IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

Case No's: 3484/19 & 3485/19

In the application between:

JYDE AREMU BREIMMO ADELAKUN N.O. First Applicant

JYDE AREMU BREIMMO ADELAKUN Second Applicant

and

WORLDPAY LLC Respondent

In the application between:

Case No: 3484/19 & 3485/19

TOUCH OF FAME GROUP First Applicant

TOUCH OF ENERGY CORPORATION Second Applicant

and

WORLDPAY LLC First Respondent

ZEENATH KAJEE N.O. Second Respondent

THABISILE DLAMINI-SMIT N.O. Third Respondent

Coram: Justice V C Saldanha

Heard: 10 November 2023

Finalised: 26 January 2024

Delivered electronically: 26 April 2024

JUDGMENT DELIVERED

SALDANHA, J:

[1] In the profound words of Justice Kampepe, writing for the majority of the Constitutional Court in *Zuma v The Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector Including Organs of State and Others*[1] who remarked 'Like all things in life, like the best of times and the worst of times, litigation must, at some point, come to an end'. The two applications for rescission before this court is however yet the beginning of the inevitable route to higher courts despite the fact that two courts of this division, the Supreme Court of Appeal and the Constitutional Court (on no less than three occasions) have already expressed themselves on the underlying merits of the issues raised in the applications. Needless to say, it may wind its way back up there.

There are two separate and related rescission applications before this court of judgments relating to the sequestration of the first applicant, Mr. Jyde Aremu Breimmo Adelakun in his personal capacity (Mr. Adelakun) and the Jhyhde International Trust

[1] [2021] ZACC 28

Registration No: IT2823/2011 (the Trust, and for convenience are jointly referred to as the applicants) obtained by Worldpay LLC (Worldpay). The first rescission application relates to case numbers 3484/19 and 3485/19 respectively against Worldpay. The second rescission application brought under the same case numbers relates to that of Touch of Fame Group (TOF Group) and Touch of Fame Energy Corporation (TOF Energy) against Worldpay. Ms. Zeenath Kajee N.O. the trustee of the sequestrated estate of Mr. Adelakun and Ms. Thabisile Dlamini-Smit N.O. in respect of the sequestrated estate of the Trust were also cited as the 2nd and 3rd respondent respectively in the second rescission application. The second application was initially brought by Mr. Adelakun and the Trust as a joinder application to formally join TOF Energy and TOF Group to the first rescission application. That application was withdrawn and in an "Amended Notice of Motion," TOF Energy and TOF Group separately sought the rescission of the sequestration orders and other declaratory relief against Worldpay and the other two respondents.

[2] The Trust and Mr. Adelakun were provisionally sequestrated by orders of Mantame J in this division on 28 March 2019. On the 6 January 2020 they were both finally sequestrated by orders of Steyn J.

[3] The sequestration processes got underway on 17 January 2020 with the publication by the Master of the High Court in the Government Gazette (42958) of a Notice to Creditors which, amongst others, published the notice of the first meeting of creditors.

[4] Mr. Adelakun and the Trust filed an application for leave to appeal the sequestration orders on 21 January 2020. The applications were dismissed on 13 February 2020 by Steyn J who held that the appeals bore no reasonable prospects of success.

[5] On 13 March 2020 Mr. Adelakun and the Trust lodged petitions for leave to appeal the sequestration orders to the Supreme Court of Appeal (the SCA). On 22 October 2020 the SCA (per Justices Mbha and Goosen) dismissed the petition with costs, holding that there were no reasonable prospects of success on appeal and that there were no compelling reasons meriting a further appeal.

[6] On 29 September 2021 under case number CCT106/21 the Constitutional Court having considered applications for leave to appeal by Mr. Adelakun, the Trust, TOF Group and TOF Energy concluded that the applications for leave to appeal did not engage its jurisdiction. Leave to appeal was refused with costs.

[7] On 24 January 2022 the Constitutional Court again refused leave to appeal the sequestration orders brought by Mr. Adelakun and the Trust together with an order of costs.

THE PARTIES

[8] Mr. Adelakun described himself in these proceedings and in that of the sequestrations as an international businessman, whose primary place of business is situated in Green Point, Cape Town, as also his residence. Mr. Adelakun was also the founder trustee of two, for the time being, of the Trust which was registered with the Master of the High Court, Cape Town under reference number IT2823-2011. Mr. Adelakun claimed that in terms of clause 10[2] of the Trust Deed he had an "*overarching right to make final and binding decisions relevant to the Trust*" and claimed that he therefore had the requisite authority to bring the application on behalf of the Trust. It is

[2]"Notwithstanding anything to the contrary contained herein, in the event that any difference of opinion may exist between the trustee(s) and the Founder in respect of any of the above provisions, the decision of the Founder shall be final and binding, and shall prevail."

apparent from the wording of clause 10 of the Deed that he does not obtain any authority therefrom.

[9] The first applicant in the second rescission application, TOF Energy is a corporate entity based and registered in Savannah, Georgia, in the United States of America (the USA). The second applicant in the second rescission application, TOF Group is a corporate entity based at the same address as the first in Savannah, Georgia in the USA.

[10] Mr. Adelakun is the Chief Executive Officer (the CEO) of both TOF Group and the related corporation TOF Energy. He described TOF Energy as being primarily involved in the business of the sale of oil and its storage.

[11] Worldpay LLC, is a limited liability corporation incorporated in Delaware, USA with its global and corporate headquarters situated in 8500 Grosvenors Hill Drive, Symmes Township, Cincinnati Ohio, USA and operates as an international global payment processing company. Ms. Thabisile Sylvia Dlamini-Smith, is an insolvency practitioner based in Johannesburg and is the appointed trustee of the insolvent estate of the Trust. Ms. Zeenath Kajee is an insolvency practitioner based in Johannesburg and a jointly appointed trustee of the insolvent estate of Mr. Adelakun.

THE PRESENT APPLICATIONS

[12] On 22 September 2023 Mr. Adelakun and the Trust instituted an application against the Worldpay on an urgent basis in which the following relief was sought:

(i) The order bearing Case No's 3484/19 and 3485/19 handed down by Mantame J on 28 March 2019 placing Jhyhde International Trust (Reg No: IT2823/2011) is set aside;

(ii) The final sequestration orders handed down by Steyn J on 6 January 2020 bearing Case No's: 3484/19 and 3485/19 are set aside in terms of Section 145(2) and/or alternatively as contemplated in Section 157(2) of the Insolvency Act 24 of 1936.

(iii) The Respondent is directed to pay the costs of the application on a punitive scale of (sic) attorney and own client.

[13] On the same date, 22 September 2023 under the same case numbers, the Trust and Mr. Adelakun issued out a Notice of Motion (the joinder application) in which the following relief was sought:

(i) Touch of Fame Group and TOF Energy Corporation are joined as Third and Fourth applicants respectively in both of the above matters bearing Case No's 3484/19 and 3485/19 respectively;

(ii) Whichever party opposes the application is directed to pay the costs thereof;

(iii) Further and/or alternative relief deemed appropriate by the above court.

[14] Worldpay filed notices of opposition to both applications and filed its answering affidavits on 2 October 2023. In respect of the first application the applicants filed their replying affidavit on 10 October 2023.

[15] On 23 October 2023, Mr. Adelakun and the Trust filed a notice of withdrawal of the joinder application against Worldpay.

[16] On 24 October 2023 Samela, J made the following order in respect of both applications by agreement between the parties, in the following terms;

1. Both matters are postponed to the fourth division roll to 10 November 2023 as arranged with the Honourable Acting Judge President Goliath.

2. It is recorded that Touch of Fame Group and TOF Energy Corporation intend:

    2.1 revoking the notice of withdrawal of their application dated 23 October 2023 by 3 November 2023;

    2.2 proceeding with their application under the aforementioned case number; and

    2.3 amending the notice of motion in relation to their application aforesaid by 3 November 2023.

3. To the extent that Worldpay LLC may be advised to file a response to the steps envisaged in 2.1 and 2.3, it will do so by 7 November 2023.

4. It is recorded that the second applicant has indicated his intention to represent the first applicant and second applicant as well as Touch of Fame Group and TOF Energy Corporation separately at the hearing.

5. Costs to stand over for later determination.

[17] On 3 November 2023, the applicants in the joinder application filed what they referred to as “Appellant’s Notice to Revoke the Notice of Withdrawal of Their Application Dated 23 October 2023”.

[18] On 3 November 2023, TOF Group and TOF Energy (as the first and second applicants) filed an “Amended Notice of Motion” (now the second rescission application), against the three respondents (Worldpay, Zeenath Kajee Trustee for the Time Being of Mr. Adelakun, Jyde and Thabisile Dlamini-Smit Trustee for the Time Being of the Jhyhde International Trust) in which the following relief was sought:

1. The initial prayer under no. 1 in the original Notice of Motion be removed and replaced with,

    1.1 The provisional sequestration order bearing Case No's 3484/19 and 3485/19 handed down by Mantame, J on 28 March 2019 against Jhyhde International Trust (Reg No: IT2823/2011) and another, is set aside;

    1.2 The final sequestration orders handed down by Steyn, J on 6 January 2020 bearing Case No's: 3484/19 and 3485/19 are set aside in terms of Section 149(2) of the Insolvency Act 24 of 1936.

2. It be declared that the first respondent lacked the locus standi from the outset, to initiate any legal action or proceedings arising out of or in any way relating to the Bank Card Merchant Agreement (BCMA) between the second applicant and the first respondent, and/or pertaining in any way to the relationship between the second applicant and the first respondent, outside the exclusive jurisdiction of the State of Ohio, United States of America.

3. It be declared that the High Court of South Africa, Western Cape Division, Cape Town lacked the competent jurisdiction to entertain and or hear the claims of the first respondent.

4. Whichever party opposes this Application is directed to pay the entire costs thereof.

5. Further and/or alternative relief deemed appropriate by the above court.

[19] On 7 November 2024, Worldpay filed a Conditional Affidavit in answer to the Amended Notice of Motion. On 9 November 2023, TOF Energy and TOF Group filed a supplementary replying affidavit.

[20] The application was heard on 10 November 2023. In the course of the proceedings and in the light of the short notice of the Amended Notice of Motion served by e-mail on the second and third respondents, Ms. Zeenath Kajee N.O. and Ms. Thabisile Dlamini-Smith N.O., the court directed the legal representatives for Worldpay to make telephonic contact with the trustees to ascertain their position in respect of the second rescission application. An affidavit was filed by Worldpay`s attorney later the morning in respect of their communication with the two trustees. They indicated that they would abide the decision of the court in respect of the second application.

[21] At the conclusion of the oral hearing on 10 November 2023, the court issued the following directive to the parties:

4.1 That the trustees of insolvent estates of Mr. Adelakun's and the Trust be provided with a copy of the first rescission application.

4.2 That the trustees' attitude in relation to the application be ascertained and that they be requested to indicate whether they intended abiding by the decision of the court or otherwise.

4.3 That the Master of the High Court, the South African Revenue Service (SARS) and First Rand Bank Limited, a creditor of both the insolvent estates of Mr. Adelakun and the Trust, be provided with a copy of the first rescission application. They were likewise requested to indicate their position with regard to the application. The Master was specifically requested to file a Report.

5. In particular, the court also directed that i) the attorney for Worldpay address correspondence to the aforesaid parties in relation to the directives issued, and that such correspondence to be copied to Mr. Adelakun and ii) provide a service affidavit within 10 (ten) days of the hearing.

[22] On 24 November 2023 the legal representative of Worldpay filed a compliance affidavit and the responses by certain of the parties referred to in the directive of the 10 November 2023. On 23 November 2023 Ms. Zeenath Kajee likewise deposed to an affidavit in which she confirmed receipt of the applications and also confirmed the contents of the affidavit deposed to by Ms. Venter filed with the court when the matter was heard. She confirmed that she would abide the decision of the court and so too Ms. Mpho Abbey Dlavani (a joint trustee) in respect of the second application. So too did Ms. Thabisile Sylvia Dlamini-Smit in respect of the second application confirm that she would abide the decision of the court. In the service affidavit Ms. Venter, advised that no response had been received from SARS and neither had the Master responded. The court was nonetheless satisfied that service had been provided to SARS of the application. The application was only served on the Master on 25 January 2024 due to logistical issues. The Master filed her Report on 26 January 2024 wherein she indicated that she would abide the decision of the court.

HEADS OF ARGUMENT FILED IN THESE PROCEEDINGS

[23] The applicants through their erstwhile legal representatives ZS Incorporated, filed heads of argument dated 19 October 2023. Worldpay`s counsel filed hers on 23 October 2023.

[24] Mr. Adelakun appeared in person at the hearing of the matter on 10 November 2023 on behalf of all of the applicants in both the first and second application. I will revert to the issue of his representation of the various applicants at the hearing other than for himself. He submitted a new set of heads of argument at the hearing.

[25] With the leave of the court, Worldpay`s counsel filed a supplementary note on argument on 21 November 2023 in response to the written heads of argument by Mr. Adelakun and to his oral address in court of 10 November 2023 and in particular with

regard to the issues raised by the TOF Group and TOF Energy. On 23 November 2023, Mr. Adelakun took the liberty of filing a supplementary note on argument in response to Worldpay`s note of 21 November 2023.

THE SEQUESTRATION PROCEEDINGS

[26] By way of no more than a thumbnail sketch of the rescission applications, Worldpay applied for the sequestration of both Mr. Adelakun and the Trust in the following circumstances. Worldpay claimed that it was the victim of a massive international fraud and the misappropriation of its funds which amounted to at least USD 12,398,662.25 (which at that stage exceeded R17 million) allegedly perpetrated by Mr. Adelakun together (amongst others) with the trustees of the Trust. Worldpay traced the proceeds of the alleged fraud to separate bank accounts held by both the Trust and Mr. Adelakun in Sea Point, Cape Town.

[27] On 6 December 2018 by way of urgent proceedings in this division under case number 19409/2018, Worldpay obtained an interim interdict freezing the funds in the bank accounts of Mr. Adelakun and the Trust held at the First Rand Bank Ltd (FRB) based in Sea Point, Cape Town. Consequent upon and in terms of the interim order, Worldpay was permitted to inspect the bank statements of the accounts held by both Mr. Adelakun and the Trust. Worldpay claimed that it was clear that Mr. Adelakun personally and through the Trust, inter alia, engaged in the systematic dissipation of funds in the respective FRB accounts. Moreover, the transfer of funds from these accounts were part of a pattern of transfers that evidenced a clear intention to evade the creditors of both Mr. Adelakun and the Trust and in particular, Worldpay. It claimed that both Mr. Adelakun and the Trust were indebted to it in a liquidated claim and that both had committed acts of insolvency. Worldpay also claimed that from the information available to it both Mr. Adelakun and the Trust had insufficient assets to pay their debts to it and were factually insolvent. Worldpay therefore sought the urgent sequestration of both Mr. Adelakun and the Trust to prevent the further dissipation of funds which funds,

Worldpay claimed belonged to it and to protect the general body of creditors. Worldpay claimed that large amounts of money including that which were transferred to South Africa and channeled through the South African bank accounts remained unaccounted for. A provisional order of sequestration was granted by Mantame J on 28 March 2018 after what was described in those proceedings as the twist and turns occasioned largely by the regular and successive changing of legal representatives by Mr. Adelakun and the Trust. They were eventually and finally sequestrated on 6 January 2018 by orders of Steyn, J. I will revert to the background of the sequestration in a little more detail and the order and the judgment of both Mantame, J and Steyn, J respectively.

THE ALLEGED FRAUD OF USD 12,398,662.25 AND OTHER EVENTS THAT LED TO THE SEQUESTRATION APPLICATION

[28] The background to the sequestration applications and that of the interdict in respect of the bank accounts of Mr. Adelakun and the Trust were set out in detail in the judgment of Steyn, J. I deal with it for no more, than to give a fuller context to the present applications for rescission.

[29] The founding affidavit in the sequestration applications was deposed to by a Mr. Ian Belsham, the global head of transaction monitoring of Worldpay. He was at that stage based in Manchester in the United Kingdom. Worldpay, as indicated, is a global payment processing company that offers a broad suite of payment processing services. It enabled merchants to accept and to process credit, debit and prepaid payments, received from customers in respect of goods and services rendered by the merchant.

[30] In August 2018, the Worldpay entered into a Bank Card Merchant Agreement (BCMA) with TOF Energy. When entering into the BCMA, Worldpay claimed it relied on audited 2017 annual financial accounts purportedly of the TOF Group that were provided to it by TOF Energy. Worldpay claimed that upon investigation it uncovered

that the TOF Group financial statements were in fact forged as they appeared to have been copied directly from a 2015 annual report of a dissolved company, Antrim Energy Incorporated and filed in 2016 in the Canadian System of Electronic Document Analysis and Retrieval. The statements were available on the website of Antrim Energy Incorporated. I should point out that Mr. Adelakun vehemently disputed the provision of the forged accounts by TOF Energy and claimed that it was also the subject to a police investigation in which he had laid formal charges against Mr. Belsham.

[31] In terms of the BCMA, the Worldpay was to provide TOF Energy with payment services, in particular, automated “clearing house” services. The automated “clearing house” services allowed merchants such as TOF Energy to accept and process Visa, MasterCard and American Express and other debit network card transactions that originated at the point of sale as well as for e-commerce and mobile transactions for the purpose of completing sale transactions. The services included all aspects of card processing, including authorisation and settlement, customer service, chargeback and retrieval processing and a network fee and interchange management. The services arose in the ordinary course of business where a merchant’s customer would present payment cards to a merchant for payment. Via a terminal at the merchant’s premises, a communication would be sent to Worldpay under which an instruction is given by the merchant to directly debit the customer’s cheque or savings account and to credit the merchant’s account. This would ordinarily follow the merchant’s authorisation of the transaction at a terminal at the merchant’s premises or online. The instruction is given to Worldpay, who pays the amount less fees into a bank account stipulated by the merchant in terms of the BCMA. TOF Energy stipulated the TOF Group bank accounts held at Fifth Third Bank (FT Bank) in the USA. Upon receipt of the electronic instruction from TOF Energy, Worldpay would obtain authorisation from the customer’s bank. There was however, often a delay in obtaining that authorisation. In certain circumstances, Worldpay would transfer funds to the merchant, TOF Energy in respect of a completed transaction prior to the receipt of the validation of the customer’s authorisation from the customer’s bank(s). In the event of a problem with payment or return by a customer to

the merchant, Worldpay would receive an error code/response from the customer's bank and the merchant would then be required to refund Worldpay with the amount transferred and associated processing charges. In common parlance, Worldpay described this as an "advanced payment" made to the merchant, which would become final upon confirmation from the customer's bank that the transaction was in order. Worldpay claimed that was the procedure adopted by it in its dealings with TOF Energy.

[32] Worldpay claimed that between the time of TOF Energy's registration on its platform in August 2018 and 10 September 2018, TOF Energy represented to it that it had purportedly made sales to customers to the amount of USD 46,056,007. The amounts were thereupon (i) processed through the Worldpay`s automated clearing services platform (ii) presented by TOF Energy for payment by Worldpay into the account stipulated by TOF Energy for payment being the FT Bank account.

[33] Worldpay claimed that it paid an amount of USD 15,310,166.25 in fifteen tranches into the FT Account in anticipation of receiving payment from TOF Energy`s customers.

[34] Worldpay claimed that before it fully reconciled the transactions as per TOF Energy's instructions between August and September 2018 it`s officials became aware of an alarming number of "*rejected transactions*" on TOF Energy`s account where response codes received by the banks of TOF`S alleged customers indicated that (i) there were no such customer accounts in the first place (ii) the owner of such customer accounts did not authorise any such payments to TOF Energy or (iii) certain transactions were rejected as invalid account numbers were provided.

[35] Worldpay explained that it promptly initiated an internal investigation into the accounts it held with TOF Energy. The investigations confirmed that all the sales

processed through the accounts were fictitious. For example, in some cases, customers did not even exist at all or if real had not made purchases from TOF Energy.

[36] Worldpay realised that it had fallen victim to a sophisticated wire (internet) transfer fraud in respect of TOF Energy`s request for transfers into the FT Bank Account. It was able though to debit against and recover from the FT Bank Account the sum of USD 2,911,504 leaving a loss as a result of the alleged fraud of USD 12,398,662.25.

