquidators the PIC was not entitled as a matter of law to have obtained the perfection order as it is the UIF which holds the security rights in terms of the facilities agreement, the perfection order is vulnerable to being set aside.

indebted to it in respect of a claim to the value of somewhere between R 13 and R 16 million, depending on the date of computation thereof.

26. In this regard, s 346(1)(e) of the Act expressly provides that an application for the compulsory winding-up of a company which is in the process of being wound up voluntarily, may be made by any creditor of the company, and it was held in *King Pie*² that the existence of a voluntary winding-up order at the instance of members of a company is accordingly no bar to the grant of a compulsory winding-up order at the instance of a creditor, and it is not necessary to have the voluntary winding-up set aside before the application for a compulsory winding-up is made.³
27. The PIC avers that the liquidators of BS ‘merely’ rely on some accounting records and correspondence between staff members of BS and WME and the opinion and analysis of Ferreira, to prove the debt owing to BS, and no ‘actual’ invoices have been provided which establish its existence ‘without doubt’ (sic). It further alleges that any indebtedness by WME to BS was one ‘created and contrived’ by the joint directors of the two companies. It claims that certain resolutions of the boards of directors of the entities were backdated and there were misrepresentations made that meetings were held, and the affairs of both entities were conducted in a manner that did not properly distinguish between their individual, separate corporate identities.
28. In my view these contentions are misplaced both factually and as to their effect, in law, insofar as the application for the compulsory winding-up is concerned (as well as the application to set aside the voluntary winding-up), and the PIC faces several, insurmountable hurdles.
29. In the first place, as was pointed out by the liquidators of BS the PIC may have no *locus standi* to oppose the compulsory winding-up (or even to make application for the setting aside of the voluntary winding-up), as it is not a creditor of WME. In this regard, the facility agreement whereby the loan finance was extended to WME was one between it and the UIF, with the PIC acting as the

² *King Pie Holdings (Pty) Ltd v King Pie (Pinetown) (Pty) Ltd; King Pie Holdings (Pty) Ltd v King Pie (Durban) (Pty) Ltd* 1998 (4) SA 1240 (D) at 1246F.

³ *Id.*, at 1249H-I.

UIF's agent. Thus, the UIF is the party which is entitled to exercise the rights afforded in terms of the facilities agreement and it is the UIF that holds the covering bond and the rights it affords in terms thereof, and not the PIC.

30. The liquidators point out that in terms of s 7 of the Unemployment Insurance Act⁴ monies belonging to the UIF may be deposited on its behalf with the PIC in order that it may invest them in accordance with the provisions of the Public Investment Corporation Act.⁵ In terms of this Act a depositor is a person or entity who pays over a deposit to the PIC for investment, on its behalf, and in terms of the Financial, Advisory and Intermediary Services Act,⁶ it is the depositor who is deemed to be the 'client' i.e the principal, to whom fiduciary and other legal duties are owed.
31. As the liquidators further point out, at common law it is trite that an agent for a creditor is not, by virtue of that fact, itself a creditor⁷ and as a general rule⁸ an agent cannot sue for a debt which is due to its principal, nor can it ordinarily sue in its own name in respect of contracts it has entered into on behalf of a principal.⁹
32. It has not been alleged by the PIC that it is authorized, as agent of the UIF, to oppose the compulsory winding-up application on behalf of the UIF, nor has it alleged that it has authority to make application for the setting aside of the voluntary winding-up of WME, on behalf of the UIF.
33. This court has held¹⁰ that an application for sequestration/liquidation must be brought in the name of a creditor, and not in the name of its agent.¹¹ The same must hold true in respect of any application which is brought by an agent of a

⁴ No. 63 of 2001.

⁵ No. 23 of 2004.

⁶ No. 37 of 2002.

⁷ *Myburgh v Walters* 2001 (2) SA 127 (C) 130G-H.

⁸ Unless by virtue of custom, trade usage, or the general course of business dealings it is accepted that the agent is authorized to act as the contracting party i.e as the principal, or the agent is either expressly or impliedly authorized to do so, in terms of the contract of agency vide *Continental Illinois National Bank & Trust Co. of Chicago v Greek Seamans' Pension Fund* 1989 (2) SA 515 (D) at 538H-542C.

⁹ *Smith v Kwanonqubela Town Council* 1999 (4) SA 947 (SCA).

¹⁰ *Body Corporate, Harborview Sectional Title Scheme vs Webb* (WCED 10619/15, 17 December 2015) para 18, following *Corder v Hanekom* 1934 CPD 46.

