CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 160/21

In the matter between:

CHRISTIAN FINDLAY BESTER N.O. First Applicant

LEGADIMANE ARTHUR MAISELA N.O. Second Applicant

THOMAS CHRISTOPHER VAN ZYL N.O. Third Applicant

(in their capacities as joint trustees of the Insolvent Estate of Petrus Serdyn Louw and Martha Maria Sophia Louw)

and

QUINTADO 120 (PTY) LIMITED Respondent

Neutral citation:	*Bester N.O. and Others v Quintado 120 (Pty) Ltd* [2021] ZACC 49
Coram:	Madlanga J, Madondo AJ, Majiedt J, Mhlantla J, Pillay AJ, Rogers AJ, Theron J, Tlaletsi AJ and Tshiqi J
Judgment:	Mhlantla J (unanimous)
Heard on:	26 August 2021
Decided on:	This judgment was handed down electronically by circulation to the parties' representatives by email, publication on the Constitutional Court website and release to SAFLII. The date and time for hand-down is deemed to be 10h00 on 13 December 2021
Summary:	Liquidation — factual enquiry — directing mind of the company test — misapplication of legal test — no jurisdiction

ORDER

On appeal from the High Court of South Africa, Western Cape Division, Cape Town:

1. Leave to appeal is refused.
2. The applicants must pay the respondent's costs, including the costs of two counsel.

JUDGMENT

MHLANTLA J (Madlanga J, Madondo AJ, Majiedt J, Pillay AJ, Rogers AJ, Theron J, Tlaletsi AJ and Tshiqi J concurring):

[1] This is an application for leave to appeal against a judgment and order of the High Court of South Africa, Western Cape Division, Cape Town (High Court)[1] which discharged the provisional order of liquidation in respect of the respondent, Quintado 120 (Pty) Limited (Quintado).[2]

Background

[2] The applicants are the trustees of the insolvent estate of Mr Petrus Serdyn Louw and Mrs Martha Maria Sophia Louw (Louw insolvent estate). Mr Louw, a chartered accountant, was the co-founder of Louw & Cronje Incorporated, a successful

[1] *Bester N.O. v Quintado 120 (Pty) Ltd*, unreported judgment of the High Court of South Africa, Western Cape Division, Cape Town, Case No 15274/2019 (18 August 2020) (High Court judgment).

[2] This matter was heard at the same time as *Burger N.O. v Bester N.O*. Case No CCT 246/20 (*HNP Trust).*

accounting firm conducting its business in Porterville, Vredendal and Strand in the Western Cape. He practised as an auditor and financial adviser for over 30 years and had a very loyal client base.

[3] Mr Louw was the manager of Quintado while his brother-in-law, Mr Markram Jan Kellerman, was the sole director. Louw & Cronje acted as Quintado's accountants. In 2010, an agreement was concluded between Mr Louw and Mr Kellerman, in terms of which Mr Louw could conduct a "separate" farming enterprise in the name of Quintado on its property, using its bank account and value added tax registration number. This arrangement was, according to Mr Kellerman, not *per se* unlawful. In 2013, Mr Louw was appointed as a co-director of Quintado, and he assumed full control of the company.

[4] Mr Louw ran a fraudulent business of, amongst others, the bogus purchasing and selling of livestock in order to perpetrate tax fraud. Email exchanges between Mr Louw and Mr Kellerman with the subject matter of "smokkels"[3] contained information about the fraudulent business, but Mr Kellerman stated that he believed the company was in fact selling and purchasing real livestock. Mr Louw defrauded his clients and transferred their funds into the bank account of Quintado. During the period from January 2015 to November 2018, money was transferred from Mr Louw's bank account to Quintado and vice versa.

[5] In 2018, a newspaper article reported that a liquidation application had been brought against Louw & Cronje for the failure to pay its debts. After the publication of the article, several clients of the accounting firm started enquiring about the status of their investments and it became clear that Mr Louw had, unbeknown to his clients, been operating, amongst others, an immense fraudulent investment scheme. Beyond swindling his clients, Mr Louw also had a family trust[4] and shares in several companies.

[3] Being an Afrikaans term colloquially used to describe shams or deceits.

[4] The sequestration of the family trust is the subject matter of the *HNP Trust* above n 2.

He used the family trust and the companies in the course of the fraudulent activities. He confessed to the fraudulent schemes, and the joint estate of Mr and Mrs Louw was provisionally sequestrated. The applicants, who are insolvency practitioners, were appointed as trustees of the Louw insolvent estate.

[6] On the applicants' version, approximately R31 million flowed from Mr Louw into Quintado, and approximately R17 million was returned to Mr Louw. Ultimately, the amount transferred back from Quintado to Mr Louw had a shortfall of approximately R13.7 million. Therefore, Quintado owed the Louw insolvent estate R13.7 million.