[37] Worldpay contacted FT Bank on 11 September 2018 in an attempt to confirm its suspicions of the fraudulent activities perpetrated through the FT Bank account of TOF Group. FT Bank responded by providing details of suspicious transactions on the FT account. As a result of that exchange Worldpay and FT Bank as well as recipient bank(s) into which funds were routed from the FT Bank to accounts in the United Kingdom, Nigeria, Sierra Leone and the United Arab Emirates. Worldpay engaged relevant criminal intelligence authorities in the United States and other affected jurisdictions, who initiated investigations into the affairs of TOF Group and TOF Energy and the alleged fraud perpetrated against Worldpay.

[38] On 26 September 2018 Worldpay received an e-mail from the United States Secret Service (the USSS) confirming that the fraud was being investigated and a suspect had been apprehended in the USA and that the following persons and their related entities were regarded as “persons of interest”; (i) Mr. Adelakun in person, (ii) TOF Energy, (iii) TOF Energy Company Limited incorporated under the laws of the Federal Republic of Nigeria with its registered office in Lagos, Nigeria (TOF Nigeria) and (iv) the TOF Group.

[39] Worldpay was able to establish that TOF Energy, TOF Nigeria and TOF Group were all linked to Mr. Adelakun via the internet and in company searches (all of which they attached to the founding affidavit in the sequestration proceedings).

[40] On 2 October 2018 Worldpay obtained bank statements of the relevant FT Bank accounts which confirmed the difference between the funds transferred by Worldpay into the FT Bank account and from which funds were promptly transferred out of the account. The TOF Group held two separate bank accounts with FT Bank. Funds were transferred from the account into which Worldpay had deposited the payments to TOF Energy into the second bank account at FT Bank. The statements also evidenced the transfer of funds into the FT Bank account by the Worldpay and the transfers of those funds from the FT Bank accounts (the statements were likewise attached to the founding affidavit). The significance of the statements is that Mr. Adelakun and the Trust nonetheless disputed that Worldpay had deposited funds into the designated account of TOF Energy in respect of the alleged fraudulent transactions.

[41] Wordpay graphically, through an elaborate flow chart and with reference to the bank statements demonstrated the flow of funds tracked by it that originated from its own bank accounts into that of TOF Group at the instance of TOF Energy between August and September 2018 as follows:

(i) The TOF Group through Mr. Adelakun or otherwise at his instance had transferred a substantial part of the funds allegedly procured fraudulently from the FT Bank account into a further account held with FT Bank by the TOF Group (the second FT Bank Account).

(ii) The TOF Group through Mr. Adelakun or otherwise at his instance debited the second FT Bank account through transferring USD 2,045,600 in seven tranches to an account in South Africa held at First Rand in Sea Point, Cape Town by the Trust.

(iii) Worldpay attached the relevant extracts from the FT Bank wire transfer statements which confirmed the transfers from the FT Bank account and the FT Bank provided a letter confirming the transfers and the steps taken by it to freeze the FT Bank of TOF Group accounts in the USA.

[42] Worldpay established that the FRB account into which the amounts had been transferred from the FT Bank account was held in the name of the Trust. Various amounts were thereupon transferred from the account of the Trust to amongst others, an account of Mr. Adelakun held in his personal capacity at FRB in Sea Point.

[43] Worldpay explained the steps it took through its attorneys in the endeavor to have the two accounts at FRB, Sea Point, that of Mr. Adelakun and that of the Trust frozen pending investigation. Worldpay claimed that aside from the transfers to the bank account of the Trust account and into that of Mr. Adelakun's personal bank account, substantial sums of the alleged misappropriated funds were also traced to having been paid from the FT Bank accounts to bank accounts located in other jurisdictions including Nigeria, the United States, Sierra Leone and the United Arab Emirates and to persons related to Mr. Adelakun and/or the TOF Energy. Worldpay claimed that it had taken steps to freeze and recover some of those funds.

[44] Worldpay explained that despite the initial uncertainty concerning who held the accounts, their lawyers filed a report with the Sandton branch of the South African Police Services (SAPS) on its behalf and sent a copy of the statement to FRB and requested that they maintain a hold over the Trust and Mr. Adelakun's accounts. FRB undertook to do so for a limited period on condition that Worldpay obtained a court order authorising it to freeze the bank accounts. The interdict proceedings to freeze the accounts of both Mr. Adelakun and the Trust ensued. It also appeared that on 17 October 2018 the Nigerian Economic and Financial Crimes Commission obtained an ex-parte order in the Federal High Court in Lagos against Mr. Adelakun for an interim

hold over accounts in Nigeria into which some of the alleged misappropriated funds had been transferred. On 8 November 2018 Worldpay also procured an ex-parte freezing injunction over funds transferred into bank accounts in Sierra Leone from the High Court of that country. The order was subsequently stayed pending an appeal.

[45] Worldpay claimed that neither Mr. Adelakun nor the Trust delivered any substantive responses to the claims made by it in the founding affidavit in the interdict proceedings. It claimed that Mr. Adelakun and the Trust took a series of steps aimed at no more than delaying the application such as the filing of a Notice in terms of Rule 35(12) of the Uniform Rules of Court delivered on no less than two days' prior the hearing of the matter and also a Notice in terms of Rule 47 demanding security for costs from Worldpay. Worldpay`s attorneys tended an amount of R200,000 as security of costs but no response was received from either Mr. Adelakun nor the Trusts legal representatives. There was also a substantive application brought for the postponement of the interdict proceedings by Mr. Adelakun and the Trust.

[46] The court was not inclined to grant the postponement but by way of a consent order FRB were compelled to provide the identities of the account holders in respect of monies that had been deposited into them from the FT Bank accounts. A mechanism was established whereby Worldpay and its legal representative could inspect but not copy the statements relating to the two bank accounts (that of Mr. Adelakun and the Trust) under the supervision of an independent facilitator. The hearing of the remaining relief was postponed together with a procedural timetable. Worldpay pointed out that neither Mr. Adelakun nor the Trust filed an answering affidavit and on the return date they appeared without any legal representation. Mr. Adelakun filed an affidavit which was headed "Affidavit in Support of the Notice of Preliminary Objection on the basis of Lack of Competent Jurisdiction in This Matter" in which Mr. Belsham's authority was challenged in bringing the application and in which Worldpay claimed, included baseless and defamatory allegations about Mr. Belsham. An interim order freezing the accounts was granted on 6 December 2018. Worldpay also pointed out the various

delays adopted by Mr. Adelakun and the legal representatives of the Trust in facilitating the inspection of the bank accounts by Worldpay`s attorneys.

[47] After eventually inspecting the bank accounts, Worldpay`s attorneys were able to provide a detailed analysis of the relevant transactions in the bank accounts of the Trust and that of Mr. Adelakun's personal account. The analysis not only provided the details of the flow of funds through the accounts but evidence of clear attempts by Mr. Adelakun and the Trust to conceal funds from the creditors of both Mr. Adelakun and that of the Trust. The analysis was attached to the founding affidavit and its accuracy was confirmed by the attorney of Worldpay who produced it.

[48] Worldpay also pointed out the following pattern of transactions into the two FT Bank accounts and which were confirmed by investigations conducted by the American authorities; (i) that the FT Bank accounts in August and September 2018 were used only for the receipt of funds from Worldpay and the funds were promptly transferred out of the account into the second FT Bank account, (ii) similarly, the second FT account also held by TOF Group were used sorely to receive funds from the first FT account during this period and the funds were promptly transferred out of the account. The funds, as already stated were transferred from the account into several accounts in five different countries including South Africa.

[49] The detailed analysis of the bank accounts held by Mr. Adelakun and that of the Trust not only demonstrated the flow of funds into the respective accounts held by Mr. Adelakun and that of the Trust but also showed that prior to the transfer of funds into the Trust`s bank account, the balance in that account was no more than R376.57. In respect of Mr. Adelakun's personal account, it showed that prior to the transfer of funds into the account the balance was zero rand. Worldpay was able to demonstrate that an amount of R3,360,000.00 was paid from the FRB account of the Trust into that of Mr. Adelakun's personal account. The analysis also showed that an amount of USD

2,045,600 (ZAR 29, 769,654) had been transferred into the Trust`s account in seven tranches from the second FT Bank account.

[50] Worldpay was also able to show that there were thirty-seven inbound transfers into the FRB account of Mr. Adelakun for the period August to October 2018 with a total of R16,850,413. These transfers appeared to be internet, mobile banking applications or ATM transfers. Worldpay also showed that as at the end of October 2018 there was no more than a balance of R2,645,699.48 in Mr. Adelakun's personal account and that the amount of R7,047,542.62 which had been transferred out of it remained unaccounted. Worldpay however, was able to show that some of the unaccounted funds may have been transferred into a further FRB bank account controlled by Mr. Adelakun namely, in the name of TOF Oil and Mineral Refinement (Pty) Ltd.

[51] Worldpay attached an extensive table to its founding affidavit with the analysis of the transfers into the various banks accounts and contended that there was no question of a pattern which emerged by the inflow and the transfer of funds. It contended that the accounts including that of Mr. Adelakun's personal account had been used to disperse the funds allegedly misappropriated from it.

[52] Worldpay contended that it had not only been able to establish the extent of the alleged fraud in a liquidated amount of USD12,398,662.55 but was able to trace some of those funds in the South African bank accounts of Mr. Adelakun and that of the Trust as follows:

52.1 R29,769,654 into the Trust's primary FRB Account, of which a balance remained of only R574,482.27;

52.2 R3,360,000 into the FRB Account of Mr. Adelakun, of which a balance remained of only R2,645,699.48.

[53] Worldpay contended that it was evident from the analysis of the bank statements that Mr. Adelakun and the Trust had actively dissipated funds prior to the freezing of the accounts.

[54] Worldpay explained that since the hearing and the grant of the interim interdict in December 2018 it had continued to take steps to trace the funds. It also sought to obtain details of the Trust from the Master and whether it held any assets. It appeared that the Trust had an immovable property registered in its name situated in Parow, Cape Town. Worldpay explained that it appeared that while it was busy securing the freezing of the accounts with FRB, there were attempts made by TOF Oil and Mr. Adelakun to lift orders in which other amounts were held at FRB. Worldpay contended that it was not able to obtain further information with regard to the amounts relating to the TOF Oil application but that such could be investigated by the trustees once appointed.

[55] Worldpay contended that it had met the requirements for the provisional sequestration of Mr. Adelakun and the Trust. It contended that it was a creditor of both Mr. Adelakun and the Trust with liquidated claims arising from the alleged internet fraud in the amount of USD12,398,662.55 alternatively it was undeniable that it had a claim against Mr. Adelakun in his personal capacity in the amount of R3,360,000.00 being the alleged misappropriate funds that had been traced and channeled into his personal FRB account. Likewise, it claimed that it had a liquidated claim against the Trust for the amount that was received from the FT Bank accounts less that the amount remaining in the account and that transferred to Mr. Adelakun. It explained that it held no security for such amounts.

[56] Worldpay contended that Mr. Adelakun in his personal capacity and the Trust had committed acts of insolvency and had dissipated assets as follows:

1. That the analysis of Mr. Adelakun's First Rand Bank account demonstrated the dissipation of funds paid into the account. Of the R16,850,413 paid into the bank account of the Trust (which included the R3,360,000 transfer directly from the Trust account only R2,645,699.48 remained).

2. In respect of the Trust, an amount of the R29,769,654 paid into the FRB account from the FT Bank only R574,482.27 remained in the account upon it being frozen.

   Worldpay contended that such conduct amounted to (i) a dissipation of property of both the Trust and Mr. Adelakun's which had or would have had the effect of prejudicing their creditors in terms of Section 8(c) of the Insolvency Act[3] or (ii) the removal or attempt at removal of property with the intent to prejudice their creditors particularly, Worldpay or to prefer creditors other than Worldpay in terms of Sections 8(d)[4] of the Insolvency Act.

[57] Worldpay had also contended that both Mr. Adelakun and the Trust were factually insolvent. In that regard it claimed, whether the liquidated claim against the Trust was R16,850,413 or R3,360,000, the only identified asset was the R2,645,699.48 frozen in Mr. Adelakun's FRB account.

[58] Worldpay contended that the sequestration of both the trust and Mr. Adelakun's personal estate was to the advantage of creditors in that there remained in excess of R2,645,699.48 in the accounts. It contended that large amounts of money, literally tens

[3] if he makes or attempts to make any disposition of any of his property which has or would have the effect of prejudicing his creditors or of preferring one creditor above another

[4] if he removes or attempts to remove any of his property with intent to prejudice his creditors or to prefer one creditor above another;

of millions were transferred through the bank account of Mr. Adelakun, the Trust and TOF Oil which included R16,850,413 which had been paid into Mr. Adelakun's bank account at FRB of which only R2,645,699.48 remained. Worldpay contended that duly appointed trustees could investigate the affairs of both Mr. Adelakun and the Trust to trace the missing "funds". That would include the powers of the trustees under the insolvency laws to obtain their bank statements and to conduct an insolvency inquiry, if necessary. Worldpay contended that placing Mr. Adelakun's estate and that of the Trust estate under sequestration prevented the further dissipation of funds and allowed the full extent of their affairs to be examined, assets determined and realised to the benefit of their general body of creditors.

THE OPPOSITION BY THE TRUST AND MR. ADELAKUN TO THE SEQUESTRATION PROCEEDINGS

[59] I should point out that the answering affidavit deposed to by Mr. Adelakun in respect of both himself and that of the Trust was filed under the hand of his then attorneys PA Mdanjelwa Attorneys with correspondent, L Twalo Attorneys.

[60] In the preamble to the affidavit Mr. Adelakun denied any knowledge of the alleged fraud perpetrated by TOF Energy against Worldpay as alleged in the founding affidavit. He disputed that Worldpay had established a liquidated debt against both him in his personal capacity and against the Trust. He sought to dismiss the claims made by the Worldpay as nothing more than an attempt by Worldpay to cover up alleged claims of an unlawful demand of USD800,000 that staff of Worldpay based in the UK had apparently sought to extort from him. He also disputed that the deponent to the founding affidavit Mr. Belsham was duly authorised to have done so on behalf of Worldpay based in the United States all of which he sought to raise by way of points in limine.

[61] Mr. Adelakun described the objectives of the Trust as being business in nature, to hold immovable property, shares and other property and assets for the benefit of its beneficiaries of which he was one. He confirmed that the Trust was the owner of the immovable property in Plattekloof, Parow, Cape Town. He claimed to have the necessary authority to depose to the answering affidavit on behalf of the Trust in terms of clause 10 of the Trust Deed which, as already indicated, did not grant him any such authority. In respect of his own business he explained that he had interests in the crude oil trade, gas refined petroleum products, exploration and mining. He confirmed that he was the Chief Executive Officer of both TOF Group and TOF Energy.

[62] He raised a further point in limine under the heading "Lack of Jurisdiction." He claimed that the court lacked the necessary jurisdiction to adjudicate the matter on the basis that Worldpay was not an "*incola*" of the republic and more so that the deponent to the founding affidavit did not work for Worldpay in the USA but rather worked for an unrelated company in the United Kingdom. He claimed that Worldpay had no business in South Africa nor did it hold any realisable property in the Republic and on that basis alone the application should be dismissed with costs. He also referred to the BCMA between TOF Energy and the Worldpay which provided:

> "23. Clause of law, jurisdiction, venue: This agreement shall be governed by and consumed and enforced in accordance with, the laws of the State of Ohio without regard to conflicts of law provisions. The parties hereby consent and without God to conflicts of law provisions. The parties hereby consent and submit to serve of process, personal jurisdiction and venue in the state of and federal courts of Cincinnati Ohio or Hamilton county, Ohio and select such courts as the exclusive forum with respect to any action or proceedings arising out of or in any way relating to this agreement, and or pertaining in any way to the relationship between Merchant and processor. Merchant and processor hereby waive the right to trial by jury in any matter under, related to, or arising out of this agreement or any transactions or relationship contemplated hereby."

[63] Mr. Adelakun claimed that the issues raised by Worldpay were for the courts of the United States to determine with the application of the laws of that country in terms of

the agreement and not for a South African court in application of South African law. A further point in limine raised was that of non-joinder. In that regard they contended that Wordpay`s allegations of acts of fraud against it were neither perpetrated by him nor the Trust. He claimed that there were no criminal proceedings pending against him or the Trust. It was therefore necessary for Worldpay to have joined TOF Energy with who it had a contractual relationship and claimed "*better yet that there is some pending legal dispute between the two companies which dispute will have a bearing on the outcome of this matter*". He also claimed that he was not involved in the conclusion of the BCMA between TOF Energy and Worldpay and he only received the reports from the treasurer of the company, amongst others, and claimed "*meaning I delegate*".

[64] Mr. Adelakun and the Trust also disputed that there was any evidence that supported the allegation that Worldpay had been a victim of fraud or that it had been perpetrated by him or his Trust. He denied that he had masterminded any acts of criminality through the various entities and claimed that they were "*in business around the world".* He disputed that there was clear evidence to support the claim that the money transferred from the various bank accounts belonged to Worldpay and that it had failed to "*even prove that they suffered any loss in the first place*". He disputed that he and the Trust were evading their creditors and denied that the Worldpay was in fact a creditor of theirs. He even disputed that the matter was urgent. As already indicated he disputed that the financial statements provided to Worldpay were provided by his companies TOF Energy or the TOF Group. He likewise disputed the transfers referred by Worldpay and claimed that inasmuch as there were no bank statements of the Worldpay attached nor that of his and the Trust, that Worldpay had failed to produce any evidence of such transfers. The only bank statements produced were that of TOF Energy and TOF Group. He disputed that the funds referred to in the transfer analysis had in fact originated from that of Worldpay in payment to TOF Energy into the designated accounts of TOF Group. He claimed that in respect of the criminal matter, SAPS had since closed their investigations after, as he claimed, "*having found no element of criminality being involved in my accounts*".

[65] He claimed that the applications by Worldpay in the Nigerian and Sierra Leone courts had been finalised in his favour and that his accounts were no longer frozen in those jurisdictions. In response to the claim by Worldpay that the transfers of money from the FT Bank accounts into that of the Trust was to conceal such funds that had been misappropriated from that paid by Worldpay, he stated as follows:

> "the primary purpose of the Trust if I must mention it is to invest in the republic through purchase of properties for investment and not to conceal money".

[66] In response to the claims made by Worldpay about the transfers of funds from the FT Bank account to that of the Trust he claimed;

> "91 What the statements shows is nothing but interaction between myself and the trust as a functionary thereof and to ensure that its interests are catered for. Nothing untoward about any of the transactions made. The funds were once again transferred into South Africa for investment purposes and I do not feel it necessary to disclose my business interests to the deponent so as to further its agenda of extorting money from me making use of the South African Courts."

[67] Mr. Adelakun also contended that the analysis of the various banks accounts by the attorneys of Worldpay was nothing more than "*a fake analysis*".

[68] In response to the claim that they were dissipating the funds to the prejudice of creditors in terms of Section 8(c) of the Insolvency Act, Mr. Adelakun denied any such dispositions. He claimed that the transactions that took place from the Trusts account "*remain above board transactions and not a single creditor besides this bogus one in the form of the alleged applicant has come forward crying foul*". He also denied that both he and the Trust were factually insolvent, although he provided no details of their assets nor for that matter any details of any of their creditors (if any).

[69] In response to the claim that his sequestration and that of the Trust would be to the advantage of their creditors, Mr. Adelakun disputed that and stated *"there exists no creditors again (sic) me or the trust".*

[70] In the answering affidavit deposed to by Mr. Adelakun, on behalf of the Trust and himself in the interdict proceedings in respect of the freezing of the bank accounts, he repeated the same points raised, in limine in the sequestration proceedings. He again disputed that he or the Trust had been involved in any act of criminality and stated that they "*never received any funds that are fraudulently misappropriated nor has the trust been involved in any act of money laundering*". Importantly he failed to provide any explanation or details as to why the trust received funds from the FT Bank account other than that it was an "*investment*".

[71] He claimed that nothing prevented TOF Group from transferring money to South Africa especially "*in line with the fact that no proof exists to show that money left the applicants (Worldpay`s) coffers destined for TOF Energy Corporation which trail is then followed to Touch of Fame Group company again a separate company."* Notably no mention was made whatsoever as to the details and to why the monies were transferred from the TOF Group into the account of the Trust. Again in denial of the allegations of misappropriation he stated "*no one has received any misappropriated funds. It is clear that there are no misappropriated funds but there is clear evidence of an attempt by the deponent to steal money from me and the trust through the use of the South African courts*". He likewise claimed that monies that were transferred to the South African bank accounts did not belong to Worldpay. He therefore sought the discharge of the Rule Nisi with a punitive cost order against Worldpay.