¹¹ In contrast to this, in the Gauteng High Court it is apparently accepted that such an application may be brought in the name of an agent if the principal is identified and the capacity and authority of the agent to bring the application is set out in the founding affidavit.

creditor, in respect of the setting aside of a winding-up, or in opposition to an application for a winding-up, unless the agent is expressly authorized to act on behalf of the creditor, which is not evident from the papers.

34. But even if one were to accept that the PIC has standing in respect of both applications, it seems to me that its contentions as to the alleged non-existence or insufficient proof of the debt and whether it is properly and validly disputed by it, have not been established by it.
35. As to the existence of the debt all that the applicants in the compulsory winding-up need to show is that *prima facie* BS has a claim against WME in an amount which exceeds the statutory minimum of R 100, which it is unable to pay,¹² whereafter the onus would fall on the *respondent* i.e WME (not on a 3rd party such as the PIC) to show that the debt is subjectively disputed *bona fide*, on objectively reasonable grounds.¹³ As the liquidators point out, a debt is not *bona fide* disputed simply because of a respondent's say-so. If the respondent raises a dispute, it must do so in good faith and on reasonable grounds.¹⁴
36. As an outsider who 1) was not party to the underlying commercial transactions between BS and WME which gave rise to the alleged indebtedness to BS and who 2) has no direct first-hand knowledge of them, the PIC is not in a position either to contest the existence of such transactions and the alleged indebtedness which arises from them, or to dispute the claimed indebtedness on objectively reasonable grounds.
37. As has already been pointed out the existence of an indebtedness by WME to BS between 2017 and 2020 in an amount which ranged between R 12 and R 16.5 million was acknowledged by WME in its own books of account on several occasions over the period in question and was confirmed not only by its own accountant Kinnear and the accountant commissioned by the liquidators of BS (Ferreira), but was also acknowledged by the liquidators of WME after they had carried out their own investigations.

¹² *Kalil v Decotex (Pty) Ltd* 1988 (1) SA 943 (A) at 975J-979F; *Orestisolve (Pty) Ltd t/a Essa Investments v NDFT Investment Holdings (Pty) Ltd & Ano* 2015 (4) SA 449 (WCC), para 7.

¹³ *Orestisolve* para 8; *Porterstraat 69 Eiendomme (Pty) Ltd v PA Venter Worcester (Pty) Ltd* 2000 (4) SA 598 (C) at 606; *Kyle v Maritz & Pieterse Inc* [2002] 3 All SA 223 (T) para 13.

¹⁴ *Id*, *Kyle* para 13.

38. The Preliminary Forensic Review Report by RR accounting services, which was commissioned at the instance of the PIC does not suggest that WME is/was not indebted to BS. It simply opined that the post-business rescue commencement funding agreement between the 2 entities may not have been properly authorized and pointed out how WME disbursed the R 100 million loan which was advanced to it in a manner which could not properly be accounted for, and it appears to have made multiple, improper and irregular payments/'loans' from these funds to other, related corporate entities such as HDI and Tramore.
39. In addition, as the applicants point out, from the PIC's own papers it is evident that WME started defaulting on the repayment of its loan to the UIF in May 2019, from which time already it appears to have been unable to pay its debts and was thus commercially insolvent.
40. In the circumstances I am of the view that, even if it has standing, the PIC has not succeeded in establishing that WME's admitted indebtedness to BS is *bona fide* disputed by it, on objectively reasonable grounds. Nor, in my view, do its contentions about the mismanagement of the 2 corporate entities by their directors rebut the *prima facie* evidence of such indebtedness, even on a *prima facie* basis. As a result, the application by the PIC for an order setting aside the voluntary winding-up on the grounds advanced by it cannot succeed and its opposition to the application for the compulsory winding-up must similarly fail.
41. Insofar as that application is concerned, as previously pointed out the fact that WME is in voluntary liquidation does not serve as a bar to an application that it be placed in compulsory winding-up. That said, as was pointed out in *King Pie*¹⁵ it is 'obviously undesirable' to have two winding-ups in respect of a single corporate entity proceeding simultaneously.
42. Section 354(1) of the Act provides that a court may at any time after the commencement of winding-up proceedings make an order staying or setting aside such proceedings, on such terms and conditions as it may deem fit. The provision must be read together with s 347(4)(a), which provides that if a court makes an order for the compulsory winding-up of a company at the instance of a

¹⁵ Note 2 at 1249F.

creditor in terms of s 346(1)(e) i.e where the company is already subject to a voluntary winding-up order, it may confirm all or any of the proceedings in the voluntary winding-up.