[7] After the fraud came to light, Mr Kellerman had Quintado's financial statements restated for the periods from 2015 to 2019. According to Mr Kellerman, he had previously only cast an eye over the farming operations and Mr Louw was in complete control of the company. During the sequestration investigation into the Louw insolvent estate, Mr Kellerman presented the redrawn financial statements which showed that Quintado only owed the Louw insolvent estate R606 047, and not the much larger amount averred by the applicants.

Litigation history

High Court

Provisional liquidation order

[8] The applicants launched an urgent application in the High Court for an order placing Quintado under provisional liquidation on the basis that Quintado was, by definition, insolvent.[5] The applicants relied primarily on the provisions of section 344(f) read with sections 345(1)(c) and 344(h) of the 1973 Companies Act.[6] In the alternative, and in the event Quintado was found to be solvent, the applicants argued

[5] The applicants argued that the respondent was unable to pay its debts, its liabilities exceeded its assets and it would be just and equitable for it to be wound up.

[6] 61 of 1973 (1973 Companies Act).

that it would be just and equitable for Quintado to be wound up in terms of section 81(1)(c)(ii) of the Companies Act.[7]

[9] The High Court held that the applicants had standing to bring the application as the Louw insolvent estate was a creditor of Quintado.[8] It accepted, as common cause, that Mr Louw had defrauded his clients of around R110 million over a period of six years.[9] Further, it accepted that Mr Louw used Quintado as well as other companies to hide his fraudulent activities from his clients and the South African Revenue Services and to launder money stolen from his clients. This was also conceded by Mr Louw under oath.

[10] The High Court, having considered the evidence before it, held that it was of no moment whether Mr Kellerman was an executive or non-executive director of Quintado.[10] He still had the same fiduciary duties as any other director in the company. This was despite his argument that due to their personal ties, he implicitly trusted Mr Louw to conduct the affairs of the company with due diligence and in good faith. The High Court held that the conduct of Mr Louw and Mr Kellerman could not be divorced. Mr Kellerman had abandoned his fiduciary duties, and this could not be excused.[11] It further rejected Mr Kellerman's contention that the practice of utilising

[7] 71 of 2008. Section 81(1)(c)(ii) of the Companies Act reads:

> "Winding-up of solvent companies by court order
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> (1) A court may order a solvent company to be wound up if—
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> . . .
>
> (c) one or more of the company's creditors have applied to the court for an order to wind up the company on the grounds that—
>
> . . .
>
> (ii) it is otherwise just and equitable for the company to be wound up."

[8] *Bester N.O. v Quintado 120 (Pty) Ltd*, unreported judgment of the High Court of South Africa, Western Cape Division, Cape Town, Case No 1527/19 (25 February 2020) (provisional liquidation judgment) at para 4.

[9] This period spanned from 2013 to 2018.

[10] Provisional liquidation judgment above n 8 at para 32.

[11] Id at para 41.

Quintado's assets and bank accounts by agreement was not unlawful, nor an abuse of the company's separate legal personality.

[11] The High Court held that it would be just and equitable to wind up Quintado in terms of section 81(1)(c)(ii) of the Companies Act without having to turn to the other ground raised by the applicants. Accordingly, it granted a provisional liquidation order. A *rule nisi* was issued for interested parties to show cause why the order should not be made final.

Discharge of provisional liquidation order

[12] On the extended return day of the *rule nisi*, the applicants applied for a final winding up order. The High Court assessed the evidence before it in relation to the bases upon which they asserted their claim as creditor against Quintado. The applicants predicated their standing on three grounds: first, Mr Louw transferred approximately R13.7 million more into Quintado's bank account than Quintado transferred back; therefore, Quintado was indebted to the Louw insolvent estate. Second, and in the alternative, it was alleged that Quintado at least owed the Louw insolvent estate just over R9 million, which was the amount reflected on Quintado's general ledger for a loan account. Lastly, Quintado's financial statements for the year ending 28 February 2019 reflected that Quintado at least owed the Louw insolvent estate R606 047 for a "director's loan".

[13] On the first basis, the High Court held that a positive finding that the Louw insolvent estate was a creditor of Quintado was a legal prerequisite to the applicants' ability to seek a liquidation order.[12] As Quintado was not a party to the receipt and disposal of the funds syphoned through its bank account, that claim for standing could not be sustained.[13] The High Court further held that the money which had been channelled through Quintado belonged to Mr Louw's clients and not the

[12] High Court judgment above n 1 at para 12.

[13] Id at para 18.