THE ORDER OF MANTAME J AND THE JUDGEMENT OF STEYN J

[72] The estates of Mr. Adelakun and that of the Trust were provisionally sequestrated by Mantame, J having been satisfied that a prima facie case had been made out for such orders. Inexplicably, and despite the provisions of the Insolvency Act, Mr. Adelakun and the Trust brought an application for leave to appeal against the orders of provisional sequestration. Needless to say, the beleaguered applications were correctly and promptly refused by Mantame, J.

[73] In the judgment of Steyn, J, she set out by way of a preamble, in some detail the manner in which Mr. Adelakun had litigated the defenses of the sequestration proceedings against both himself and the Trust. She expressed her strong concerns about the manner in which he repeatedly changed legal representatives, sought postponements and that he had inappropriately addressed emails directly to her and with threats against her. Most unconventionally, she attached a copy of an e-mail addressed by Mr. Adelakun to her after the final hearing of the application. She pointed out that it was done no more than to cause confusion and distraction and supported the impression of a lack of reliability and credibility on the part of Mr. Adelakun. He also falsely accused her of conversing with the legal representative of the Worldpay in her chambers despite her not having previously met the counsel and who had hailed from Johannesburg.

[74] The interdict proceedings also served before Steyn, J. In the judgment she also referred to the manner in which Mr. Adelakun and the Trust dealt with those proceedings.

[75] As already indicated she dealt extensively with the background to the application, she was satisfied with the conclusions reached by Mantame, J to the effect that Worldpay had successfully shown the flow of funds from Worldpay to TOF Energy through the bank accounts held by the TOF Group in the FT Bank and from the FT Bank accounts disbursed into the FRB account of the Trust and the further disbursements into the account of Mr. Adelakun at FRB and others. Steyn J found that the provisional

sequestration orders were “justifiably and duly granted”. She was satisfied that the requirements for the final sequestration orders in terms of Section 12(1)[5] of the Insolvency Act had been met and that Worldpay had shown on a balance of probability that it had a liquidated claim against Mr. Adelakun and the Trust in excess of R100 (Sections 12(1)(a) of the Insolvency Act). In fact, Steyn, J correctly pointed out that Worldpay had demonstrated that it was owed substantial amounts comprising millions of rand by Mr. Adelakun and the Trust. Steyn, J was of the view that Mr. Adelakun personally and in his capacity as a Trustee were complicit in the alleged fraudulent conduct that resulted in the unlawful flow of funds into their accounts at FRB. She was satisfied that Worldpay had established a liquidated claim against both Mr. Adelakun and the Trust that conferred locus standi on it in compliance with the provisions of the Act. Steyn, J also found that Mr. Adelakun and the Trust were moreover factually insolvent and that they had committed acts of insolvency. In this regard she referred to the various amounts which remained in the bank accounts of Mr. Adelakun and the Trust in the analysis provided by Worldpay`s attorney. She was also satisfied that there had been dispositions in terms of Sections 8 (c) of the Act and that there was a risk of creditors being preferred as contemplated in the provisions of Sections 8(d) of the Act. Steyn, J was of the view that there did not appear to be a genuine and bona fide dispute of fact on any of the relevant issues. Mr. Adelakun, had in respect of his own estate and that of the Trust failed to set out a defense in particular with regard to providing a reasonable, probable and good faith explanation as to the flow of funds into his and that of the Trust`s FRB accounts. She pointed out that the transfers in respect of these accounts had been explained in detail by the Worldpay and importantly with computer generated information that was corroborated by the evidence of Mr. Belsham. She was

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[5] **Final sequestration or dismissal of petition for sequestration**

(1)If at the hearing pursuant to the aforesaid rule *nisi* the Court is satisfied that—

(a) the petitioning creditor has established against the debtor a claim such as is mentioned in subsection (1) of section 9; and

(b) the debtor has committed an act of insolvency or is insolvent; and

(c) there is reason to believe that it will be to the advantage of creditors of the debtor if his estate is sequestrated,

it may sequestrate the estate of the debtor.

satisfied by the explanation provided by Worldpay in the analysis of the flow of funds which she regarded as not only "*useful*" but was neither persuasively nor at all challenged by either Mr. Adelakun or the Trust.

[76] Importantly, Steyn, J found that there was no merit in any of the points raised in limine, such as the lack of joinder of any other party such as TOF Energy and also the challenge to the jurisdiction of the court in respect of the BCMA. The court was satisfied that it would be to the advantage of the creditors of both Mr. Adelakun's personal estate and that of the Trust that they be finally sequestrated. She pointed out that millions of rand remained unaccounted for and that inquiries may have to be conducted to establish the whereabouts of such assets for the benefit of creditors. She pointed out that Mr. Adelakun and the Trust had no more than boldly asserted that they "*do not have creditors*" which had been shown to be patently untrue. Steyn, J was satisfied that the conduct of Mr. Adelakun in relation to these matters indicated fraudulent dealings with far reaching consequences that justified investigation and interrogation and a final winding-up order of the estates of both his and that of the Trust that would be to the advantage of creditors. Steyn, J also referred to the interdict proceedings in respect of Mr. Adelakun's and that of the Trust`s bank accounts. She pointed to the remaining balances that were found upon the accounts being frozen and that a large amount remained unaccounted for and "*unexplained*".

[77] The interdict proceedings were postponed by Steyn, J with the Rule Nisi extended (the interdict was subsequently discharged after the appointment of the trustees to the insolvent estates). The following orders were made by Steyn, J:

1. Final sequestration orders are granted in cases 3484/19 and 3485/19.

2. The costs of the sequestrations, including reserved costs in respect of any extensions of return days or postponements, save where orders in this regard have already been made, will be costs in the sequestrations.

THE BASIS FOR THE PRESENT APPLICATIONS FOR RESCISSION OF THE SEQUESTRATION ORDERS

The first rescission application

[78] In the first application, the Trust and Mr. Adelakun seek the setting aside of the provisional order of sequestration by Mantame, J. They also seek the setting aside of the order of Steyn, J of 6 January 2020 and claim that they do so in terms of Sections 149(2) and/or alternatively Sections 157(1) of the Insolvency Act. They also seek a punitive order of costs on an attorney and own client scale against Worldpay.

Section 149(2) of the Act provides;

> "149 (2) The Court may rescind or vary any order made by it under the provisions of this Act."

Section 157(1) of the Act provides;

> "157. Formal defects
>
> (1) Nothing done under this Act shall be invalid by reason of a formal defect or irregularity, unless a substantial injustice has been thereby done, which in the opinion of the Court cannot be remedied by any order of the Court."

[79] The applicants in the rescission application were represented by attorney, Mr. Saban of the firm ZN Attorneys under whose hand the applications were issued and served. Mr. Adelakun as with all of the other affidavits in the proceedings deposed to the founding affidavit on behalf of his personal estate and that of the Trust. In respect of the Trust, he once again claimed that he was authorised to do so in terms of clause 10 of the Trust Deed which, as already indicated, does not give him any such authority. He also claimed that they were not required to cite the trustees appointed in their respective sequestrated estates as the primary relief sought by the Trust and him related to their legal status as contemplated in Section 23(6) of the Act, which provides;

> "The insolvent may sue or may be sued in his own name without reference to the trustee of his estate in any matter relating to status or any right in so far as it does not affect his

estate or in respect of any claim due to or against him under this section, but no cession of his earnings after the sequestration of his estate, whether made before or after the sequestration shall be of any effect so long as his estate is under sequestration."

[80] In the founding affidavit Mr. Adelakun referred extensively to and attached the founding affidavit deposed to Mr. Ian Belsham in the sequestration applications. He confirmed by way of a general background that he was the Chief Executive Officer of TOF Group and that TOF Energy had entered into the BCMA with Worldpay. He claimed that despite being the CEO of TOF Energy he had not involved himself in the day-to-day affairs of the company. He claimed that all of the business dealings that arose from the BCMA took place entirely between TOF Energy and Worldpay. He claimed that despite Worldpay having accused TOF Group and TOF Energy of fraudulent conduct there was no record that Worldpay had ever taken any steps to recover any monies allegedly paid to TOF Energy and/or TOF Group by Worldpay and nor has it in fact done so. He claimed that Worldpay`s "*sole reason*" for applying for his sequestration and that of the Trust stemmed from what he referred to as no more than the bold allegations made by Mr. Belsham against the Trust and himself with regard to the alleged fraud and misappropriation of large sums of money against Worldpay.

[81] Mr. Adelakun contended that Mr. Belsham had misleadingly presented to the court in the sequestration proceedings that he together with others were involved in the alleged fraudulent conduct inasmuch as Belsham stated that the fraud "*was being investigated*" by the competent authorities in the USA.

[82] Mr. Adelakun claimed that the bold allegations made by Worldpay were countered by the following facts:

(1) that a suspect had been arrested in the USA relating to the allegations of fraud whereas he had simply been flagged as a "person of interest";

(2) that on 17 March 2020 a charge of fraud had been laid against him based on the allegations leveled by Worldpay. He claimed that those charges were based on an affidavit deposed to by a Mr. John Kraemer, a special agent in the employee of the United States Secret Service (USSS). The detailed affidavit by Mr. Kraemer was attached to the founding affidavit, which in brief set out the following:

i) that Mr. Kraemer was a special agent employed in the United States Department of Homeland Security, USSS, and set out his extensive experience in criminal investigations relating to bank fraud and cybercrime. He deposed to the affidavit in support of a criminal complaint and an arrest warrant for Mr. Adelakun for the violation of 18 USC SS 1343 (wire fraud), 1344 (bank fraud) and 1349 (conspiracy). The affidavit was submitted for the limited purpose of securing a criminal complaint and an arrest warrant and did not contain every fact that he had learned during the course of the investigation. He only set out facts necessary to establish probable cause that Mr. Adelakun had violated the statutes referred to above. Under the heading of “Probable Cause” he explained that in September 2018 the USSS was contacted by Fifth Third Bank concerning Worldpay`s report about a suspected fraud in excess of $15,000,000.00 resulting in a total loss to Worldpay of $12,000,000.00. The USSS had opened an investigation into the alleged fraud. Through the investigation the USSS had learned that TOF Group had through Mr. Adelakun and others committed a scheme to defraud in that they exploited a loophole in the Worldpay’s electronic check (“eCheck”) processing system.

(ii) He described what he referred to as the “Scheme to Defraud,” which was largely consistent with that made by Worldpay in the founding affidavit in the sequestration proceedings(above). His investigations however provided greater detail in respect of the transfers to the various bank accounts in the United States.

(iii) He also referred to investigations conducted by a corporate investigator at FT Bank who reported that the TOF Group had ran approximately 329 fraudulent electronic checks through Worldpay via an electronic check processing terminal registered in Georgia. The electronic checks processed with the terminal totaled approximately USD46,000,000. He pointed out that in June and July 2018 the CEO of TOF Group opened up bank accounts at FT Bank in the name of the company which were used in the scheme of fraud. He pointed out that in June 2018 the account was opened up with a deposit of USD100 with the CEO as the signatory to the account. He reviewed the bank records of the accounts which did not show any deposits from Worldpay during the months of June and July 2018. From 16 August 2018 through to September 2018 the FT account received approximately USD15,000,000,00 acquired fraudulently from Worldpay.

(iv) He pointed out that in July 2018 the CEO opened a further bank account with FT Bank with an initial deposit of USD100. The account was opened in the name of TOF Group and Mr. Adelakun was the sole signatory. The bank record showed there were approximately 16 transfers from the first FT account into the newly opened FT account between August and September 2018 totaling approximately USD12,000,000.00. He explained that for the month of August 2018 there were approximately 24 outgoing wire transactions from the FT account (the second) which totaled approximately $7,388,928.00. The majority of these outgoing wire transactions that went to international destinations, including but not limited to Cape Town, Lagos, Nigeria, Dubai and the United Arab Emirates.

(v) He pointed out that in addition to the international wires, 5 transfers were made from FT at a bank in the United States in an amount of USD548,220.00 also held in the name of the CEO of the TOF Group.

(vi) He explained that once the funds were transferred in the FT accounts and available (but before the six-day window period was up) the CEO authorised multiple wire transfers to other financial institutions including the overseas financial institutions. Out of the USD46,000,000.00 fraudulent checks that were attempted, approximately USD15,300,000.00 was illegally obtained by Mr. Adelakun, the CEO and others associated with the TOF Group.

(vii) He stated that the CEO had stated to USSS agents that the accounts at Fifth Third bank were set up on instructions provided to her by Mr. Adelakun. He reviewed text messages on the CEO's cellphone on a Whatsapp platform that confirmed that Mr. Adelakun had provided her with instructions to set up the accounts at Fifth Third Bank in order to receive the proceeds of the fraudulent scheme. He claimed that the CEO had also stated to USSS agents that in addition to using Whatsapp to communicate with Mr. Adelakun they had conversations over the phone. He claimed that these conversations were apparently for the purpose of Mr. Adelakun instructing the CEO what type of transfers to make and also to advise her of the amounts to be wired into various accounts. He also referred to various transfers made to accounts in Dubai, UAE and to the accounts made to FRB in Cape Town.

(viii) He stated that in February 2020 he learned that Mr. Adelakun and a Mr. Patrick Mwenze were arrested by law enforcement authorities in the UAE. Those charges related to the investigation being conducted by him and other USSS agents.

(ix) He claimed that Mr. Adelakun was the subject of the USSS investigation into a similar fraud in 2015 with accounts related to the Bank of America. Mr. Adelakun who he claimed resided in South Africa was originally arrested in London, England but was subsequently released. Additionally, he reviewed the written statement made by Mr. Adelakun to the South

African police in 2018. In that statement Mr. Adelakun listed his address in South Africa and his nationality as Nigerian.

(x) Mr. Adelakun claimed that the Central Authority of the United States Department of Justice who had investigated the allegations of fraud against TOF Energy and him sought assistance from their counterparts in the United Arab Emirates in the investigation. That appeared to have been done in July 2020. He attached a copy of the request to the authorities in the United Arab Emirates.

(xi) Mr. Adelakun claimed that on 12 December 2021, once the investigation had been completed, the United States District Court, Eastern District of Michigan (the Michigan Court) granted a motion brought by the US government to dismiss the complaint against him, which complaint he claimed related specifically to the allegations raised by Worldpay in their founding affidavit which formed the basis for both his and the Trusts sequestration.

(xii) Mr. Adelakun attached a copy of the order which is headed and reads:

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF MICHIGAN

United States of America Plaintiff

v Case No. 2:20-mj-30135-DUTY

Jyde Adelakun Defendant(s)

ORDER GRANTING LEAVE TO DISMISS COMPLAINT WITH PREJUDICE

This matter coming before the Court on the Government's motion, with notice having been provided to the defense, for the reasons stated in the Government's motion, the Court grants the Government leave to dismiss the complaint against Jyde Adelakun.

Accordingly, it is hereby ordered that the Complaint against Jyde Adelakun be dismissed without prejudice, and that the Appearance Bond, if any, and the Order Setting Conditions of Release be cancelled.

s/Anthony P. Patti

Anthony P. Patti

U.S. Magistrate Judge

Certificate of Service

I hereby certify that this Notice was electronically filed, and the parties and/or counsel of record were served.

By: s/M Williams

Case Manager

Dated: December 12, 2021

[83] Mr. Adelakun further attached to their affidavit an e-mail from a Mr. Mark Chasteen, Assistant United States Attorney dated 17 March 2022 addressed to him. In the e-mail Mr. Chasteen states that he had previously communicated with Mr. Adelakun in that "*the criminal complaint in the Eastern District of Michigan case number 20-MJ-3O135 was dismissed without prejudice."* Mr. Chasteen stated that he had provided Mr. Adelakun with a copy of the government's motion and the court order of dismissal. He also stated "*there currently is no pending criminal case against you in this matter in the Eastern District of Michigan*".

[84] Mr. Adelakun claimed that "*as is evident from JA6 (the e-mail from Mr. Mark Chasteen) the criminal investigation has been finalised and that proof of neither criminal conduct nor fraud has been brought against him and/or the Trust."*

[85] Mr. Adelakun added that Worldpay`s basis for applying for his sequestration and that of the Trust was "*now debunked and discredited(sic) series of allegations made by Belsham in his founding affidavit*". He also claimed that Worldpay was unable to have pointed to a single act of insolvency by either himself or the Trust to justify their sequestration.

[86] He added with the reference to the BCMA, (i) that contrary to provisions of the BCMA between TOF Energy and Worldpay and with reference to clauses 22, 23 and 24 of the BCMA[6] Worldpay had failed to annex copies of the alleged instructions to identify

[6] 22. Review of Settlement Activity and Reports: Notice of Failure by Processor.

Reports are provided online by Processor for each fiscal day's activity by 10 AM ET the next calendar day and include an accounting for each currency with supporting detail of transaction activity. Daily Proceeds, reserves and funds transfers for transaction settlement services. Reports will be available for download on the online reporting tool for period of 14 months from the date of issue. Reports shall be upgraded, enhanced and or modified by Processor in its sole discretion.

Merchant agrees that it shall review all reports, notices and invoices prepared by Processor or its agent and made available to Merchant, including but not limited to reports, notices and invoices provided via Processor's online reporting tool. Processor reserves the right to send some all of the reports and/or invoices and/or notices of any pricing changes permitted under this Agreement via communication methods utilized as components of its Service Delivery Process which method Purchaser may change from time to time with notice via Processor's Service Delivery Process. Merchant expressly agrees that Merchant's failure to notify Processor that Merchant has not received any settlement funds within 5 business days from the date that settlement was due to occur, or fails to reject any report, notice, or invoice within thirty (30) days business days from the date the report or invoice is made available to Merchant shall continue Merchant's acceptance of the same. In the event Merchant believes that Processor has failed in any way to provide the Services, Merchant agrees to provide Processor with written notice, specifically detailing any alleged failure within 30 days of the date on which the alleged failure first occurred.

23. Choice of Law, Jurisdiction, Venue.

This agreement shall be governed by, and construed and construed and enforced in accordance with the laws of the State of Ohio without regard to conflicts of law provisions. The parties hereby consent and submit to service of process, personal jurisdiction, and venue in the state and federal courts in Cincinnati Ohio or Hamilton County, Ohio, and select such courts as the exclusive forum with respect to any action or proceeding arising out of or in any way relating to this Agreement, and/or pertaining in any way to the relationship between Merchant and Processor. Merchant and processor hereby waive the right to trial by jury in any matter under, related to or arising out of this agreement or any transactions or relationships contemplated hereby.

whom of TOF Energy's customer were responsible for the alleged fraud. He claimed that based on the BCMA, Worldpay should have first ensured that sufficient funds existed in the customer's account prior to making payment to TOF Energy (ii) he claimed that Worldpay had not attempted to implement the provisions of clause 13[7] read together with clause 23 of the BCMA in order to secure the return of monies that were allegedly fraudulently transferred. He further claimed that that was despite the fact that TOF Energy, himself and TOF Group were "*exonerated*" in 2021. He claimed that

24. Limit of liability, Force Majeure

A. EXCEPT FOR THOSE EXPRESS WARRANTIES MADE IN THIS AGREEMENT, PROCESSOR DISCLAIMS ALL WARRANTIES, INCLUDING. WITHOUT LIMITATION, ANY EXPRESS OR IMPLIED WARRANTIES OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE. MERCHANT HEREBY ACKNOWLEDGES THAT THERE ARE RISKS ASSOCIATED WITH THE ACCEPTANCE OF CARDS AND MERCHANT HEREBY ASSUMES ALL SUCH RISKS EXCEPT AS MAY BE EXPRESSLY SET FORTH HEREIN.

B. Without limiting the foregoing neither party shall be liable for lost profits, lost business or any incidental, special, consequential or punitive damages (whether or not arising out of circumstances known or foreseeable by the other party) suffered by such party, its customers, or any third party in connection with the Services provided hereunder. However, nothing in the foregoing sentence is in any way intended, and shall not be construed, to limit (i) Merchant's obligation to pay any fees assessments or penalties due under this Agreement, including but not limited to those imposed by telecommunications services providers, VISA, Mastercard and or Other Networks or (ii) any damages due from Merchant related to an early termination of this Agreement or (iii) any damages due from Merchant related to the failure by Merchant to exclusively receive the Services from Processor to the extent required by the Agreement, and/or (iv) Merchant's obligation to indemnify Processor pursuant to Section 21. In no event shall Processor be liable for any damages or losses (i) that are wholly or partially cause by the Merchant, or its employees, agents or Merchant Suppliers that should have been reported to Processor pursuant to Section 22, (ii) that first occurred, whether or not discovered by Merchant, more than 30 days prior to Processor's receipt of written notice from Merchant or (iii) that were caused due to errors in data provided by Merchant to Processor.