43. It has been held that the court's powers in terms of s 354(1) (read together with s 347(4)(a)) are wide, discretionary powers¹⁶ which are 'practically unlimited',¹⁷ save that it is required to have regard for the wishes of interested parties such as the liquidator, creditors and members and should take into account the 'surrounding' circumstances.¹⁸
44. In *Klass*¹⁹ it was held, after a conspectus of several English decisions (our legislation is modelled on English law) and the earlier decisions of our courts in *Ex parte Chenille Corporation*²⁰ and *Storti*²¹ that considerations such as commercial morality and public interest should also be had regard for by the court when exercising its discretion.
45. In my view the following are the principal considerations which must be taken into account in the circumstances of this matter, and which militate in favour of an order being made in terms of s 354(1) in respect of the voluntary winding-up proceedings:
 - 45.1 The voluntary winding-up of WME occurred in breach of a contractual stipulation in the facilities agreement that it would only be entitled to make application therefor, with the prior written consent of the UIF/PIC, which it failed to obtain. Commercial morality requires that parties should, as far as possible, be held to contracts they have entered into and setting aside the voluntary winding-up would give effect to this principle.
 - 45.2 Although not raised directly in the papers, the court cannot close its eyes to the fact that the validity of the special resolution which certain of the shareholders took whereby they resolved to wind-up WME, is questionable. In this regard it appears, on the face of it, that the resolution

¹⁶ *King Pie*, n 2 at 1249H.

¹⁷ *Klass v Contract Interiors CC (In Liquidation)* 2010 (5) SA 40 (WLD), para 65.1.

¹⁸ *Id.*

¹⁹ *Id.*, para 65.4.

²⁰ *Ex parte Chenille Corporation & Ano: In re Chenille Industries (Pty) Ltd* 1962 (4) SA 459 (T) at 465A-G.

²¹ *Storti v Nugent & Ors* 2001 (3) SA 783 (W).

may not have been taken by and with the requisite majority of shareholders, although I hasten to add that in the absence of a copy of the shareholders' agreement, if any, and the memorandum of incorporation, or a copy of the relevant extract from the share register one is not able to draw any definitive conclusions in this regard. Nonetheless, the fact that the voluntary winding-up may not have been affected validly is, in my view, a consideration which should be taken into account, and which militates in favour of the discharge of the voluntary winding-up order and the placement of WME under compulsory winding-up at the instance of creditors.

- 45.3 Given the circumstances which prevailed at the time, the timing of the adoption of the special resolution suggests that the placing of the company in voluntary winding-up was done in order that shareholders, or certain of them, could exert some control over it and thereby avoid having the circumstances of any mismanagement being exposed at an insolvency enquiry in terms of the Act. I say this without in any way casting any aspersions on the liquidators who, by all accounts, appear to have carried out their duties in an exemplary manner that is beyond reproach. But, that said, there is a niggling and understandable perception that the voluntary winding-up was affected with a view to avoiding full exposure and accountability. In my view, to correct or assuage this perception the public interest requires that the voluntary winding-up be set aside and replaced with a compulsory one, at the instance of creditors, with a view to achieving full and complete transparency and a dissolution and winding-up which is considered legitimate.
- 45.4 In this regard, from the contents of both the founding as well as the answering affidavits and the annexures thereto, which include the report of the liquidators of WME there are clear indications of numerous, material irregularities in the management of the company and its funds by its directors, including in particular in relation to the R 100 million which was advanced to it by the PIC/UIF. Inasmuch as these funds were derived

from public monies, the public interest requires that liquidators nominated by creditors be appointed to investigate the circumstances, not only which led to the company's demise but in terms of which the loan was granted to WME and how it was used by the directors of WME. This will serve to reassure the public that, as far as possible, any persons responsible for any financial mismanagement and or irregularities will be held accountable, personally if necessary. In this regard, amongst the troubling allegations that have been made it is alleged that when the business rescue proceedings were terminated the business of BS was 'hijacked' by WME and then ruined, at a time when it was supposedly worth in the order of R180 million. In addition, the PIC avers that a number of other, serious irregularities occurred at the time, including the improper and unlawful payment of salaries, bonuses and other payments to executives under the guise that they had acted as consultants/independent contractors, and unlawful agreements were entered into with entities such as Arc whereby fuel/oil was sold to it at a certain price and then immediately repurchased from it, at double such price. Furthermore, the liquidators of WME have reported that their investigations reveal that millions of Rands were diverted out of the company prior to its voluntary winding-up. All of these aspects require proper investigation and exposure at an insolvency enquiry.