Louw insolvent estate.[14] Regarding the applicants' argument that, through the directing mind doctrine,[15] the actions of Mr Louw could be attributed to the actions of the company, the High Court considered the judgment of *Canadian Dredge*,[16] and held that the doctrine only applies when the action taken by the director was within the field of the company's operation, it was not a total fraud on the company and it was by design or result partly for the benefit of the company.[17] The High Court went on to consider these factors, and held that each case must of course be read in the context of its facts[18] and a "pragmatic approach" is the appropriate approach to considering the application of the doctrine.[19] In applying the three factors set out in *Canadian Dredge*, the High Court held that the use of Quintado's bank account for money laundering purposes was in a sense a fraud on the company, the fraud could not be said to fall within the operations assigned to Mr Louw, and the use of the company's bank account for nefarious purposes was not by design for the company's benefit.[20] Therefore, the High Court held that Mr Louw acted for himself and not for the company, and his conduct could not be attributed to Quintado.[21]

[14] The High Court held that the applicants' reliance on *Dumas*,[22] to argue that they had a claim against Quintado as money was paid from the Louw insolvent estate into

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[14] Id at para 23.

[15] This doctrine or test is used to determine whether, in law, the acts of those who purport to represent a company can be attributed to the company.

[16] In *Canadian Dredge & Dock Co v Her Majesty The Queen* [1985] 1 SCR 662; 1985 CanLII 32 (SCC) (*Canadian Dredge*), the Canadian Supreme Court was tasked with determining whether four corporations could be held criminally liable for acts of tender collusion committed by their managers. The Court identified the three elements of a test for determining the directing mind of a company. According to that test, the doctrine operates only when the action taken by the so-called directing mind (a) was within the field of the company's operation assigned to him or her; (b) was not totally a fraud on the company; and (c) was by design or result partly for the benefit of the company.

[17] High Court judgment above n 1 at para 24.

[18] Id at para 25. The High Court relied on *Consolidated News Agencies (Pty) Ltd (in liquidation) v Mobile Telephone Networks (Pty) Ltd* [2009] ZASCA 130; 2010 (3) SA 382 (SCA) (*Consolidated News Agencies*) at para 31; *Meridian Global Funds Management Asia Ltd v Securities Commission* [1995] 3 All ER 918 (PC) at 928; and *H L Bolton (Engineering Co Ltd) v T K Graham & Sons Ltd* [1957] 1 QB 159; [1956] 3 All ER 624 at 173.

[19] High Court judgment id relying on *El Ajou v Dollar Holdings Plc* [1994] 2 All ER 684 (CA).

[20] High Court judgment above n 1 at para 26.

[21] Id at para 30.

[22] *Trustees, Estate Whitehead v Dumas* [2013] ZASCA 19; 2013 (3) SA 331 (SCA) (*Dumas*).

the bank account of Quintado, was misplaced. It held that Mr Louw was not acting for Quintado when he transferred money into its bank account, and Quintado did not have a transactional relationship with Mr Louw's clients.[23]

[15] Regarding the alleged R9 million owed, being the second basis for standing, the High Court accepted the evidence of Mr Louw's son who refuted this claim and provided evidence that the consolidated position of the accounting books was in fact that the Louw insolvent estate owed Quintado an estimated R7 million. As conceded by counsel for the applicants, an attempt in formulating that claim was "an exercise in futility".[24] Lastly, the High Court held that the third basis was premised on a reconstruction of the financial statements based on an incomplete investigation.[25] Further, Mr Kellerman alleged that he had the financial statements restated, and the actual amount owed to the Louw insolvent estate was R209 977, which had since been paid to the applicants.[26]

[16] The High Court held that the applicants had not, on a balance of probabilities, established that they had an undisputed liquidated claim against Quintado, and the admitted claim was paid before the provisional liquidation order was granted.[27] Accordingly, the applicants did not have the necessary standing to bring the application. The provisional order of liquidation was discharged, and the winding-up application was dismissed.[28]

Supreme Court of Appeal

[17] Aggrieved, the applicants sought leave to appeal to the Supreme Court of Appeal. The Supreme Court of Appeal refused leave on the grounds that there were no

[23] High Court judgment above n 1 at para 36.

[24] Id at para 20.

[25] Id at para 22.

[26] Id at para 41.

[27] Id at para 43.

[28] Id at para 50.

reasonable prospects of success on appeal. The applicants applied for a reconsideration of the order refusing leave to appeal.[29] That application was also dismissed. The applicants now approach this Court for leave to appeal against the order of the High Court.

In this Court

Applicants' submissions

[18] On jurisdiction, the applicants submit that establishing the correct test to identify the directing mind of the company is a constitutional issue. Secondly, they submit that an arguable point of law is raised, in that two High Court judgments – one granting the provisional liquidation order and the other discharging that order – made findings in relation to the doctrine of the controlling mind of the company that were fundamentally opposed to one another.