C. Processor's liability related to or arising out of this Agreement shall in no event exceed an amount equal to the lesser of (i) actual monetary damages incurred by Merchant or (ii) fees paid to and retained by Processor for the particular Services in question for the three calendar months immediately preceding the date on which Processor received a written notice from Merchant detailing Processor's material non-performance under this Agreement. For avoidance of doubt, the cap on Processor's liability set forth in the immediately preceding sentence will not limit Processor's obligation to settle funds due to Merchant under this Agreement.

D. Processor shall not be deemed to be in default under this Agreement or liable for any delay or loss in the performance, failure to perform, or interruption of any Services to the extent resulting from a Force Majeure Event Upon such an occurrence performance by Processor shall be excused until the cause for the delay has been removed and the Processor has had a reasonable time to again provide the Services No cause of action, regardless of form shall be brought by either party more than 1 year after the cause of action arose, other than one for the non-payment of fees and amounts due Processor under this Agreement. Any restriction on Processor's liability under this Agreement shall apply in the same manner to Member Bank. In the event that Merchant has a claim against Member Bank in connection with the Services provided under this Agreement, Merchant shall proceed against Processor (subject to the limitations and restrictions herein), and not against Member Bank unless otherwise specifically required by the Operating Regulations.

[7] Default. The following events shall be considered an "Event of Default"

(i)Merchant becomes subject to any voluntary or voluntary bankruptcy, insolvency, reorganization or liquidation proceeding. A receiver is appointed for Merchant, or Merchant makes an assignment for the benefit of creditors, or admits its inability to pay its debts as they become due or

instead, Worldpay through Belsham had "*contented itself with simply a misguided (follow the money) (See Steyn, J judgment at para 16) approach."*

[87] Mr. Adelakun contended that Worldpay had "*inexplicably*" proceeded to hold the Trust and him liable for the alleged damages incurred as a result of the agreement entered into between Worldpay and TOF Energy. He claimed it did that without even "*beginning to make out a case for the need for piercing the corporate veil*" and based solely on the allegations made by Mr. Belsham or in "*addressing the directing mind doctrine*" in order to hold the Trust liable. He contended that it had not been established in the sequestration proceedings that neither he nor the Trust were debtors of Worldpay. He contended that Worldpay had completely failed nor made out a case as contemplated in Sections 8 and 9[8] of the Insolvency Act. He claimed that Worldpay had approached the court to sequestrate the Trust and him based on allegations of

(ii) Merchant fails to pay or reimburse the fees, expenses or charges referenced herein when they become due; or

(iii) Merchant is in default of any terms or conditions of this Agreement whether by reason of its own action or inaction or that of another; or

(iv) Processor reasonably believes that there has been a material deterioration in Merchant's financial condition; or

(v) any standby letter of credit if and as may be required pursuant to Section 20, will be cancelled, will not be renewed, or is not in full force and effect; or

(vi) Merchant ceases to do business as a going concern, or there is a change in ownership of Merchant which changes the identity of any person or entity having directly or indirectly more than 30% of either the legal or beneficial ownership of Merchant.

Upon the occurrence of an Event of Default, Processor may at any time thereafter terminate this Agreement by giving Merchant written notice thereof. However, except in instances where immediate termination is required by any Association or if Member Bank and/or Processor reasonably believe that the Event of Default poses material risk to either of them or involves a violation of applicable law, Merchant will have 30 days following Processor's notice to cure an Event of Default under Section (ii), (iii), (iv) or (v) prior to termination under this Section. Termination of Merchant for any reason shall not relieve Merchant from any liability or obligation to Processor. If prior to the date on which the then current term of this Agreement is scheduled to expire, either this Agreement is terminated by Processor as specifically permitted by this Agreement, or Merchant for any reason discontinues receiving the Services from Processor (except as may be specifically permitted by this Agreement). Merchant shall be liable to Processor for an early termination fee in an amount equal to $350. Merchant shall also reimburse Processor for any damage, loss or expense incurred by Processor as a result of a breach by Merchant, including any damages set forth in any addendum and/or schedule and/or exhibit hereto and including all past due, unpaid and/or future invoices for services rendered by Processor in connection with this Agreement. All such amounts shall be due and payable by Merchant upon demand. Processor shall also have the option to require. Merchant to reacquire all outstanding sales transactions acquired by Processor hereunder. In addition to, and not in limitation of the foregoing, Processor may refuse to provide the Services in the event it has not been paid for the Services as provided herein.

[8] **9.Petition for sequestration of estate**

fraudulent conduct between TOF Energy and itself. He maintained that he had since been "*cleared of all allegations in that regard*". He claimed that his "*exoneration*' was of no small moment since Mr. Belsham had confirmed that the very fraudulent conduct which Worldpay relied on "*was still being investigated*". He claimed that in the circumstances Worldpay had failed to comply with the provisions of Sections 12(a) of the Act.

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(1) A creditor (or his agent) who has a liquidated claim for not less than 50 pounds, or two or more creditors (or their agent) who in the aggregate have liquidated claims for not less than 100 pounds against a debtor who has committed an act of insolvency, or is insolvent, may petition the Court for the sequestration of the estate of the debtor.

(2) A liquidated claim which has accrued but which is not yet due on the date of hearing of the petition, shall be reckoned as a liquidated claim for the purposes of subsection (1).

(3) (a) Such a petition shall, subject to the provisions of paragraph (c), contain the following information, namely—

(i) the full names and date of birth of the debtor and, if an identity number has been assigned to him, his identity number;

(ii) the marital status of the debtor and, if he is married, the full names and date of birth of his spouse and, if an identity number has been assigned to his spouse, the identity number is such spouse;

(iii) the amount, cause and nature of the claim in question;

(iv) whether the claim is or is not secured and, if it is, the nature and value of the security; and

(v) the debtor's act of insolvency upon which the petition is based or otherwise allege that the debtor is in fact insolvent.

(b) The facts stated in the petition shall be confirmed by affidavit and the petition shall be accompanied by a certificate of the Master given not more than ten days before the date of such petition that sufficient security has been given for the payment of all fees and charges necessary for the prosecution of all sequestration proceedings and of all costs of administering the estate until a trustee has been appointed, or if no trustee is appointed, of all fees and charges necessary for the discharge of the estate from sequestration.

(c) The particulars contemplated in paragraph (a)(i) and (ii) shall also be set out in the heading to the petition, and if the creditor is unable to set out all such particulars he shall state the reason why he is unable to do so.

(d) In issuing a sequestration order the registrar shall reflect any of the said particulars that appear in the heading to the petition of such order.

(4) Before such a petition is presented to the Court, a copy of the petition and of every affidavit confirming the facts stated in the petition shall be lodged with the Master, or, if there is no Master at the seat of the Court, with an officer in the public service designated for that purpose by the Master by notice in the *Gazette,* and the Master or such officer may report to the Court any facts ascertained by him which would appear to him to justify the Court in postponing the hearing or in dismissing the petition. The Master or the said officer shall transmit a copy of that report to the petitioning creditor or his agent.

[88] He contended further that, based on a reading of the founding affidavit in the sequestration proceedings nowhere does the deponent (Mr. Belsham) point to "*a liquidated debt*" due to Worldpay by either himself or the Trust. He claimed nor does Worldpay specify which subsections of Section 8 it relied upon. He claimed that in terms of paragraph 13 of the BCMA, Worldpay was bound by the terms thereof to take steps against TOF Energy for any monies allegedly owed. Worldpay had to date failed to do so preferring to infer fraud on his part by referring to his personal and other banking accounts.

[89] Mr. Adelakun claimed that he together with his "*fellow trustee*" (despite not having been formally cited in the proceedings) therefore sought the relief that both the

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(4A) (a) When a petition is presented to the court, the petitioner must furnish a copy of the petition—

(i) to every registered trade union that, as far as the petitioner can reasonably ascertain, represents any of the debtor's employees; and

(ii) to the employees themselves—

(aa) by affixing a copy of the petition to any notice board to which the petitioner and the employees have access inside the debtor's premises; or

(bb) if there is no access to the premises by the petitioner and the employees, by affixing a copy of the petition to the front gate of the premises, where applicable, failing which to the front door of the premises from which the debtor conducted any business at the time of the presentation of the petition;

(iii) to the South African Revenue Service; and

(iv) to the debtor, unless the court, at its discretion, dispenses with the furnishing of a copy where the court is satisfied that it would be in the interest of the debtor or of the creditors to dispense with it.

(b) The petitioner must, before or during the hearing, file an affidavit by the person who furnished a copy of the petition which sets out the manner in which paragraph (a) was complied with.

(5) The Court, on consideration of the petition, the Master's or the said officer's report thereon and of any further affidavit which the petitioning creditor may have submitted in answer to that report, may act in terms of section 10 or may dismiss the petition, or postpone its hearing or make such other order in the matter as in the circumstances appears to be just.

provisional order as well as the final order of sequestration be set aside in terms of Sections 149(2) of the Act. He claimed that there existed exceptional reasons as to why the orders that placed them both in provisional and final sequestration be set aside. The reasons he contended were:

i. That Worldpay`s case for their sequestration was based solely on the contention that he and the Trust were parties to a fraud. He claimed that basis had "*finally been laid to rest*" by the Michigan Court which dismissed the complaint relating to fraud in respect of the allegations made by Worldpay.

ii. He also claimed that it had been confirmed by Mr. Chasteen.

iii. He pointed out that the decision by the Michigan Court was taken on 12 December 2021 after both he and the Trust had already been placed in final sequestration by Steyn, J.

[90] Mr. Adelakun also claimed that the United Arab Emirates had confirmed his *"non-involvement in the alleged fraud*" as set out in a document annexed to his affidavit. The documents appeared to be on the official letter head of the United Emirates Minister of Interior which states under:

> "No criminal antecedents of the above subject till date. This certificate is issued upon the request without any liability towards others".

A police clearance certificate was also issued under the letterhead of the government of Dubai - General Department of Criminal Investigation in which the following is stated:

> "General Department of Criminal Investigation certifies that the above mentioned individual is of good conduct and behavior until the issuance date of this certificate. This certificate is issued upon individual's request. The department is not liable towards any legal rights of others."

It was signed by the Acting Director of General of Criminal Investigations, a Mr. Jamal Salim Ali.

[91] Mr. Adelakun explained that he returned to South Africa in June 2023 in order to follow-up on his status and that of the Trust`s in sequestration. He claimed that he was unrepresented at the time, he had spent several days being shunted from the Master's of the High Court and the appointed trustees. He claimed that having faced all of these difficulties, he then instructed his attorneys of record to act on his behalf since his personal intervention had not yielded any positive results. He claimed that prior to the Michigan Court's ruling, he had been confined to the UAE due to the collaborative investigations between the US Department of Justice and its UAE counterpart. It was only after the investigation between the parties had been concluded that he was "*exonerated*". He was thereafter free to travel from the UAE. He claimed that despite the fact that the Michigan Court having dismissed the complaint of fraud against him in December 2021 the UAE authorities only notified him in 2023 that he had been finally cleared of any wrongdoing. He claimed that he was thereafter only free to travel from the UAE since late May 2023.

[92] In October 2018 Worldpay`s attorneys filed a complaint with the South African Police Services as referred to earlier. He again contended that the affidavit filed by Mr. Belsham with the SAPS failed to point to a single fraudulent act allegedly perpetrated by him, TOF Group or TOF Energy. He claimed that after investigating the matter the SAPS as well *"failed to find any evidence of fraud as alleged and consequently closed its file"*. He attached an affidavit from the SAPS in which a police officer, Ms. Charlene De Klerk of Table Bay Harbour SAPS stated that the '*Sandton CAS 327-10-2018 reported by/opened on behalf of Worldpay LLC USA against Jyde Adelakun & others has been closed and filed on 2018-12-12 and found undetected of any element of criminality after investigation*". The affidavit was dated 17 January 2019.

[93] Mr. Adelakun claimed that it was evident from the minutes of the statutory meeting of creditors that with the exception of Worldpay, no other creditors were

recorded. He claimed that the current trustee, Ms. Steenkamp had agreed to hold the further proceedings in the sequestration in abeyance pending finalisation of this application. As a consequence the estate of the Trust and his has not been finally wound up which according to him meant that the absence of any creditors and since the only assets found in the Trust and that of his comprised cash in the respective bank accounts, a rescission of the final sequestration would not bring any hardship to bare upon any person or entity. He claimed that in the event of the orders being granted, the setting aside of the sequestrations that any financial losses incurred as a result of "*misguidedly and maliciously sought and erroneously granted final sequestration order*" would be recouped as he and the Trust intended issuing summons out against Worldpay and its attorneys for having recklessly proceeded with the sequestration applications without any legal basis. He claimed in conclusion that it was clear that the sequestration of both him and the Trust was based solely "*on a nebulous and false allegation of fraud lodged by Worldpay through the affidavit of Mr. Belsham."* He reiterated that despite the "*now debunked allegation*" at no stage did or could Worldpay present any evidence at all of a debt which existed between him, the Trust and Worldpay.

[94] In the alternative, he contended that the final sequestration orders should be set aside on the basis of sections 157(1) of the Insolvency Act. In this regard he argued that inasmuch as Worldpay had failed to launch an application for sequestration on one or more of the peremptory or obligatory grounds set out in Sections 8 and 9 of the Act, Worldpay`s conduct constituted "*a formal defect or irregularity*" as contemplated in Sections 157(1). That being the case, "*substantial injustice*" was suffered by both him and the Trust namely a diminution of their legal status and the infringement of their

constitutional rights enshrined in Sections 7(1)[9], 9(1)[10], 10[11], 12(1)(a)[12], 14(c)[13] and (d)[14], 22[15] and 25(1)[16] of the Constitution.

[95] He claimed that the application was urgent as the Trust had been registered with the intention of being used as a vehicle through which to conduct and embark about various business ventures both locally and abroad. He claimed that the Trust was in fact active in various business transactions prior to its provisional sequestration but had been prevented from continuing therewith as a result of the sequestration proceedings. He claimed that the persistence of such state of affairs will erode any business confidence which the business community had built up in the Trust and permanently damage its reputable footprint in the business world.

[96] He also claimed that the Trust owned several valuable assets including immovable property and it was exposed to the real risk of its assets being liquidated resulting in the permanent loss of the assets. He claimed that there was no other legal procedure which could be relied upon to rescue the Trust since the latter would be up long before the Trust could finalise "*the dispute via normal motion procedure."*

[97] He further claimed that his final sequestration prevented him personally from conducting his business affairs freely while the only alternative legal step could take

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[9] This Bill of Rights is a cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom.

[10] Everyone is equal before the law and has the right to equal protection and benefit of the law.

[11] Everyone has inherent dignity and the right to have their dignity respected and protected.

[12] Everyone has the right to freedom and security of the person, which includes the right-
(a)Not to be deprived of freedom arbitrarily or without just cause…;

[13] Everyone has the right to privacy, which includes the right not to have –
(c) their possessions seized

[14] (d) the privacy of their communications infringed

[15] Every citizen has the right to choose their trade, occupation or profession freely. The practice of a trade, occupation or profession may be regulated by law.

[16] No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property.

possibly months if not years to finalise by which time his reputation and ability to conduct business locally would be permanently lost. He claimed that the longer his sequestration and that of the trust endured, they suffered ongoing consequences of "*unconstitutional disturbance of their rights to dignity, privacy, privilege and to be economically active."*

WORLDPAY`S ANSWER

[98] The answering affidavit of Worldpay was deposed to by Mr. Gerhard Rudolph a partner in the firm of attorneys of record, Allen and Overy, having been authorised to do so by Worldpay.

[99] By way of a preamble Worldpay pointed out that the application was fatally defective for the following reasons:

(i) That Mr. Adelakun and the Trust had failed to disclose material facts and had literally come to court with dirty hands.

(ii) That the application was legally indefensible whether assessed under Sections 149(2) of the Insolvency Act or the common law.

(iii) The application was not urgent.

(iv) Mr. Adelakun and the Trust had failed to join the trustees of their respective insolvent estates; and

(v) The factual premises for the application was flawed.

[100] In response to the founding affidavit by Mr. Adelakun and the Trust, Worldpay adopted what it referred to as a thematic response rather than to deal with each of the claims made by them *ad seriatim*. It also pointed out that it had been given insufficient time to prepare the affidavit given the short period to do so by Mr. Adelakun and the Trust. Worldpay contended that the application was self-evidently an abuse of process;

including but not only limited to the issue of urgency. It nonetheless prepared an affidavit as quickly as possible in order to deal with the issues as comprehensively as possible.

[101] Worldpay pointed out that it filed an answering affidavit rather than to seek an extension of time as the application was substantively defective and should be dismissed or at the very least struck from the urgent roll. It pointed out though that the manner in which the Trust and Mr. Adelakun litigated was prejudicial to Worldpay and had it been given sufficient time it would have prepared a more comprehensive affidavit.

[102] Worldpay noted that together with the main application, Mr. Adelakun had also deposed to the founding affidavit in what purported to be the joinder application in respect of TOF Group and TOF Energy. That application, Worldpay contended like the main application was even more than an abuse of process but that it would deal with it because it was relevant to the issue of a de bonis propriis costs order that Worldpay sought against attorneys, ZS Incorporated.

THE MATERIAL NON-DISCLOSURES

[103] Worldpay pointed out that the applications by Mr. Adelakun and the Trust suffered from several serious non-disclosures.

[104] The first related to the fact that both the Trust and Mr. Adelakun unsuccessfully applied for leave to appeal the provisional orders of sequestration by Mantame, J. In fact, the applications were hopelessly defective in law in the light of the provisions of the Act. They failed to disclose in their affidavits the unsuccessful attempt.

[105] Mr. Adelakun and the Trust again unsuccessfully applied for leave to appeal the final sequestration orders from Steyn, J. They again failed to disclose their unsuccessful applications.

[106] Mr. Adelakun thereafter petitioned the Supreme Court of Appeal for leave to appeal the orders of Steyn, J. The petition was dismissed on 3 November 2020 on the basis that "there was no reasonable prospect of success of the appeal and there was no compelling reason meriting a further appeal." They likewise failed to disclose the unsuccessful petition.

[107] Mr. Adelakun and the Trust thereafter applied to the Constitutional Court for leave to appeal on three separate occasions. In that regard, on 29 September 2021, on 17 November 2021 and 24 January 2022 the Constitutional Court dismissed the applications for leave to appeal. In the application for leave to appeal dated 29 September 2021 the TOF Group and TOF Energy were also applicants. On 17 November 2021, the Constitutional Court also refused leave to appeal the interdict order relating to the freezing of the accounts. Leave to appeal was refused with costs. The various application to the Constitutional Court were likewise not disclosed by Mr. Adelakun, the Trust nor TOF Energy nor TOF Group.

[108] Worldpay pointed out that these non-disclosures were crucially important and self-evidently material for the following reasons:

(i) Inasmuch as Mr. Adelakun and the trust relied on the provisions of Section 149(2) alternatively 157(1) of the Insolvency Act as the basis of their rescission applications,

(ii) Worldpay pointed out that the application based on 157(1) could simply be dispensed with on the following basis. It was a provision which serves to preserve the validity of acts performed under the Insolvency Act which were formally defective in some way. It had absolutely nothing to do with the present

case, in particularly it confers no cause of action whatsoever on the applicant. I should point out that neither Mr. Adelakun nor the Trust sought to pursue the basis of the rescission under this section at the hearing of the matter.

[109] In respect of the basis of the application being brought under Section 149(2) counsel for Worldpay pointed out that Scott, JA in *Ward v Smit and Others: In Re Gurr v Zambia Airways Corp Ltd*[17] made it clear that :

(i) the power conferred on this court by the provision of section 149(2) to rescind an order may only be exercised in exceptional cases;

(ii) the power does not give the court any wider power to rescind other than under the common law;

(iii) the power cannot be exercised by the court unless the applicant explains why he did not oppose the sequestration order or appeal it which carries the necessary implication that if he/she did oppose it or did appeal it, Section 149(2) cannot apply and even

(iv) if the provision was in principle applicable it cannot be invoked in cases of delay unless there is full explanation of what caused the delay.

[110] In respect of the principles applicable to rescission applications under the common law the following applies; the judgment to which the rescission application is related to had to be made in the absence of the applicant and that there is good cause to explain the applicant's absence.