- 45.5 Discharging the company from provisional voluntary winding-up and placing it in compulsory winding-up will mean that the date of commencement of the winding-up will be extended to 19 August 2020 and will allow the liquidators to challenge any voidable dispositions or impeachable transactions which were made after that date.²² This will ensure that, as far as possible, all assets and funds will be repatriated into and form part of the company's estate, for the benefit of all its creditors and not only some of them.

²² In terms of s 341(2) of the Act.

- 45.6 Finally, it must be noted that the liquidators of WME do not contest the application to place the company in compulsory winding-up, provided that the steps which they have taken to date are recognized and not invalidated and they are remunerated for the work they have performed. In this regard, care must be taken when placing WME under compulsory winding-up not to reverse the progress which has been made by the liquidators of WME in its administration to date. In this regard numerous claims were admitted to proof at the 1st and 2nd meeting of creditors which took place on 30 November 2021 and 25 February 2022 respectively, and any order which is made should recognize this, in order not to prejudice the creditors.
46. The liquidators of WME suggested that, given the length of time that it has been under provisional liquidation and given that statutorily the Act does not require that a company first be placed under provisional liquidation, particularly not in the case of an order which is made in terms of s 347, consideration should be given to making an order which places it directly into a state of final liquidation/winding-up, as making another order placing the company in a state of provisional liquidation/winding-up would serve no purpose and would only drag out the process even further. Whilst it is indeed so that there is no statutory bar to placing a company directly into a state of final liquidation/winding-up, as Henochsberg points out even where the making of a provisional order may appear to serve no practical purpose it will, save in exceptional circumstances, be 'fundamentally unsound' to deviate from the accepted and long-standing practice in this regard, of first placing the company in provisional liquidation/winding-up, and it would be 'unjust' to the company, its members and its creditors to wind it up finally without affording them an opportunity to contest the process. It was not suggested that the circumstances of this matter are exceptional. In addition, the liquidators of BS indicated that they were not seeking a final order on behalf of the petitioning creditor, and in accordance with the long-standing and accepted practice in this division were merely asking for a provisional order, returnable in 6-8 weeks' time, as is customary.

47. Finally, as far as costs are concerned, the following. Firstly, in my view it would not be appropriate or fair to creditors of WME to order that the costs of the failed application by the PIC to set aside the voluntary winding-up, or the costs of its failed opposition to place WME under compulsory winding-up, should be borne by WME i.e should be costs in either the compulsory or the voluntary liquidation. As I have previously indicated, it is apparent that the PIC's objective was to free WME from both forms of liquidation in order that it could grab the remaining, movable assets for itself to the exclusion of other creditors, and could avoid the embarrassment that will possibly ensue at an insolvency enquiry were the circumstances under which the R 100 million loan which was advanced by the PIC/UIF, to be probed. In the circumstances, the PIC should pick up the tab in respect of such costs and not the creditors. I may point out that currently the liabilities of WME are estimated to be in the order of R 136 million, whereas its assets are only R 9 million. Every effort should accordingly be made to ensure that what little remains in the pot is not spent on legal costs, at the instance of a 3rd party who sought to challenge the company's winding-up, on grounds which had little, if any, merit.
48. The same must apply in respect of the wasted costs which were occasioned by the PIC's failure to file its answering affidavit in the principal application and the resultant postponement of such application (which was initially supposed to have been heard on 9 November 2021), on 21 April 2022. The PIC's explanation for its failure to file its answering affidavit on time was two-fold: it was waiting for an issued copy of the order which had been prepared by its attorneys and which was granted by agreement on 2 March 2022, whereby the principal application was postponed for hearing to 13 and 14 June 2022.
49. The fact that an issued copy of the order which it had prepared and obtained by agreement on 2 March 2022, was not forthcoming, can in no way serve to justify the PIC's failure to comply with the terms thereof: the agreed draft order was signed by me on 2 March 2022, whereupon a copy thereof was emailed to the parties' attorneys, including the PIC's attorneys. That order was of full force and effect from that date and the PIC did not need to wait for an issued copy thereof

before it was compelled to comply therewith. In any event, an issued copy of the order was provided to it well in advance of the date by which it was to file its affidavit, so this is not an excuse that holds any water.