[111] Worldpay contended that a rescission application under the common law and therefore under Section 149(2) of the Act could not be granted where the applicant was a party to the proceedings - much less where the applicant was not only a party but tried and failed on multiple occasions to appeal the orders that are the subject of the rescission applications.

[17] 1998 (3) SA 175 (SCA)

[112] For that reason Worldpay pointed out that, the omitted facts with regard to the unsuccessful appeals were material and that the rescission applications literally amounted to an abuse of process. It pointed out that had the application been moved on an unopposed basis it may have increased the chances of the application being granted as the court would have been none the wiser. For that reason alone, Worldpay contended that the applications be dismissed.

[113] It was also not clear on exactly what basis Mr. Adelakun and the Trust sought leave to appeal to the Constitutional Court in respect of the interdict proceedings. The interdict had been discharged once the trustees in the sequestrated estates had been appointed and there could not have been any basis for an appeal against the order. In fact, it appeared that Mr. Adelakun and the Trust had simply maintained their opposition to the interdict proceedings despite the court having made it clear that it was doing no more than that which they sought, a discharge of the order. If anything their position in the interdict proceedings were demonstrative of their obfuscatory approach in all of the proceedings.

[114] Worldpay filed two opposing statements in the Constitutional Court applications, which it attached to its answering affidavit. The statements set out extensively the background to the sequestration applications and largely the conduct of Mr. Adelakun and the Trust. Worldpay had also pointed out that notwithstanding the Constitutional Court having dismissed the application for leave to appeal on 29 September 2021, Mr. Adelakun and the Trust brought two further applications for leave to appeal. In doing so they had attempted to couch the second and third applications as raising different issues, but were in Worldpay's view, no more than attempting to have a second (and a third bite of the cherry) by seeking leave to appeal again and again.

[115] Worldpay also submitted that there was no basis for the urgent relief sought by Mr. Adelakun and the Trust inasmuch as the urgency was self-created. Worldpay however, was mindful that if the court simply struck the matter off the roll for lack of urgency. Mr. Adelakun and the Trust would simply seek to ventilate the application in the ordinary course. For that reason, Worldpay sought to oppose the application on a substantive basis so as to prevent unnecessary delay in the winding up of the estates of the Trust and that of Mr. Adelakun.

[116] Worldpay contended that there was a further reason as to why the matter should not simply be struck from the urgent roll but instead be dismissed. As already indicated, Mr. Adelakun and the Trust had fully participated in all of the proceedings before Steyn, J which was a complete bar to the bringing of the rescission application. However, Worldpay pointed to the further difficulty facing Mr. Adelakun and the Trust and that related to Steyn, J having repeatedly found that they had failed to put up any factual response to the allegations in the founding affidavit. That was abundantly clear as already indicated in both judgment of Steyn, J and Mantame, J.

[117] Worldpay pointed out that inasmuch as Mr. Adelakun and the Trust attached to the founding affidavit, the affidavit of Mr. Belsham in the applications for sequestration, they had not annexed the answering affidavit deposed to by Mr. Adelakun. Worldpay contended that it was understandable given that they failed to make out any defense to the application. Worldpay contended and correctly so in my view that the merits of the proceedings before Steyn, J do not arise for re-consideration nor determination in this matter. As already indicated Steyn J's judgment remains unimpeached and in my view both Mr. Adelakun and the Trust failed to put up any meaningful defense in the sequestration proceedings.

[118] In respect of the criminal proceedings in the USA, Worldpay pointed out that the standard of proof on which the sequestration applications were based, as that on a

balance of probability as opposed to the fate of a criminal investigation to secure a conviction based on guilt been proved beyond reasonable doubt was an important distinction that Mr. Adelakun simply overlooked. The dismissal of the charges been investigated in the USA was therefore entirely irrelevant to the sequestration applications.

[119] Worldpay, pointed out with reference to the founding affidavit by Mr. Belsham that it had set out a detailed case for the sequestrations, in particular with regard to the undisputed flow of funds from the TOF Group accounts in the FT bank under the hands of Mr. Adelakun, into the first FRB accounts held by the Trust and Mr. Adelakun in South Africa and from which the funds were dissipated. The sequestration applications were moreover based on a claim that Mr. Adelakun and the Trust were indebted to the Worldpay. In that regard Worldpay pointed out that was subtly and more importantly different to a situation where the sequestrations were based on their alleged criminality. Albeit, that the allegations of criminality were directly relevant to the claimed indebtedness, the cause of action for the sequestrations was that of the indebtedness to Worldpay.

[120] Worldpay contended that both Mr. Adelakun and the Trust had the fullest opportunity to put up detailed allegations of their defense to the allegations of indebtedness. They simply failed to do so. Likewise, in these proceedings, despite trumpeting his alleged "*exoneration*" he failed to do so. Mr. Adelakun and the Trust failed to explain how the judgment of Steyn, J or indeed the allegations of Worldpay which supported the order were wrong in any respect. The "*exoneration"* asserted Mr. Adelakun was no more than a fiction and an utter failure on his part (and those legal representatives who initially represented him) to have understood the order of the Michigan Court. Worldpay contended that it would not be appropriate to rescind the sequestration orders.

[121] Worldpay also dealt at length in its answering affidavit with the issue of urgency which need not be laboured at this stage. This court will deal with the merits of the rescission applications and not simply strike it from the roll with its inevitable consequences.

NON-JOINDER OF THE TRUSTEES

[122] The further defect pointed out by Worldpay and correctly so was that Mr. Adelakun and the Trust had failed to join the trustees of their respective insolvent estates as respondents in the first rescission application.

[123] Inasmuch as Mr. Adelakun and the Trust contended that they did not need to join the trustees of their estates in the application as they relied on Section 23(6) of the Insolvency Act Worldpay correctly pointed out that they had totally misunderstood the provisions. The provision entitles an insolvent to litigate in his or her name without reference to the trustee relating to the status or any right insofar as it does not affect his estate. They clearly misunderstood what was meant by status. The whole purpose their application was to affect their estates by lifting the sequestration orders. Needless to state, the insolvent estates of both the Trust and Mr. Adelakun through the respective trustees have a substantial interest in the relief claimed in the rescission applications.

[124] Moreover, Mr. Adelakun claimed that Mr. Steenkamp, the trustee of his sequestrated estate had agreed to hold further winding up proceedings in abeyance. Worldpay did not dispute the undertaking but contended that was all the more reason for Mr. Steenkamp to have been cited as a respondent. More importantly, Mr. Steenkamp as the trustee of Mr. Adelakun's estate would crucially have been able to provide information with regard to the progress in the winding-up of Mr. Adelakun`s estate that would also impact on the merits of the application. Nonetheless, as indicated, in an attempt to avoid any delay in the determination of the merits of this

matter, the court in the course of the proceedings directed both Worldpay and Mr. Adelakun to ensure that notice was given to the trustees and their position sought with regard to relief.

NO FACTUAL BASIS FOR THE APPLICATION

[125] Worldpay correctly pointed out that much of the founding affidavit by Mr. Adelakun was no more than an impermissible attempt at rearguing the merits of the sequestration applications. That is neither permitted under Section 149(2) nor as a matter of law, to which I will revert.

[126] With reference to the decision of the Michigan Court with regard to the criminal complaint against Mr. Adelakun, Worldpay contended that it was important to note that neither the order of the Michigan Court nor the e-mail from Mr. Chasteen (referred to above) supported the claims made by Mr. Adelakun and the Trust inasmuch as:

(i) the dismissal of a criminal complaint on a "without prejudice" basis in the order referred to the interest of the state concerned (the US federal government) and not the "defendant" (the term used in the US for an accused person). In other words, the state and the US federal government was entitled to bring the complaint back before the court should it have a basis to do so in the future. That of course, carried the necessary implication that the order of the Michigan Court was in any sense, evidence that the Mr. Adelakun had been "*exonerated*". It simply meant that the U.S. federal government was not in the position to proceed with the charges at that stage.

[127] Worldpay also pointed out that it was clear that the order made by the Michigan Court of the dismissal was on a "without prejudice basis" and was made on application by the US federal government itself and in that regard referred to the part of the order in which the complaint was dismissed "*for the reasons stated in the government's motion*".

Worldpay pointed out, that yet again, Mr. Adelakun failed to disclose material facts. It attached to the answering affidavit a copy of the actual motion by the US federal government filed in support of the order made by the Michigan court. The motion read as follows:

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF MICHIGAN

United States of America,

Plaintiff

v. Criminal No. 20-mj-30135

Jyde Adelakun

Defendant(s).

MOTION AND BRIEF FOR LEAVE TO

DISMISS COMPLAINT WITHOUT PREJUDICE

Pursuant to Rule 48(a) of the Federal Rules of Criminal Procedure, the United States of America hereby moves for leave to dismiss without prejudice the complaint against Jyde Adelakun. In this case, the government needs additional time

1) To develop and obtain evidence sufficient to establish defendant's guilt beyond a reasonable doubt;

2) To investigate the full extent of the offense(s) in question and identify all other individuals who should be held criminally responsible for the offense(s); and

3) To decide whether criminal prosecution of defendant for the offense(s) in question is in the public interest.

See generally United States v. Lovasco, 431 U.S. 783,790-96 (1977); 18 U.S.C & 3161(d)(1).[18]

[18]In its ruling in that matter, the court referred to the decision of *United States v Lovasco,* 431 U.S. 783, 790-96 (1977); 18 U.S.C & 3161(d)(1) ("Lovasco"). Counsel for Worldpay, Ms. Wharton pointed out, that matter concerned a consideration of the circumstances in which the Constitution of the United States "requires a criminal indictment to be

Accordingly, the government requests leave to dismiss the complaint without prejudice and requests that the Court quash the warrants for defendant's arrest issued on March 17, 2020 and September 17, 2021.

Respectfully submitted,

SAIMA S. MOHSIN

Acting United States Attorney

s/Mark Chasteen

Mark Chasteen

Assistant United States Attorney

211 W. Fort Street, Suite 2001

Detroit, MI 48226

mark.chasteen@usdoj.gov

(313) 226 – 9555

Dated: December 8, 2021

[128] As was apparent from the motion and far from any question of Mr. Adelakun having been "*exonerated'*, the stated purpose of the motion was to request more time to obtain further evidence to establish Mr. Adelakun's guilt or innocence and to determine whether additional persons should be prosecuted alongside him.

[129] Worldpay correctly contended that there was nothing in the order of the Michigan Court that in the least indicated that Mr. Adelakun had been "*exonerated*". So too in the e-mail of Mr. Chasteen. Mr. Chasteen was no more than responding to a request by Mr. Adelakun to provide certain documents. More importantly Mr. Chasteen stated "*that there was currently no pending criminal case against you in this matter in the Eastern*

dismissed because of a delay between the commission of an offence and the initiation of prosecution. The majority judgment by Marshall J was summarised as follows:

"…to prosecute a defendant following investigative delay does not deprive him of due process, even if his defense might have been somewhat prejudiced by the lapse of time".

District of Michigan". It does not say anything at all about Mr. Adelakun's guilt or innocence.

[130] With regard to the affidavit by Ms. Charlene De Klerk of the SAPS dated 17 January 2019, Worldpay pointed to the following:

(i) a chain of correspondence between its attorneys and the SAPS that related to the investigation by SAPS;

(ii) that when the affidavit of Ms. Charlene De Klerk came to their attention they wrote to the SAPS to determine whether the document was authentic and enquired as to the status of the docket.

[131] A Lieutenant Colonel M Van Niekerk in a letter dated 26 March 2019 explained that the case had been closed not because no crime had been committed but because SAPS took the view that the crime was committed in the USA. The e-mail records the willingness of the SAPS to cooperate with the US authorities and on more than one occasion expresses the view that "*a crime*" was committed. Lieutenant Colonel Van Niekerk stated further and explained that the affidavit by Sergeant De Klerk could incorrectly be interpreted to mean that no crime was committed when to the contrary, SAPS took the view that a crime had been committed. Worldpay contended that the position expressed by Lieutenant Colonel Van Niekerk directly refuted Mr. Adelakun's interpretation of the affidavit by Sergeant De Klerk.

[132] Moreover, Worldpay repeated and correctly so, that the criminal liability of Mr. Adelakun was in any event irrelevant to the merits of the sequestration applications.

[133] Worldpay also referred to other civil proceedings in which the US federal government had been granted a civil forfeiture order in respect of funds which were fraudulently obtained from Worldpay on the basis as described in the affidavit deposed to by Mr. Belsham. The order was sought against a Mr. Oyeniran Oyewale, an associate

of Mr. Adelakun. Worldpay pointed out that Mr. Adelakun attempted to intervene in the proceedings to oppose the order which clearly demonstrated his interest in the funds that were the subject of the order. Mr. Oyewale sought to stay the order pending an appeal but was unsuccessful as the court held that there were no prospects of success. Mr. Adelakun in reply pointed out Mr. Oyewale had since been granted leave to intervene on an in forma pauperis basis. That in my view, does not in any event impact on the merits of these applications.

[134] The significance of all of this is that Mr. Adelakun's repeated contention in his founding affidavit that he had been "*exonerated*" was without any substance and not supported by the order of the Michigan Court and more importantly the basis on which it had been sought by the US federal government.

THE JOINDER-APPLICATION

[135] This relates to the aborted joinder application which was removed by Mr. Adelakun after he and the Trust terminated the mandate of their attorneys.

[136] I do not intend to deal in detail with the joinder application save to point out that the founding affidavit was once again deposed to by Mr. Adelakun in his capacity as CEO of both the TOF Group and TOF Energy. Of particular significance in the affidavit are the following claims:

(i) That TOF Energy had in fact on various occasions submitted claims and/or invoices for payments for services rendered as alleged by Worldpay in its founding affidavit in the sequestration applications. The significance of this is that for the first time Mr. Adelakun admitted contrary to the claims made in the opposing affidavits in the sequestration applications that Worldpay had in fact made payments to TOF Energy ostensibly on behalf of its customers.

(ii) Mr. Adelakun contended that from time to time and based purely on bona fide business transactions between TOF Group and the Trust, funds were transferred to the bank account of the Trust. He claimed that the frequency of business transactions between TOF Group and the trust varied from time to time which transactions included periodic and sporadic transfer of funds “legally”.

(iii) Mr. Adelakun and the Trust contended that based solely thereon, Worldpay had in the main application for sequestration relied on a series of what it referred to as false allegations in terms of which it was alleged that the TOF Energy and TOF Group had defrauded Worldpay. He claimed further that the allegations were made without any proof whatsoever other than to point out that funds had from time to time flowed from TOF Group and TOF Energy to the Trust and Mr. Adelakun. He claimed that there were no transactions whatsoever between TOF Energy and the Trust and him in his personal capacity.

(iv) Mr. Adelakun claimed further that Worldpay had simply accused TOF Group and TOF Energy of fraudulent conduct without either of the companies having been cited in the sequestration proceedings. He claimed that in doing so TOF Energy and TOF Group were denied an opportunity of defending themselves and presenting their version to the court.

(v) He again pointed to the BCMA agreement that governed the relationship between Worldpay and TOF Energy and the detailed provisions for the legal steps to be followed in the event of a breach. He claimed that it was on record that Worldpay had failed to take any legal steps whatsoever against TOF Energy as the BCMA required, in any attempt to claim monies allegedly owed to it, if any. He again referred to the investigation by the US authorities and that in Dubai and with reference to the order of the Michigan Court that the complaints of fraud were “*dismissed including a complaint that he acted as an alter ego of the TOF Group and TOF Energy*”. He therefore complained that Worldpay had “*absolutely no business dealings with both himself and the Trust and that the latter could therefore not have been indebted to the respondent(Worldpay) for any amount.”* He claimed that at best Worldpay had a claim against TOF Energy in the United

States based on the BCMA agreement. For these reasons he and the Trust contended that the TOF Group and TOF Energy had a direct and substantial interest in the litigation since their reputation had been unlawfully tarnished thus prejudicing their ability to continue conducting their businesses internationally.

[137] In its answering affidavit Worldpay contended that besides the joinder application not being urgent and the failure on the part of Mr. Adelakun to have established any authority to represent the TOF Group and TOF Energy, they had, more importantly failed to establish any direct and substantial interest in the sequestration orders. Inasmuch as the TOF Group and TOF Energy contended that they were accused of fraudulent conduct in the sequestration application they had simply conflated the question as to which parties were necessary in the litigation which determined who should be joined and what evidence was relevant in the proceedings. Worldpay contended that there was no obligation to have joined the TOF Group or TOF Energy in the sequestration proceedings. If any of the parties in that application were of the view that the evidence of TOF Energy and TOF Group was relevant, that party was wholly at liberty to have procured and placed it before the court. More importantly, the sole basis on which they contended they had a substantial and direct interest in the application was that their reputations were unlawfully tarnished. That did not give them a direct and substantial interest in the applications for rescission of orders that were not made against any of them. More importantly, neither the TOF Group nor TOF Energy, had through Mr. Adelakun who was not only their CEO but clearly their *alter ego* failed to explain why they had not applied to intervene in the sequestration proceedings. Moreover, Mr. Adelakun and the Trust had in fact raised their complaint about the TOF Group and TOF Energy not having been joined by Worldpay in the sequestration proceedings. Neither the court dealing with the provisional sequestration Mantame, J nor that of the final sequestration by Steyn J regarded the point in limine of any merit. If TOF Energy and TOF Group sought to protect their interests or their reputations their CEO who deposed all of the affidavits and who had quite clearly managed the defenses on behalf of not only himself and the Trust, could have formally applied to intervene in

the proceedings and the respective courts would have considered the merit of such applications. The complaint of non-joinder was in my view hopelessly without any merit and it was not surprising that that application for joinder was withdrawn.

[138] That notwithstanding, Mr. Adelakun on behalf of the TOF Group and TOF Energy sought to amend the notice of motion and sought to file an entirely separate application in which it sought the rescission of the orders of sequestration against Mr. Adelakun and the Trust in terms of Sections 149(2) of the Insolvency Act and Rule 42 of the Uniform Rules of Court. On this basis, they, represented by Mr. Adelakun, contended that inasmuch as they were not parties to the proceedings (by either having been joined by Worldpay or inexplicably not having sought to intervene themselves) claimed that they were entitled to seek the rescission of the sequestration applications. Once again the basis was no more that their reputations had been tarnished and that they had not been given the opportunity of defending themselves against what they regarded as the meritless claims of fraud against them. The TOF Group and TOF Energy sought that the first prayer in the original notice of motion (in the joinder application) be removed and be replaced with relief that sought the provisional sequestration orders of the Trust and Mr. Adelakun be set aside and so too the final sequestration orders. They also sought a declaratory order to the effect that Worldpay lacked the locus standi from the outset to initiate any legal action or proceedings arising out of the BCMA between TOF Energy and Worldpay and/or "*pertaining in any way to the relationship between TOF Energy and Worldpay outside the exclusive jurisdiction of the state of Ohio United States of America."* It also sought a declaratory order that the High Court of South Africa, Western Cape Division lacked the competent jurisdiction to entertain or hear the claims of Worldpay.

[139] It appeared that the founding affidavit in the second application was drafted in person by Mr. Adelakun.

[140] He claimed that the reason "*I am amending my notice of motion" was because TOF Energy and TOF Group were erroneously referred to in the judgments as if they were parties to the proceedings and players in the alleged fraud allegedly committed against Worldpay but that neither of them had been sighted(sic) as parties to defend themselves or to be heard in any of the proceedings nor were they given the opportunity to defend themselves in the interest of justice"* about the allegations, accusations and conclusions of fraud made against them. He claimed that was despite the clear complaint of "*non-joinder and the request made by Mr. Adelakun"* to the court in the sequestration proceedings in their answering affidavits. The TOF Energy and TOF Group claimed that they were affected by the judgments, that they had a direct and substantial interest in the sequestration proceedings and that they had the right to the protection of their rights of personality and dignity amongst others, with their "*affiliates at the time(sic) the Judgments were delivered in these matters without being heard in the interest of Justice*". Mr. Adelakun again referred to paragraph 23 of the BCMA and contended that it was "*abundantly clear"* that the issues raised by Worldpay were issues for the courts in the United States of America and not that of South Africa to have dealt with.

[141] He further claimed that in November 2022 the trustees of their respective estates (who were cited as the second and third respondents in the second application) had been requested "*to file for legal review on these matters*" to this court but to his surprise no response was forthcoming from them. He claimed that it was clear that nothing would be done except through his personal presence in the Republic moreover since he had no legal representation. In that regard he referred to an e-mail addressed by him to the trustees and a whole host of other recipients in which he stated that he was requesting that they file applications to the Master of the High Court to review the sequestration orders "for their reversal." He further claimed in the e-mail that *"dirty roles played by everyone are all right there and clear. Now you have the last chance to act in the interest of justice*".

REPLYING AFFIDAVIT OF MR. ADELAKUN

[142] In the reply to the answering affidavit filed by Worldpay in the first application much of Mr. Adelakun's response was no more than argumentative. In respect of the aborted joinder application he claimed that it was brought contrary to the advice of his attorneys but on the basis that he was adamant that both TOF Group and TOF Energy were unfairly accused of fraud in the sequestration applications and by not having been cited as parties to the application. He claimed for that reason he did not persist with the joinder application "*at this moment*".

[143] Mr. Adelakun claimed that the rescission application in terms of section 149(2) was based on the interpretation of the section as well as the new facts that "*had not served before the courts when dealing with the sequestration application"* that he claimed "*effectively trump Worldpay's fallacious basis for the sequestration applications."* He further claimed that these "*defects*" had emerged only after the unsuccessful applications for leave to appeal which he brought without the benefit of legal representation. He again claimed to having been "*cleared of any fraudulent activity involving Worldpay by the US department and the latter's counterpart in UAE as well as by the South African police*". He further claimed that when he applied for leave to appeal the orders of Steyn, J and the applications for leave to appeal to the Supreme Court as well as the Constitutional Court he did so without any knowledge of the legal procedures which governs such applications. He decided on that approach as by that time he had "*lost all faith in the legal profession and the judiciary based on confidential information which he had at his disposal*". He accepted with hindsight and on advice of his attorneys that his applications for leave to appeal were inadequate. He claimed though that he was unaware as to how the order made by the Constitutional Court on 17 November 2022 in respect of his application for leave to appeal against the interdict proceedings came about and claimed that he bore no knowledge thereof. Mr. Adelakun however did not indicate in either his heads of argument nor in his oral address to the court, what interpretation the court was required to give to the provisions of section 149(2) of the Act other than its ordinary grammatical meaning.

[144] He claimed that he did not approach the court for relief in terms of "*Rule 42 or the common law*" and that Worldpay`s responses with regard to him having fully participated in the proceedings was therefore irrelevant.

[145] Mr. Adelakun claimed that he was a law graduate from a USA university and that he was therefore able to comment on the application of the law of the United States. He contended that in the event of a "*complaint"* being dismissed "*without prejudice*" it meant that there was no longer a need to conduct further investigations into the alleged complaint except in the event of a "*new complaint*" being lodged, based on "*new facts which differ from the previous complaint."* He contended that inasmuch as the complaint of fraud that was investigated in the US prior to 2018, that the statute of limitations for mail and wire fraud prescribed after 5 five years of the commencement of the investigation. He contended that the five-year period had since elapsed. He also claimed that Worldpay failed to file a civil suit against TOF Group and TOF Energy despite being invited to lay a claim to the funds held in USA. The upshot of it was that he could never be charged for fraud in the USA based on Worldpay`s allegations nor could TOF Group or TOF Energy be sued in the USA as the claims had prescribed. He claimed moreover that Worldpay could not stake a claim against the attached funds referred to in the application involving Mr. Oyeniran Oyewale. He also sought to contradict Worldpay`s reference to the correspondence with the South African Police Services with regard to the investigation. He contended that the views of the SAPS were "irrelevant besides being incorrect." That despite the fact that he raised the alleged position of SAPS in his founding affidavit in support of the applications. He also pointed out that Mr. Oyeniran Oyewale had since been granted leave to file "*a good faith basis to appeal the final default judgment*". None of these claims are in my view of any significance or of assistance and as indicated are no more than argumentative and the personal views of Mr. Adelakun. Significantly though, he attached a further letter dated 30 September 2022 from the U S State Department to a Mr. Terry Eaton, a trial attorney for the U.S. Department of Justice Criminal Division from a Mr. Dawn N Ison United

States Attorney and Mark Chasteen (the Assistant U.S. Attorney referred to above). In the letter they point to the order made by the Michigan Court on 12 December 2021 in which leave was granted to dismiss the complaint without prejudice. They state:

"(a) *The criminal action against Mr. Jyde Adelakun in case number 20-mj-30135 is terminated upon entry;*

(b) The phrase "without prejudice" means that the court's order does not prevent the United States from re-initiating prosecution of Jyde Adelakun by filing charges in the future in a new criminal complaint or indictment."

Once again, Mr. Adelakun sought to rely on this letter as a basis of claiming that he had been "*exonerated*" by the Michigan Court. Needless to say, it is self-evident that was not the position.

FURTHER AFFIDAVITS FILED BY WORLDPAY AND MR. ADELAKUN

[146] Worldpay as indicated filed a Conditional Affidavit in answer to the supplementary affidavit deposed to by Mr. Adelakun on 3 November 2022 in support of the amended notice of motion.

[147] It pointed out that the further conduct order taken by agreement between the parties on 24 October 2023 before Samela, J did not make provision for the filing of any further affidavits. It therefore objected to the filing of the supplementary affidavit by Mr. Adelakun. It also pointed out that Mr. Adelakun and the Trust who initiated the application were legally represented by both attorneys and counsel up until 24 October 2023. There was no factual explanation given to justify why a further affidavit had to be accepted at that stage of the proceedings. Nonetheless it pointed out, in the event of the court admitting the supplementary affidavit it asked that Worldpay's own supplementary affidavit be admitted. I am inclined to admit the supplementary affidavits by parties given that Mr. Adelakun acted in person at the time and was not familiar with court procedure and more so for the convenience of allowing him to give full expression and explanation

to the position of both TOF Energy and TOF Group. Worldpay pointed out though, that of particular significance were the allegations made by Mr. Adelakun on behalf of TOF Group and TOF Energy that the transfer of part of the alleged misappropriated funds in the TF Bank account of TOF Group were made as a "*temporary business loan*" to the Trust. That was an entirely new averment, one never made before in any of the proceedings hitherto, not during the entirety of the sequestration proceedings nor in the founding affidavit in these proceedings. Moreover, such "*business loan*" was not supported by any documentation or by any of the other officials of the various entities. Worldpay contended that the claim of a "*business loan*" was both false and a misleading afterthought. I agree.

[148] Worldpay also pointed out that the transcript of the proceedings before Steyn, J which Mr. Adelakun had attached to the supplementary affidavit had notably shown that he and the Trust were represented by both an attorney and counsel on the return date and that the allegation that no evidence was presented in the sequestration proceedings to show that the misappropriated monies originated from Worldpay was clearly false. Worldpay also pointed out also that it was not competent for a lay person despite being a shareholder or an officer of that cooperation to represent the corporations in legal proceedings.

[149] Worldpay contended that even if Mr. Adelakun was permitted to represent TOF Group and TOF Energy in these proceedings there was absolutely no merit in their application whether for their joinder or the separate application for the rescission of the sequestration orders in that they had simply not met the most basic of requirements of establishing a direct and substantial interest in any of applications nor in respect of the orders made. Worldpay contended that TOF Group and TOF Energy were impermissibly seeking a rehearing of the sequestration applications.

[150] Worldpay highlighted that both TOF Group and TOF Energy had already unsuccessfully sought leave to appeal the sequestration orders from the Constitutional

Court. Moreover, it was most unlikely that Mr. Adelakun, the chief executive officer of both companies could not explain how their application for leave to appeal to the Constitutional Court came about.

[151] Not to be outdone by Worldpay, Mr. Adelakun filed a further supplementary replying affidavit to that of Worldpay. Once again, the affidavit was no more than argumentative in challenging the assertions made by Worldpay. Mr. Adelakun pointed out that the TOF Group and TOF Energy in the second application were not merely seeking to be joined to the application for rescission brought by him and the Trust but that it had now brought their own separate applications for rescission under the amended notice of motion. He again contended that the separate interests of the TOF Group and TOF Energy were asserted to no avail before Mantame, J. He contended that the amended notice of motion and the relief sought thereon was an entirely "*new application based on new facts*" in that the American authorities had "*absolved me and the two applicants of any wrongdoing*". He claimed that "*its crystal clear that no such fraud existed*" against Worldpay and that it was in the interest of justice that the sequestration orders which "*incorrectly found*" him and the Trust to be debtors in the context of the Insolvency Act stood to be rescinded and set aside.

[152] Significantly, Mr. Adelakun, on behalf of TOF Group and TOF Energy and indeed on behalf of the Trust and himself did not refute the claim made by Worldpay that the claim of a "*temporary business loan*" raised for the first time in the latest affidavits in the proceedings was no more than false and a misleading afterthought.

THE LEGAL FRAMEWORK AND APPLICABLE PRINCIPLES

[153] In both applications, the rescission of the sequestration orders made by Mantame, J and Steyn, J were sought in terms of Sections 149(2) of the Insolvency Act.

[154] The section provides:

> "The Court may rescind or vary any order made by it under the provisions of this Act."

[155] In the second application the co-operations, TOF Group and TOF Energy sought in the alternative the rescission of the sequestration orders in terms of Rule 42(1)(a). The rule provides:

"(1) The court may, in addition to any other powers it may have, mero motu or upon the application of any party affected, rescind or vary:

(a) An order or judgment erroneously sought or erroneously granted in the absence of any party affected thereby;…"

[156] They (all four of the applicants in the two applications) also contended that based on amongst others various constitutional rights, that it is in the interests of justice that the sequestration orders be rescinded. TOF Group and TOF Energy in a further written reply to Worldpay's note on argument filed after the hearing also sought to invoke the provisions on Section 172(1)(b)[19] of the Constitution and contended that the court should make a just and equitable order for what they considered to be a violation of their constitutional rights.

[157] In the early Cape decision of *Abdurahman v Estate Abdurahman* 1959 (1) SA 872 (C) De Villiers AJ in considering the provisions of Sections 149(2) of the Insolvency Act remarked as follows:

[19] Powers of courts in constitutional matters. –
(1)When deciding a constitutional matter within its power, a court-
(a)…
(b) may make any order that is just and equitable, including-
(i) an order limiting the retrospective effect of the declaration of invalidity; and
(ii) an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect.

> "The Courts of various Provincial and Local Divisions have in the past not considered the discretionary power conferred by this section to be limited to rescission on the common law grounds. They have, nevertheless, however, stressed that some unusual, or special, or exceptional circumstances, must exist in order to justify relief under sec. 149 (2). With respect, it appears to me that this approach is based upon sound principle. Inasmuch as the relief that could be obtained under sec. 149(2) is of an extraordinary nature, special grounds must needs be required for the exercise of the discretion to grant such relief. There are ordinary forms of procedure available to a debtor, which, is properly availed of, should mostly make it necessary for him to seek this form of relief in order to escape insolvency. He is given full facilities for contesting sequestration proceedings and raising such defences as he may have on the merits in those proceedings. In addition, sec. 150 of the Insolvency Act provides facilities for appealing against a sequestration order. Where a sequestration order has properly been granted against a debtor he has available the ordinary procedure for obtaining rehabilitation under appropriate circumstances. The consideration has also been stressed, in my opinion correctly, that the question whether a person who has been properly sequestrated should become solvent again is a matter which does not affect only that person and his creditors: there are certain aspects of public interest involved, inter alia, as regards the question whether the debtor is to be re-vested with full rights of trading and of obtaining credit. It is by reason of these and similar considerations that the Legislature has prescribed certain periods which have to elapse before a rehabilitation order can be granted. For all these reasons it seems clear that in order to justify the exercise of a discretion under sec. 149 (2) in his favour, the applicant or plaintiff seeking relief from insolvency should satisfy the Court that his being confined to the normal forms of procedure available to him would for some reason be inequitable and not desirable regard being had to his own position, to that of his creditors and to the considerations of public interest above referred to.

[158] De Villiers AJ added, 'examples of special and exceptional circumstances that were found to exist in particular cases were mostly of the kind where the debtor was in fact not insolvent or had made a provision for the payment of his creditors in full and where in addition he had laboured under some disability or difficulty with regard to contesting the sequestration proceedings (see for example ex parte Belcher 1939 WLD 39) or alternatively, where in addition unnecessary hardship would be involved for

himself and for others in the event of his being confined to the ordinary rehabilitation machinery'. De Villiers AJ remarked further that he had not come across a single case and none had been cited to him in which the relief had been granted under Section 149(2) merely upon the consideration that affected the merits of the sequestration proceedings.

[159] Importantly, he held that it is necessary for an applicant who seeks a rescission under Sections 149(2) would in addition to the common law grounds for rescission have to establish unusual, special or exceptional circumstances in order to justify the relief under the subsection.

[160] In March 1998 in *Ward v Smith and Others: In Re Gurr v Zambia Airways Corp Ltd,* the Supreme Court of Appeal considered the requirements for the setting aside of a winding-up order in terms of the provisions of Sections 354(1) of the Companies Act 61 of 1973. The section provides:

> "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."

Scott JA writing on behalf of the court remarked that the language of the section was wide enough to afford the court a discretion to set aside a winding-up order, both on the basis that it ought not to have been granted at all or on the basis that it falls to be set aside by reason of subsequent events (Meskin Henochsberg on the Companies Act at 747; see also Joubert (ed) The Law of South Africa Vol. 4 first re-issue para 185 (MS Blackman).

> "In the case of the former, the onus on an applicant is such that generally speaking the order will be set aside only in exceptional circumstances. This has been emphasised by the Courts of various Provincial and Local Divisions not only in relation to section 354

and its predecessor (section 120 of Act 46 of 1926) but also in relation to s 149(2) of the Insolvency Act 24 of 1936 which affords a similar discretion to a Court to rescind or vary a sequestration order (See *Herbst v Hessels NO en Andere* 1978 (2) SA 105 (T); *Aubrey M Cramer Ltd v Wells NO* 1965 (4) SA 304 (W); *Abdurahman v Estate Abdurahman* 1959 (1) SA 872 (C)). There is nothing in the section to suggest that the Court's discretionary power to set aside a winding-up order is confined to the common-law grounds for rescission. However, in the *Herbst* case *supra*, Eloff J expressed the view (at 109F-G) that no less would be expected of an applicant under the section than of an applicant who seeks to have a judgment set aside at common law. I think this must be correct. The object of the section is not to provide for a rehearing of the winding-up proceedings or for the Court to sit in appeal upon the merits of the judgment in respect of those proceedings. To construe the section otherwise would be to render virtually redundant the facilities available to interested parties to oppose winding-up proceedings and to appeal against the granting of a final order. It would also 'make a mockery of the principle of *ut sit finis litium'*. (*Abdurahman v Estate Abdurahman (supra* at 875G-H)). It follows that an applicant under the section must not only show that there are special or exceptional circumstances which justify the setting aside of the winding-up order or appealed against the order. Other relevant considerations would include the delay in bringing the application and the extent to which the winding-up had progressed. (Compare *Aubrey M Cramer Ltd v Wells NO* (*supra)* at 305H.)"

[161] The court remarked that as with sections 354, so too, in respect of an application brought under Section 149(2) of the Insolvency Act, the discretionary power to set aside the winding-up was not confined to the common law grounds of rescission. Although Eloff, J was of the view that no less would be expected of an applicant under the section. Importantly, the court emphasised that the object of the section was not to provide for a rehearing of the winding-up proceedings nor for a court to sit in appeal on the merits of the sequestration judgment. And for the same reasons as set out in the decision of De Villiers AJ in *Abdurahman*, the court was of the view that such an approach would defeat the facilities available to interested parties to intervene in winding-up proceedings and appeal against the final order.

[162] The SCA, as did De Villiers AJ in *Abdurahman*, held that an applicant, besides establishing the common law grounds for rescission would have to demonstrate that there were special or exceptional circumstances that would justify the setting aside of the winding- up order in addition to having to provide a satisfactory explanation for not having opposed the granting of a final order in the first place or having appealed it.

[163] Interestingly, in a judgment handed down on 27 May 1998 Gautschi AJ in *Storti v Nugent and Others* and, reported much later in 2001 (3) SA 783 (W) and without reference to the decision of the Supreme Court of Appeal in *Ward* above, conducted extensive research into the history of the origins of the Companies Act in South Africa and with particular reference to the provisions of sections 354(1) of the 1973 Companies Act. In that matter he found that the provisions of Sections 149(2) were applicable as opposed to sections 354(1). He remarked that there was a long and respected line of authority that the section may be invoked both where the order should not have been granted and where it was properly made but supervening factors made its rescission or variation necessary and desirable. In that regard, he referred, amongst others to the decision of De Villiers AJ in *Abdurahman* referred to earlier. Gautschi AJ remarked as follows:

> "The principles to be gleaned from the authorities, often not harmonious, are in my view the following:
>
> (1) The Court's discretionary power conferred by this section is not limited to rescission on common-law grounds.
>
> (2) Unusual or special or exceptional circumstances must exist to justify such relief.
>
> (3) The section cannot be invoked to obtain a rehearing of the merits of the sequestration proceedings.
>
> (4) Where it is alleged that the order should not have been granted, the facts should at least support a cause of action for a common-law rescission.

(5) Where reliance is placed on supervening events, it should for some reason involve unnecessary hardship to be confined to the ordinary rehabilitation machinery, or the circumstances should be very exceptional.

(6) A court will not exercise its discretion in favour of such an application if undesirable consequences would follow.

In *Ex parte Van der Merwe* (supra at 72E-H) certain other general principles are enunciated. The first deals with notice to interested parties. I have not repeated that principle because it is of course fundamental to all applications. The second is that there should be no dispute on the facts. I do not agree with this unqualified statement. If the application involves a rescission of an order which should not have been granted, an applicant for a rescission under the common law need only make out a *prima facie* case (I deal more fully with this below). The effect of the order is interim only, and not final, and therefore factual disputes are ordinarily not a bar to success. If on the other hand the order was correctly made, but is to be set aside (permanently) because of, for instance, a composition with creditors, the order of setting aside is expected to have final effect and factual disputes would then become an obstacle to the applicant (*Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634E-635C)."

[164] In respect of an application under both sections 354(1) or 149(2) of the Act he remarks as follows:

"On either basis, the applicant must at least bring itself within a rescission under the common law. That involves establishing 'sufficient cause', which in turn involves two essential elements-

(1) The party seeking relief must present a reasonable and acceptable explanation for his default, and

(2) On the merits such party must have a bona fide defence which, prima facie, carries some prospect of success.

(*Chetty v Law Society, Transvaal* 1985 (2) SA 756 (A) at 764I-765D.)"

[165] The common law grounds for rescissions were set out in the oft-referred to decision of Miller, JA in *Chetty v Law Society, Transvaal* 1985 (2) SA 756 (A). There the court set out the requirements for the rescission of a judgment obtained by default of appearance provided that sufficient cause therefore was shown. In dealing with what was meant by 'sufficient cause' the court remarked:

> "The term "sufficient cause" (or "good cause") defies precise or comprehensive definition, for many and various factors require to be considered. (See *Cairn's Executors v Gaarn* 1912 AD 181 at 186 *per* INNES JA.) But it is clear that in principle and in the long-standing practice of our Courts two essential elements of "sufficient cause" for rescission of a judgment by default are:
>
> (i) that the party seeking relief must present a reasonable and acceptable explanation for his default; and
>
> (ii) that on the merits such party has a *bona fide* defence which, *prima facie*, carries some prospect of success. (*De Wet's* case *supra* at 1042; *PE Bosman Transport Works Committee and Others v Piet Bosman Transport (Pty) Ltd* 1980 (4) SA 794 (A); *Smith NO v Brummer NO and Another; Smith NO v Brummer* 1954 (3) SA 352 (O) at 357-8.)
>
> It is not sufficient if only one of these two requirements is met; for obvious reasons a party showing no prospect of success on the merits will fail in an application for rescission of a default judgment against him, no matter how reasonable and convincing the explanation of his default. And ordered judicial process would be negated if, on the other hand, a party who could offer no explanation of his default other than his disdain of the Rules was nevertheless permitted to have a judgment against him rescinded on the ground that he had reasonable prospects of success on the merits."