50. The second reason which was given for its failure to comply with the order was that it allegedly required time to work through the volume of documentation which had been seized by the sheriff from WME's premises, pursuant to the grant of the final perfection order on 4 October 2021. Once again, this does not constitute a valid excuse for its failure to prepare and file its answering affidavit, and its heads of argument, timeously, so that the matter could be heard on 21 April 2022, some 6 months later. That this was not the reason for its failure to comply is in any event evident from the fact that on 11 April 2022 it sought a postponement on the basis that the liquidators of WME had belatedly sought leave to file a report in the principal application.
51. In the circumstances, in my view the PIC's conduct warrants a punitive costs order whereby the other parties are wholly indemnified in respect of the wasted costs they incurred, which were occasioned by the postponement of the principal application and the application to set aside the voluntary winding-up, on 21 April 2022.

Conclusion

52. In the result, I make the following Order:

- A) Ad the application under case number 6227/22

The application by the PIC to set aside the voluntary winding-up of the 1st respondent WME ('the matter') is dismissed with costs, including the costs of 2 counsel where so employed, save that in respect of the costs of the application made on 19 April 2022 for the postponement of the hearing of the matter on 21 April 2022, as well as the wasted costs occasioned by the postponement of the hearing of the matter to 13-14 June 2022, the PIC shall be liable for costs, including the costs of 2 counsel where so employed, on the attorney-client scale.

- B) Ad the application under case number 11237/20

1. The 1st respondent, WME, is provisionally wound up.
2. A *rule nisi* is hereby issued calling upon all interested parties to show cause, if any, at 10h00 on Wednesday 1 March 2023 why the 1st respondent WME should not be placed under final liquidation; and why
 - 2.1 save in respect of the costs of the application made on 19 April 2022 for the postponement of the hearing of this winding-up application on 21 April 2022, as well as the wasted costs occasioned by the postponement of the hearing of this winding-up application to 13-14 June 2022, in respect of which the 2nd respondent, the PIC, shall be liable for costs, including the costs of 2 counsel where so employed, on the attorney-client scale; and
 - 2.2 the costs occasioned by the PIC's opposition to this winding-up application, including the costs of 2 counsel where so employed, in respect of which the PIC shall be liable on the party and party scale, the costs of this application should not be costs in the liquidation.
3. Service of this Order is to be effected as follows:
 - 3.1 On the 1st respondent, at its registered address;
 - 3.2 On the 1st respondent's employees, if any, by affixing a copy thereof to any notice-board to which the employees have access at the premises of the 1st respondent's registered address, or by affixing a copy thereof to the front door of such premises;
 - 3.3 On the registered trade unions of the 1st respondent's employees, if any;
 - 3.4 On the South African Revenue Services at 22 Hans Strijdom Avenue, Cape Town;
 - 3.5 By one publication in each of the *Cape Times* and *Die Burger* newspapers; and

- 3.6 By email or registered post to all known creditors, with claims in excess of R20,000.00.
4. In terms of sections 354(1) and 347(4)(a) of the Companies Act No. 61 of 1973 the voluntary winding-up of the 1st respondent WME which commenced on 26 August 2021 is set aside, subject to the following conditions:
 - 4.1 The appointment of the 1st respondent's liquidators by the Master which was made pursuant to the commencement of the voluntary winding-up, is confirmed as a valid and lawful appointment, which subsisted until the setting aside of the voluntary winding-up in terms of this Order;
 - 4.2 The actions of the 1st respondent's liquidators which were taken during the course of the administration of the 1st respondent during the subsistence of the voluntary winding-up are confirmed as valid and lawful actions;
 - 4.3 The resolutions adopted and the claims proved at the first and second meetings of creditors of the 1st respondent, which were held on 19 November 2021 and 25 February 2022 are confirmed as valid and lawful;
 - 4.4 The 1st respondent's liquidators' reasonable fees and disbursements which have been incurred by them shall be costs in the liquidation; and
 - 4.5 The legal fees and disbursements incurred by the applicant's liquidators and the 1st respondent's liquidators, including the wasted costs occasioned by the postponement of 22 April 2022 shall be costs in the liquidation of the 1st respondent.
 5. It is declared that, as a consequence of the grant of the setting aside order in paragraph 4 and the winding-up order in paragraph 1, the commencement date of the winding-up of the 1st respondent shall be 19 August 2020.



M SHER
Judge of the High Court
(Signature appended
digitally)

Appearances

Counsel for the liquidators (Bunker Supplies): R van Rooyen and D Pietersen

Attorneys for the liquidators (Bunker Supplies): Cox Yeats (Durban)

Shaw Attorneys (Cape Town)

Counsel for the liquidators (World Marine Energy): B Manca SC

Attorneys for the liquidators (World Marine Energy): ENS (Cape Town)

Counsel for the Public Investment Corporation: K Mokotedi

Attorneys for the Public Investment Corporation: Nkadimeng Attorneys (Johannesburg)

Parker Attorneys (Cape Town)