THE APPLICATION OF THE LEGAL PRINCIPLES TO THE TWO APPLICATIONS

[166] In respect of the first application it was incontrovertible that both applicants, Mr. Adelakun in his personal capacity and the Trust had fully participated in the proceedings both before Mantame, J and Steyn, J. They were also legally represented in such proceedings although at times Mr. Adelakun appeared in person where they had

terminated the services of his legal representatives. The answering affidavit by both of them had been prepared by their legal representatives and it was evident from a copy of the record of the proceedings before Steyn, J at the return date of the provisional sequestrations they were represented by a Mr. De Pontes, a practicing advocate. There can be no question that they were not aware of the proceedings and were given the fullest opportunity by the court (despite repeated postponements and who accommodated them to appoint new legal representatives whenever requested). There appeared to be some suggestion that because Mr. Adelakun had appeared in person he had suffered from some disability by not being properly and fully familiar with the law on sequestrations and its requirements. As indicated when the merits of the applications were argued, both before Mantame, J and Steyn, J they were legally represented. There can be no question that they were in any way disadvantaged by the lack of legal representation in the various hearings on the merits of the applications and the many postponements that they sought and which were granted.

[167] The repeated grounds of attack on the judgments of both Mantame, J and Steyn, J by Mr. Adelakun and the Trust were amongst others, that Worldpay had failed to establish a liquidated claim against them or that an act of insolvency had not been established and what they regarded as without any basis the claim that they had deliberately sought to dissipate their assets to the prejudice of the Worldpay and other creditors (of which they disputed that any existed).

[168] Needless to say, counsel for the Worldpay contended and correctly in my view, that the contentions by both Mr. Adelakun and the Trust were neither sustainable both in fact nor in law. Their challenge on Worldpay`s locus standi in the sequestration proceedings and its failure to meet the requirements of Section 12(1) of the Act amounted to no more than a vain attempt by Mr. Adelakun and the Trust at seeking a rehearing of the sequestration applications. As already indicated, the settled law endorsed by the Supreme Court of Appeal is that Section 149(2) cannot be invoked to obtain a rehearing of the sequestration application or for that matter as Scott JA in the

Ward remarked for the court to sit in appeal upon the merits of the judgments in those proceedings. The applicants have moreover exhausted all of their avenues of appeal both before the Supreme Court of Appeal and the Constitutional Court. It would as the authorities stated, make a mockery of the legal process and in particular that of the appeal courts for this court to in any way revisit not only the question of locus standi of Worldpay in the sequestration applications but also the affirmative findings by Steyn, J and Mantame, J that both Mr. Adelakun and the Trust committed acts of insolvency, and importantly, that the transfer of funds into their various accounts was tantamount to a dissipation of their property to defeat the interests of creditors such as Worldpay. It was thus incontrovertible that it was to the benefit of their creditors that the estates of both Mr. Adelakun and that of the Trust be placed into the hands of their trustees. More importantly given the large amounts of money that was unaccounted for, the trustees would not have been able to conduct the necessary investigations.

[169] In respect of the second leg as to whether the applicants have established any bona fide defense which prima facie carried some prospect of success, Mr. Adelakun and the Trust, as did TOF Energy and TOF Group in the second application claim that the alleged "*exoneration*" by the Michigan Court constituted not only exceptional circumstances but a bona fide defense to the claims of misappropriation by Worldpay in the sequestration applications.

[170] It was apparent from the motion brought before the Michigan Court by the federal government of the U.S and the order of that court that the dismissal was granted on a "without prejudice basis" and that the stated reason for the dismissal was to enable the state to be given the opportunity of conducting further investigations, and whether to join other parties, if necessary in the investigations. It was clearly not an "exoneration" of Mr. Adelakun nor any of his counterparts and his repeated claims of having been vindicated or as he put it, found and cleared of all allegations of fraud were wholly without substance. More importantly though, as pointed out by the Worldpay, the basis of the sequestration of Mr. Adelakun and that of the Trust was not premised simply on the

allegations of fraud which he was alleged to have masterminded through the use of TOF Energy on Worldpay to obtain the payments but that there had been a clear tracing and tracking of the flow of funds that belonged to Worldpay to that of TOF Group (having been the stipulated account by TOF Energy) and from which further transfers were made into a secondary TOF Group account and of which approximately USD 2 million were transferred into the account of the Trust. The monies received by the Trust were thereafter dispersed to Mr. Adelakun in his personal capacity and to other entities. Of particular significance was that in the sequestration proceedings Mr. Adelakun and the Trust disputed that any funds received into the TOF Group accounts had its provenance from Worldpay and it was repeatedly disputed and challenged to provide proof and its bank statements of such payments. That spurious defense was abandoned in these proceedings where both corporations TOF Energy and TOF Group acknowledged that payments were made on invoices presented by TOF Energy to Worldpay who thereupon made several payments into the bank account of TOF Group at FT Bank. This summersault by Mr. Adelakun as the CEO of both TOF Group and TOF Energy remained inexplicable. More importantly, as Steyn, J and Mantame, J found, no reasonable explanation was provided by the Trust through Mr. Adelakun as principal trustee, as to the reason for the receipt of the monies from TOF Group. Vague claims were made that it was no more than an "*investment"* which the Trust claimed it was entitled to receive. No details were provided of any such *"investment*", nor any basis for it. Moreover, the "*investment*" morphed into a "short term business loan" as inexplicably claimed by TOF Group in the second application. The basis of any such loan was moreover not disclosed nor its terms and absolutely no details were provided about it. Worldpay correctly pointed out that it was no more than a false and a dishonest claim and nothing more than an afterthought. So too, did Mr. Adelakun in his personal capacity wholly fail to provide any explanation as to the receipt of money from the Trust into his personal accounts. It appeared that in the answering affidavit in the sequestration proceedings he adopted the remarkable attitude that he did not owe any explanation for the funds into his account nor that of the Trust. The purported explanation as to the receipt of the funds from TOF Group, in my view, did not constitute any bona fide defense to the sequestration application and equally so too in the

applications for the rescission of the orders. Moreover, Mr. Adelakun as the controlling mind and the CEO of both TOF Group and TOF Energy was sufficiently familiar with the business dealings of the corporations to have provided a cogent explanation in the sequestration proceedings if any existed. What was even more significant about the revelations of the "*short term business loans*" or "*investment*" in the rescission applications were that they were not supported by any other official or shareholder (if any) in the corporations other than the mere say so of their CEO who previously professed not to have been intimately involved in the day to day business operations of the two corporations.

[171] I am more than satisfied that the applicants in both applications failed to establish a bona fide defense which prima facie carried some prospect of success. Moreover, what Mr. Adelakun regarded as the unusual, special, exceptional and supervening circumstances of the dismissal of the complaint against him in the Michigan Court on a "without prejudice basis" does not in any way undermine the findings of both Mantame, J and Steyn, J. Moreover, all four of the applicants have wholly failed to demonstrate that they would be subject to any unnecessary hardship if confined to the ordinary rehabilitation machinery. In this regard the remarks of De Villiers, AJ's in *Abdurahman* that the rigors and time expanse of a rehabilitation process also entails the protection of the public interest in the reinvesting of the estate of an insolvent remains particularly apposite.

[172] During the course of argument Mr. Adelakun submitted that his status as an insolvent was prejudicial to the corporation's ability to conduct business. In that regard, he volunteered that, the corporations, TOF Group and TOF Energy stood to conduct business with the South African government and also in the oil industry but the fact that he as their CEO was an unrehabilitated insolvent was raised as a bar for doing business with the corporations. Counsel for the respondent correctly pointed out there was no cogent explanation provided by Mr. Adelakun as to why the corporations could not

simply conduct business without the involvement of Mr. Adelakun. Except of course, that he really was and remains the alter ego of both corporations.

[173] In respect of the second application, TOF Group and TOF Energy contended that they were deliberately excluded from participating in the sequestration proceedings and more importantly to defend themselves against the false claims of fraud against them by Worldpay in its failure to have joined them in the proceedings. In the answering affidavit both Mr. Adelakun and the Trust had in fact raised as a point in limine the non-joinder of the corporations. Both Mantame, J and Steyn, J separately rejected the points in limine initially as a bar to the provisional sequestration of the Trust and Mr. Adelakun and so too in the final sequestration proceedings. Needless to say, all of that findings were the subject of the applications for leave to appeal to the Supreme Court of Appeal and the Constitutional Court. They found favour with none. Moreover, other than claiming simply to protect their reputation against the false accusations of fraud neither TOF Group nor TOF Energy contended that their participation in the sequestration proceedings would or could have led to a different outcome in respect of those proceedings. More importantly, they were not the subject of the sequestration proceedings and if as they seek to suggest that they may well be creditors of the estates of Mr. Adelakun and the Trust they remain at liberty to prove such claims in the insolvent estates. Strangely, in this regard Mr. Adelakun contended that the rescission would not impact on any creditors as there were none other than what he referred to as the alleged false claims made by Worldpay. That claim does not square up with the belated explanation of the corporations having made an investment or short term loan to the Trust. These contentions were simply irreconcilable and demonstrative, once again, of the lack of a credible and honest disclosure about the reasons for such transfers between TOF Group and the Trust.

[174] There was also no explanation provided by TOF Group and TOF Energy through Mr. Adelakun as to why they had not applied in terms of the Rules of the High Court to formally intervene in the sequestration proceedings, more so after the point in limine had been rejected by Mantame, J in the provisional sequestration proceedings. Nothing

prevented the corporations from doing so and for the court on the return date to have considered the merits (if any) of such an application. Mr. Adelakun in the supplementary heads filed after the oral presentations sought to suggest there was a responsibility on both Mantame, J and Steyn, J to have invited TOF Group and TOF Energy to have indicated whether they had any interest in the sequestration applications and, if any, to have invited them to apply to join or intervene in the proceedings. In this regard, Mr. Adelakun opportunistically sought to rely on this court having provided the parties with the opportunity of obtaining the views of the various interested parties such as the trustees, the Master, SARS and creditors who ought to have been given notice of these proceedings and to have indicated whether they wished to intervene or to abide the outcome of this court's decision. The comparison made was without merit inasmuch as there was an obligation on the part of Mr. Adelakun and the Trust in the first application to have cited at the very least the trustees and to have given the Master, SARS and other creditors notice of these proceedings. There was no obligation on either Mantame, J or Steyn, J to have invited the corporations or for them to have been given notice of the sequestration proceedings.

[175] Counsel for Worldpay referred to the decision of Corbett, J in the matter of *United Watch and Diamond Co. v Disa Hotels* 1972 (4) SA 409 (C) at 415B:

> "…an applicant for an order setting aside or varying the judgment or order of Court must show, in order to establish locus standi, that he has an interest in the subject-matter of the judgment or order sufficiently direct and substantial to have entitled him to intervene in the original application upon which the judgment was given or the order granted."

[176] The interest required is a legal interest that could prejudicially be affected by the order and not merely a financial interest which is only an indirect interest. In this regard Worldpay contended that the findings and reasoning in *United Watch & Diamond Co. v Disa Hotels* were of equal application in respect of the rescission brought in terms of 149(2) of the Insolvency Act by the corporations inasmuch as they had failed to show a direct and substantive legal interest in the sequestration proceedings.

THE APPLICATION FOR RESCISSION BROUGHT UNDER RULE 42(1)(a) OF THE UNIFORM RULES

[177] It was incumbent upon the two corporations in reliance on Rule 42(1)(a) to demonstrate why the order was erroneously granted. In this regard Kampepe, J in *Zuma v Secretary of the Judicial Commission and Others*[20] stated:

> "Ultimately, an applicant seeking to do this must show that the judgment against which they seek a rescission was erroneously granted because: "there existed at the time of its issue of fact of which the judge was unaware which would have precluded the granting of the judgment and which would have induced the judge, if aware of it not to grant the judgment".[21]

[178] In this regard the cooperation sought to suggest that the error committed by both Mantame, J and Steyn, J was based on the fact that they were not aware that there was no substance to the fraud allegations which they claimed had subsequently emerged through the further investigation and the dismissal order by the Michigan Court. Once again, the error relied upon by the corporations and for that matter also Mr. Adelakun and the Trust in the first application was that of the dismissal by the Michigan Court as already indicated, bore no relevance to the actual findings of the court's in both the provisional and final sequestration orders, all of which were based on the requirements provided for in the Insolvency Act. Once again, the corporations sought to conflate the criminal investigation with the onus cast upon Worldpay in the sequestration proceedings to have established on a balance of probability that there was a liquidated debt owed to Worldpay, that Mr. Adelakun and the Trust had committed acts of insolvency, were factually insolvent and were in fact dissipating their assets to the prejudice of their creditors and that it was therefore in the interests of the creditors for their respective estates to be placed under sequestration.

[20] Refer to the previous footnote at 62.
[21] Nyingwa v Moolman N.O. 1993 (2) SA 508 (TK) at 510D-G; see also Daniel above fn 10 at para 6 and fn 20 at para 6.

[179] In respect of their absence from the sequestration proceedings, I have already considered that in the context of not only their failure to have formally applied for their intervention in the sequestration proceedings and to have established a direct and substantial interest in the proceedings they were merely seeking to protect and defend their reputations against the allegations of fraud against them which is a wholly insufficient basis for a rescission of the orders. Moreover, from the content of the affidavit deposed to on behalf of the corporations by their CEO, there appears to be nothing of any value and merit that would have led the courts to a different decision in the sequestration applications.

[180] In my view, the applicant and the corporations have likewise failed to make out a case for rescission under Rule 42(1)(a).

THE CHALLENGE TO THE JURISDICTION OF THE COURT

[181] In the sequestration proceedings Mr. Adelakun and the Trust contended that the court did not have jurisdiction to deal with the sequestration. They claim that the allegations of fraud arose out of the contractual relationship between Worldpay and TOF Energy which was governed by the BCMA in which the parties submitted themselves to the jurisdiction of the state and federal courts of Ohio. The corporations also sought declaratory relief in the second application where in reliance on the provisions of clause 23 of the BCMA they contended that neither the court of Mantame, J nor that of Steyn, J enjoyed jurisdiction in respect of the applications.

[182] Counsel for Worldpay correctly in my view, contended that the sequestration applications were not proceedings that arose out of or related to the BCMA and moreover neither was the sequestration applications brought against a party to that agreement. The fact that the BCMA contained a choice of law clause was no bar to

either Mantame, J or Steyn, J dealing with the sequestration of Mr. Adelakun in his personal capacity or that of the Trust.

[183] In my view, the relief sought by the corporations in the amended notice of motion was hopelessly without merit in seeking declaratory orders that both the courts of Mantame, J and Steyn, J had no jurisdiction over the parties and in dealing with the sequestration application. To the extent that the corporations, Mr. Adelakun and the Trust sought to suggest in any way that constituted an error on the part of the courts that entitled it to a rescission of the judgments, is in my view equally without any merit. The remaining clauses referred to and relied upon by all of the applicants were in my view, likewise of no relevance to the sequestration application or their rescission.

THE RELIANCE ON VARIOUS RIGHTS UNDER THE CONSTITUTION

[184] The applicants in both the first and second application sought to rely on what they contended were a violation of various of their rights under the Constitution in the sequestration proceedings and the eventual sequestration orders against Mr. Adelakun and the Trust. These contentions were not articulated with any coherence and it appeared that what the four applicants sought to do was to bolster their claims for rescission under both Sections 49(2) of the Insolvency Act and under Rule 42(1)(a).

[185] In respect of the corporations Mr. Adelakun alleged that certain rights of the corporations had been violated namely those enshrined in Sections 9(1), (10), 25(1), 34 and 35(3)(a)(c)(e)(h)(i) and Section 36(1) of the Constitution.

[186] Section 9(1) of the Constitution provides that everyone is equal before the law and has a right to the equal protection and benefit of the law. There is nothing to indicate that each of the corporations and Mr. Adelakun and the Trust suffered a violation of their right to equality and the benefit of the law in the sequestration

proceedings. Section 10 provides that everyone has inherent dignity and the right to have their dignity respected and protected. In this regard counsel for Worldpay contended that Section 8 of the Constitution determines the application of the Bill of Rights. Section 8(4) provides that "a juristic person is entitled to the rights in the Bill of Rights to the extent required by the nature of the rights and the nature of that juristic person".[22]

> "[18] As we have seen, privacy is a right which becomes more intense the closer it moves to the intimate personal sphere of the life of human beings, and less intense as it moves away from that core. This understanding of the right flows, as was said in *Bernstein*, from the value placed on human dignity by the Constitution. Juristic persons are not the bearers of human dignity. Their privacy rights, therefore, can never be as intense as those of human beings. However, this does not mean that juristic persons are not protected by the right to privacy. Exclusion of juristic persons would lead to the possibility of grave violations of privacy in our society, with serious implications for the conduct of affairs. The state might, for instance, have free licence to search and seize material from any non-profit organisation or corporate entity at will. This would obviously lead to grave disruptions and would undermine the very fabric of our democratic state. Juristic persons therefore do enjoy the right to privacy, although not to the same extent as natural persons. The level of justification for any particular limitation of the right will have to be judged in the light of the circumstances of each case. Relevant circumstances would include whether the subject of the limitation is a natural person or a juristic person as well as the nature and effect of the invasion of privacy."

[187] Inasmuch as Mr. Adelakun contended that his dignity had been undermined by his sequestration, that in my view is not a violation of the Constitution insofar as it is permitted by a law of general application and would in my view survive any limitations analysis under Section 36(1). Inasmuch as any of the applicant's complain that they have been unlawfully accused of fraud by Worldpay or have been the unlawful beneficiaries thereof, they enjoy all the rights under the law to protect their reputation if found to be unlawful infringed. Section 25 provides that no one may be deprived of

[22] Investigating Directorate: Serious Economic Offences and others v Hyundai Motor Distributors (Pty) Ltd and Others: In re: Hyundai Motor Distributors (Pty) Ltd and Others v Smit NO and Others 2001 (1) SA 545 (CC) at [18].

property except in terms of the law of general application and no law may permit arbitrary deprivation of property. Worldpay correctly pointed out that Section 25(1) could only be invoked in the event that the corporations could prove that funds in question, those of Worldpay which were proven to have been transferred to Mr. Adelakun and the Trust via the corporation's bank accounts were the corporation's property. The corporation simply failed to do so. Moreover, Mr. Adelakun and the Trust were not arbitrarily deprived of their property. They were given notice of all of the proceedings and fully participated in it. The corporation were equally fully aware of the proceedings.

[188] Inasmuch as the corporations rely (and to the extent that Mr. Adelakun and the Trust also rely thereon) on fair trial rights under Section 35 of the Constitution afforded to every person facing prosecution of a crime, Worldpay correctly asserted that the section finds no application as neither this application nor the sequestration application was concerned with a criminal prosecution. In respect of the applicant's reliance on Section 34 of the Constitution which provides that everyone has a right to have any dispute that can be resolved by application of the law decided in a fair public hearing before a court or where appropriate another independent and impartial tribunal forum, Worldpay correctly contended that the corporations had simply failed to explain why they had not sought to have formally intervened in the sequestration proceeding, if they indeed enjoyed any substantial interest in the proceedings by having brought a formal application for intervention or joinder. Moreover Mr. Adelakun had personal knowledge of Worldpay`s claims of the funds found in his and the Trust`s bank accounts since at the very least as early as 6 December 2018.[23]

[189] In as much as the corporations and Mr. Adelakun and the Trust rely on the provisions of Section 36(1) relating to the limitations clause which provides:

[23]In the interdictory proceedings, a rule nisi was granted under case number 19409/08 inter alia, which called upon all interested parties to show cause why the bank accounts should not be frozen. The corporations had failed to intervene.

> "rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including – (a) the nature of the right; (b) the importance of the purpose of the limitation; (c) the nature and extent of the limitation; (d) the relation between the limitation And its purpose; and (e) less restrictive means to achieve the purpose."

All of the applicants would have been required to establish the violation of any of their rights for a limitations analysis to be relevant in the circumstances of the matter. No infringement was shown. In my view the reliance on the violation of the constitutional rights was nothing more than a shotgun approach adopted by all of the applicants in what was no more than just another desperate attempt to obtain the setting aside of the sequestration orders.

[190] The applicants also contended that it was in the interest of justice that the sequestrations be set aside.

[191] Khampepe J in *Zuma v Secretary for the Commission and Others* considered the question of circumstances in which the interest of justice would warrant a rescission. In that regard the court stated; referred:

> "[87] This power was alluded to by this Court in *Ka Mtuze* as follows:
>
> 'If the position were to be that this Court does have the power outside of rule 29 read with rule 42 to reconsider and, in an appropriate case, change a final decision that it had already made, one can only think that that would be in a case where it would be in accordance with the interests of justice to re-open a matter in that way.'
>
> I should emphasise however, before we go any further, that this Court noted that "[t]he interests of justice would require that that be done in very exceptional circumstances".

[192] In that regard the Constitutional Court dealt extensively with what constituted exceptional circumstances and did so with reference to Sections 17(2)(f)[24] of the Superior Courts Act that empowers the President of the Supreme Court of Appeal either *mere motu* or upon application to reconsider a matter after a refusal of a petition for leave to appeal, where exceptional circumstances warrant it. In that regard, the court referred to the interpretation provided in *S v Liesching* [2018] ZACC 25; 2019 (4) SA 219 (CC); 2018 (11) BCLR 1349 (CC) *(Liesching II*) where the following was stated:

> "[E]xceptional circumstances, in the context of section 17(2)(f), and apart from its dictionary meaning, should be linked to either the probability of grave individual injustice…or a situation where, even if grave individual injustice might not follow, the administration of justice might be brought into disrepute if no reconsideration occurs."

[193] The court remarked that Section 17(2)(f) did not allow for a parallel appeal process or an additional bite at the proverbial appeal cherry and explained that the provision could only be invoked for the President of the Supreme Court of Appeal to prevent an injustice. In that matter, the Constitutional Court found that no grave injustice would befall Mr. Zuma in the event that the court refused to reconsider its order or that the administration of justice would brought into disrepute. On the contrary, the Constitutional Court was of the view that the administration of justice would be brought into disrepute if the court did reconsider its order. In considering whether a reconsideration of its decision had to be made the applicant had to meet the high threshold of exceptional circumstances. The Constitutional Court referred to the factual matrix in considering it. So too, in this matter, the factual matrix points unequivocally to the fact that no exceptional circumstances exist. The exceptional circumstances relied upon by the applicants with reference to the order of the Michigan Court was wholly without any merit. I am therefore satisfied that it would not be in the interest of justice to rescind the sequestration orders against both Mr. Adelakun and the Trust in as much as no case has been made out for such rescission and more so it would in fact undermine

[24] The decision of the majority of the judges considering an application referred to in paragraph (b), or the decision of the court, as the case may be, to grant or refuse the application shall be final: Provided that the President of the Supreme Court of Appeal may in exceptional circumstances, whether of his or her own accord or on application filed within one month of the decision, refer the decision to the court for reconsideration and, if necessary, variation.

the administration of justice and more importantly not only the protection of the public but also the creditors of the estates of both Mr. Adelakun and the Trust.

[194] The Constitutional Court, moreover, emphasised that finality and legal certainty were the linchpins in the consideration of the interests of justice. In this regard it referred to its own words in the matter of *Minister of Justice v Ntuli* [1997] ZACC 7; 1997 (3) SA 772 (CC); (1997) BCLR 677 (CC) at para 29:

> "[t]he principle of finality in litigation which underlies the common law rules for the variation of judgments and orders is clearly relevant to constitutional matters. There must be an end to litigation and it would be intolerable and could lead to great uncertainty if courts could be approached to reconsider final orders made".

In that regard Khampepe, J was of the view that there was good reason for Rule 42, that had long consolidated the common law permitted and operated only in specific and limited circumstances. In that regard she stated "Lest chaos be invited into the process of administering justice, the interests of justice requires the grounds available for rescission to remain carefully defined." She added; "Indeed, a court must be guided by prudence when exercising its discretionary powers in terms of the law of rescission, which discretion as expounded above should be exercised only in exceptional circumstances, having 'regard to the principle that is desirable that there be finality in judgments'". In that matter, the Constitutional Court was also mindful of what it referred to as "the dirty hands" with which the applicant had come to court that swung the pendulum in the interest of justice entirely against him. So too, in this matter, as counsel for the Worldpay emphasised, Mr. Adelakun and others literally approached this court with dirty hands in having failed to disclose their successive and unsuccessful applications for leave to appeal and their obstinate failure to have joined the trustees as parties to the application all of which were indicative of their conduct. In my view the belated incantation of the "interests of justice" does not assist them at all in the light of the facts and their own conduct.

[195] Lastly, in reliance on the Constitution, Mr. Adelakun contended that the court should invoke the provisions of Sections 172(1)(a)[25] to provide just and equitable relief on account of a breach of the constitutional rights of the applicants. Needless to say, such an invocation was hopelessly without any merit in as much as all four applicants have not demonstrated in any way that there was a breach of any of their constitutional rights.

MR. ADELAKUN'S REPRESENTATIONS OF THE CORPORATIONS

[196] Mr. Adelakun appeared on behalf of the corporations in the second application and contended the he had been authorized to act on behalf of them by virtue of Section 38 of the Constitution as he claimed various rights of the corporations had been violated. Section 38 of the Constitution provides:

> "38. Enforcement of rights – Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights. The persons who may approach a court are –
>
> (a) anyone acting in their own interest;
>
> (b) anyone acting on behalf of another person who cannot act in their own name;
>
> (c) anyone acting as a member of, or in the interest of, a group or class of persons;
>
> (d) anyone acting in the public interest; and
>
> (e) an association acting in the interest of its members."

Counsel for Worldpay pointed out that the corporations were neither an association neither did Mr. Adelakun contend that he was acting in the public interest nor could he

[25] Powers of courts in constitutional matters. –
(1) When deciding a constitutional matter within its power, a court-
(a)Must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency; and …

competently make such an averment. The corporations did not claim to be part of a group or a class of persons in the sense required nor are the corporations suffering from an incapacity that precluded them from instructing legal representatives to have appeared in court on their behalf. Worldpay contended that Section 38 did not afford Mr. Adelakun a right to represent the corporations in the second application. Rather, it afforded the corporations the right to approach a court in appropriate circumstances. For that reason, counsel for the respondent contended that Mr. Adelakun's reliance of Sections 38 of the Constitution was misplaced in as much as Mr. Adelakun was not seeking to apply for relief in his own name on behalf of the corporations. What Mr. Adelakun was in fact doing was seeking leave to represent the corporations in the stead of a legal representative in arguing their case.

[197] The common law provides that the company may not conduct its case in a court except by appearance of counsel (or an admitted legal practitioner) on its behalf. In this regard, see also the provisions of the Legal Practice Act Section 33:

> "33. Authority to render legal services:-
>
> (1) Subject to any other law, no person other than a practicing legal practitioner who has been admitted and enrolled as such in terms of this Act may, in expectation of any fee, commission, gain or reward-
>
> (a) Appear in any court of law or before any board, tribunal or similar institution in which only legal practitioners are entitled to appear; or
>
> (b) Draw up or execute any instruments or documents relating to or required or intended for use in any action, suit or other proceedings in a court of civil or criminal jurisdiction within the Republic."

[198] At the hearing Mr. Adelakun appeared on behalf of not only his estate and that of the Trust but also on behalf of the corporations. Worldpay raised no objection during the hearing to Mr. Adelakun's representation of the corporations and counsel for Worldpay subsequently claimed that it did not intend to do so. In that regard she referred to the

decision of *Manong & Associates v Minister of Public Works 2010 (2) SA 167 (SCA)* where the Supreme Court of Appeal recognised the residual discretion of superior courts that arose from the inherent power of the courts to regulate their own proceedings and so permit the rule prohibiting corporate entities being represented in court otherwise than by legal practitioner to be relaxed where it would be in the interests of the administration of justice.

[199] Relaxation of the rule was recognised as being appropriate, where, inter alia, a private person that sought to represent a company was "the governing mind of a small company" and the company was in reality no more than his/her business alter ego. In that matter Mr. Manong was permitted to represent the company although the court was of the view that the company was "by no stretch of the imagination be regarded as an alter ego of Mr. Manong". Part of the reasoning of the SCA in that regard included that Mr. Manong had already appeared before the SCA in another matter concerning the same company and "were he to be debarred from representing the company, the matter would have had to be postponed – occasioning delay and the incurring of additional costs to both parties (all of which may not have been recoverable from the losing litigant)".

So too in this matter, counsel for Worldpay correctly contended that had Mr. Adelakun been prevented from representing the corporations, a postponement would have been inevitable with the associated costs and delays. She submitted that the court had implicitly exercised its inherent jurisdiction in the interests of the administration of justice to permit Mr. Adelakun to represent the corporations in the second application. However, the circumstances of this matter are peculiar and without opening any flood gates by lay persons to represent corporations that they are associated with in various capacities, it is important to note the following:

(i) It appeared that Mr. Adelakun was really the controlling mind of not only the Trust but also the two corporations.

(ii) More importantly Worldpay had issued a serious threat at seeking a cost order *de bonis propriss* against the legal representatives of the applicants in the first application. Needless to say, that threat and in my view, the merit thereof, may well have constituted a deterrent for Mr. Adelakun to have secured legal representation for not only the Trust but also for the corporations. The matter would have then dragged on for an inordinate time thus frustrating the finalisation of the sequestration proceedings. That in my view would not be the interests of justice. I was therefore inclined, as did the court in *Manong* to simply allow Mr. Adelakun to proceed to address the court on behalf of the corporations. I must make it clear that I do not seek to create an unqualified precedent as it was only as a result of the peculiar circumstances of the matter and the real threat of a cost order de bonis propriss against the erstwhile legal representative of Mr. Adelakun and the other applicants that the court allowed him to address it on behalf of the corporations.

THE HEARING OF THE APPLICATION

[200] As indicated, Mr. Adelakun appeared in person and addressed the court on behalf of all of the applicants in both applications. What was of particular interest to the court was the fact that a firm of attorneys PA Mdanjelwa Attorneys and Mr. Twalo who were fully robed were also present in court. They were seated on the public gallery. On enquiry by the court, Mr. Twalo advised that they were there to observe the proceedings on behalf of the applicants. It appeared that Mr. Adelakun had only approached attorneys Mdanjelwa a day before the hearing and that they were not prepared in the short time and without any time for preparation to appear on his behalf and the other applicants. Mr. Adelakun therefore instructed them to attend court and to observe the proceedings. I should point out that Ms. Mdanjelwa's firm had also been briefed in the sequestration proceedings and appeared to have drafted the answering affidavit and would have been familiar with the matter from that perspective. Their mandate was

subsequently terminated and as indicated various other firms of attorneys and counsel appeared on behalf of Mr. Adelakun and the Trust in the sequestration proceedings.

[201] The proceedings commenced shortly after 10h00 am on 10 November 2023 and was finally concluded well after 18h00. The court had only a short adjournment in which the attorneys for Worldpay were given the opportunity of contacting the trustees to obtain their attitude with regard to the second application and whether they intended to oppose it. As indicated, an affidavit was filed by Worldpay`s attorneys in which the trustees informed them that they would abide the court's decision. However, during the course of his reply to the address by counsel for Worldpay, in respect of the second application Mr. Adelakun remarked that the court had treated him "unfairly and had not given him a fair hearing and the opportunity of fully addressing it." For the better part of the day Mr. Adelakun addressed the court at length besides having read out his heads of argument which he had only handed up to the court in the morning of the hearing. He also complained that the court had not provided him with any assistance despite him being a lay litigant while the court had interacted favourably, in his view, with counsel for Worldpay. In response to Mr. Adelakun's complaint of having been treated unfairly, the court invited him to consult with his attorneys Ms. Mdanjelwa and Mr. Twalo who were present in court to obtain their views with regard to whether the court had in fact treated him unfairly. The court pointed out to Mr. Adelakun that the court was prepared to make no more than directives with regard to the procedural aspects of the applications with regard to the service of the application on the trustees and other interested parties and that the court would not proceed to deal with the merits of the matter and that it would be postponed for a different judge to re-hear the applications.

[202] Having consulted with both Ms. Mdanjelwa and Mr. Twalo, Mr. Adelakun informed the court that he was satisfied with the court to proceed to determine the merits of the applications and that he had reconsidered his position and was of the view and on the advice from his lawyers that the court had in fact treated him fairly and had given him the fullest opportunity to address it on all and any aspects he chose to deal with. The

court obtained confirmation from both Ms. Mdanjelwa and Mr. Twalo who stated that they were satisfied that the court had treated Mr. Adelakun fairly and had listened patiently to his lengthy address. They were of the view that there was no reason for the court not to proceed to deal with the merits of the matter. Mr. Adelakun was thereafter given a further opportunity of addressing the court which he did at length. Needless to say counsel for Worldpay, Ms. Wharton contended that any complaint by Mr. Adelakun of having been treated unfairly by the court was wholly without any merit as the court had indulged him endlessly throughout the entire day in allowing him to address the court, at times repetitively and elaborately on his claims and that of the other applicants.

THE ISSUE OF COSTS

[203] In the answering affidavit Worldpay contended that it would seek a punitive order of cost on an attorney and client scale against all of the applicants on account of the applications as wholly devoid of any merit and were tantamount to an abuse of the court. It contended that the applications were nothing short of an attempt to delay the finalization of the sequestration processes. Worldpay also gave notice that it would seek an order of costs de bonis propriss against the attorneys ZS Incorporated who initially represented the applicant. In that regard they informed the court that prior to filing the answering affidavit on behalf of Worldpay they addressed a letter to the applicant`s attorneys in which they pointed out that the applications were ill-fated and no more than an abuse of process and invited them to obtain their clients instructions with regard to withdrawing the application failing which they will proceed to seek a punitive order of costs against the client and an order of cost de bonis propriis against their firm. There was no response to that letter. I should point out that in the replying affidavit which was filed while attorneys ZS Inc. were still on the record, they did not deal substantively or at all with the prayer for costs de bonis propriis against them. They no more than simply dismissed it out of hand and likewise in the heads of argument filed by their erstwhile counsel. I should point out that the heads of argument initially filed on behalf of the applicant's in the first application in my view appeared to have been done without serious thought. Despite the reference to the decisions of both *Abdurahman* and *Ward*

referred to above, counsel for the applicants contended that the court enjoyed a wide discretion under Section 149(2) of the Insolvency Act to set aside the final sequestration order on any grounds deemed appropriate and upon an applicant showing special and exceptional circumstances. The heads of argument thereupon did no better than refer to the claims made by Mr. Adelakun in the founding affidavit that the applications for sequestration had no more been based on false, untested and premature allegations of fraud by Mr. Belsham. The applicant`s also sought to suggest that the applications for sequestration had been brought as Mr. Adelakun contended for unlawful reasons by members of Worldpay to obtain an unlawful payment from him. The allegation by Mr. Adelakun was wholly incoherent, made little sense and was well deserving of little and no attention by the courts dealing with the sequestration applications. It was surprising that Mr. Adelakun sought to re-resurrect such unsubstantiated claims in these proceedings.

[204] In respect of a punitive order of costs sought, counsel for Worldpay contended that it was appropriate *"by reason of special considerations, arising the circumstances which gave rise to the action or from the conduct of a party, should a court in a particular case deem it just, to ensure that the other party is not out of pocket in respect of the expense caused by the litigation."*[26]

[205] Ms. Wharton contended that the applications were demonstrative of the abuse of court. She contended that the applicants had repeatedly misrepresented the factual position in particular the implications of the Michigan Court order. The applicants also failed to make material disclosures of facts known to them and they had recklessly forced Worldpay to engage in litigation entirely devoid of merit and has wasted limited judicial resources and on issues that have long since been finally determined. Worldpay contended that this was an appropriate matter for it not to be out of pocket resulting from such vexatious litigations.

[26] Nel N.O. v Davis SC N.O. [2017] JOL 37849 (GP) at 25.

[206] In respect of the prayer for an order of costs de bonis propriss against ZS Inc. Ms. Wharton pointed out that attorney, Mr. Saban was duty bound to promote the efficient administration of justice and his obligations to his clients were subject to this courts oversight. She referred to the recent decision by the Kwazulu-Natal High Court in *Grundler N.O. and Another v Zulu and Another* (D8029/2021) [2023] ZAKZDHC 7 (20 February 2023) where the conduct of a legal practitioner (the first respondent therein) came under scrutiny. The following was stated:

> "37. There is a rising trend in the legal profession of practitioners demonstrating disrespect (if not outright contempt) for courts and the judiciary. One does not need to look far to find examples of this sort of behaviour, from the ranks of senior counsel to the most junior of candidate attorneys. It manifests not only in how practitioners interact with opponents and judges in and out of court but also in the launching of prima facie spurious applications, lacking in factual or legal foundation, that are designed to "snatch bargains", achieve ulterior objectives, delay and/or obstruct. It is a "win at all costs" attitude that does a disservice to the profession and to the country and sets an appalling example to the public at large. It ignores not only the oath that all lawyers take upon their admission but also the distinction between the duty that practitioners owe to their clients and the separate duty that they owe to the Court."

[207] In this regard counsel for Worldpay contended that ZS Inc. had caused two entirely spurious applications to be launched both of which lacked any factual and legal foundation and which was designed to delay the course of justice. In this regard she contended that ZS Inc. had simply not upheld their duties to the court and the administration of justice. She further pointed out that the duty owed by all legal practitioners to the court was codified *inter alia,* in the Rules set out in the *Code of Conduct for all Legal Practitioners and Juristic Entities* ("the LPCC") made pursuant to section 36(1) of the Legal Practice Act 28 of 2014. Part II (Code of Conduct: General Provisions) Rule 3 provides *inter alia*:

> "3. Legal practitioners, candidate legal practitioners and juristic entities shall-

3.1 maintain the highest standards of honesty and integrity;

3.2 uphold the Constitution of the Republic and the principles and values enshrined in the Constitution, and without limiting the generality of these principles and values, shall not, in the course of his or her or its practice or business activities, discriminate against any person on any grounds prohibited in the Constitution;

3.3 treat the interests of their clients as paramount, provided that their conduct shall be subject always to-

3.3.1 their duty to the court;

3.3.2 the interests of justice;

3.3.3 observance of the law; and

3.3.4 the maintenance of the ethical standards prescribed by this code, and any ethical standards generally recognized by the profession".

[208] Sutherland DJP, of the Gauteng Local Division in an article *The Dependence of Judges on Ethical Conduct by Legal Practitioners: The Ethical Duties of Disclosure* and *Non-Disclosure* described the following provisions of Rule 60 of the LPC as stipulating a critical injunction:

"Commitment of legal practitioners to an effective court process.

60.1 A legal practitioner shall not abuse or permit abuse of the process of court or tribunal and shall act in a manner that shall promote and advance efficacy of the legal process.

60.2 A legal practitioner shall not deliberately protract the duration of a case before a court or tribunal".

In this regard Sutherland, J, further stated *"bland words belie their cardinal significance. Abuse undermines the prospect of effective hearings."*

[209] Further, in *Grundler* the following was stated:

> "I accept that courts must be slow to impute mala fides to a legal practitioner, who will not 'be guilty of negligence merely because he committed an error of judgment, whether on matters of discretion or law. It is a question of degree and there is a borderline within which it is difficult to say whether a breach of duty has or has not been committed…An attorney is not responsible for any wrongful act committed by him qua attorney within the scope of his authority: *qui facit per alium facit per se*. There is, however, a duty of care owed by an attorney conducting litigation on behalf of a client, to the court, and a duty of care owed towards his opponent.'"

[210] Ms. Wharton pointed in detail to what was quite clearly the abuse of the proceedings at the hand of ZS Inc. The court however pointed out that inasmuch as ZS Inc. were no longer on record, the court could not in fairness, consider any order of costs against them. This court however wishes to express its deprecation of the manner in which they conducted the litigation and in having placed themselves in the embarrassing situation of having faced an order of costs de bonis propriss. I should indicate that at the hearing of the matter a candidate attorney from the firm ZS Inc. was present in court. He informed the court that he was there out of no more than a professional interest in the matter. I have no doubt that his firm would not have allowed him to spend an entire day in court simply for his curious interest as opposed to their real concern about their own conduct in having initially prosecuted the matter.

[211] Nonetheless I am more than satisfied that Worldpay is entitled to a punitive order of costs against the applicants in both applications. Needless to say the order of costs against the applicants in the first application may well be cold comfort given their sequestrated status. Nonetheless, Worldpay would be fully entitled to proceed to execute an order of cost against the corporations in the second applications through the appropriate processes.

CONCLUSION

[212] In conclusion, with reference to the preamble of this judgment, I echo the strong sentiment that all litigation must indeed come to end, especially and more so where the legal proceedings are no more than the subject of abuse.

The following order is made:

(i) The applications for rescission of the sequestration orders in respect of both the first and second application are dismissed.

(ii) The further relief including the declaratory orders sought in paragraphs 2 and 3 of the second application are likewise dismissed.

(iii) The applicants are ordered to pay the costs in both applications on an attorney and client scale.

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VC SALDANHA

JUDGE OF THE HIGH COURT