[19] In terms of *Canadian Dredge*, the directing mind doctrine operates only when the action taken by the so-called directing mind was: (a) within the field of the company's operation assigned to him or her; (b) not totally a fraud on the company; and (c) by design or result partly for the benefit of the company. The applicants submit that a more flexible approach to the *Canadian Dredge* test is appropriate in terms of South African constitutional principles, and that the test should be developed in accordance with section 39(2) of the Constitution. In support of this argument, the applicants rely on this Court's judgment in *K*[30] to argue that the question whether the common law rule of vicarious liability should be developed is a constitutional issue.[31] They submit that the policy considerations underlying the directing mind of the company doctrine are similar to those underlying vicarious liability.

[29] In terms of section 17(2)(f) of the Superior Courts Act 10 of 2013.

[30] *K v Minister of Safety and Security* [2005] ZACC 8; 2005 (6) SA 419 (CC); 2005 (9) BCLR 835 (CC).

[31] Id at para 22.

[20] The applicants submit that, when considering the application of the directing mind of the company doctrine, each case must be read in context and a pragmatic approach should be followed. According to the applicants' more flexible interpretation of the directing mind principle, Mr Louw's actions should be regarded as those of the company and, therefore, the Louw insolvent estate has standing to apply for the winding-up of Quintado. They contend that the test relied on by them is a more flexible test, as in the Canadian case of *Spadina*.[32]

[21] The arguable points of law of general public importance that this Court ought to consider, according to the applicants, are: (a) whether notionally the directing mind of a company test can be met when one of only two directors is left to manage the company, and that director is permitted to run his own "separate" business through the company, and the other director has knowledge of the tax fraud; (b) whether, in the circumstances of this case and considering the outcome in respect of the first question, the legal test for the directing mind of the company is met; and (c) whether the fact that some of Mr Louw's actions were criminal acts places the actions beyond the confines of what is attributable to the company on the basis that such acts do not fall within the field of operation of the company assigned to that director.

[22] The applicants submit that there are three factual disputes. First, they submit that the "smokkels" email exchanges between Mr Kellerman and Mr Louw were evidence of Mr Kellerman's knowledge of the schemes and tax fraud; therefore, the High Court erred in holding that Mr Kellerman had no knowledge of the schemes. Second, they submit that the company did benefit from the payments, as the funds channelled through Quintado were used for legitimate purposes of the company in extinguishing its debts, therefore the company had the intention to receive those funds and Quintado was enriched by the payments. Last, the applicants argue that it is not possible for Quintado to be seen solely as a conduit for fraudulent activities as it benefitted from the fraudulent activities. Several sources of monies were paid into the

[32] *DBDC Spadina Ltd v Walton* 2018 ONCA 60 (*Spadina*).

bank account of Mr Louw, and therefore *commixtio* (mixing) took place and it is impossible to distinguish which sources were due to fraudulent activities.

Respondent's submissions

[23] Quintado firstly submits that this is an enrichment claim and the only question which is relevant is whether the company acted and if so, whether Mr Louw's actions can be attributed to it. The question regarding enrichment, according to the respondent, is not an arguable point of law, but rather a factual dispute. The directing mind of the company debate is wholly academic, as it is argued that Mr Louw was not impoverished by the payments made to Quintado, and Quintado was not enriched by them. The money transferred from Mr Louw to Quintado did not belong to Mr Louw, he had stolen it from his clients, therefore, Mr Louw was not impoverished by the payments. Quintado was not enriched, as its bank account was used only as a conduit to syphon money to another company owned by Mr Louw. Consequently, no cause of action was made out on enrichment, as Quintado was merely used as a conduit.

[24] Regarding the development of the controlling mind of the company test, Quintado argues that there is no precedent for the watering down of the test. In fact, the *Spadina* judgment relied on by the applicants was overturned in the Canadian Supreme Court. In terms of Canadian law, the three requirements of *Canadian Dredge* must always be met, and in some instances even if they are met, public policy might demand that there be no attribution to the company. Further, the applicants did not proffer any reasons why the requirements in *Canadian Dredge* constitute a deviation from the spirit, purport and objects of the Bill of Rights.

[25] In so far as the dispute of facts were concerned, Quintado submits that, although Mr Kellerman signed its financial statements, Mr Louw manipulated the accounting records and Mr Kellerman did not detect the falsity of the contents thereof. Mr Kellerman trusted Mr Louw and did not suspect him, as his brother-in-law, of fraud.

[26] Lastly, Quintado was merely used as a conduit to launder money to another company owned by Mr Louw. Quintado relied on *Vereins*[33] to argue that payment is a bilateral transaction which requires the co-operation of a debtor and creditor. In this regard, there was no evidence that Quintado intended to accept payments from Mr Louw. The payments from Mr Louw to Quintado were not underpinned by any contractual or transactional basis. For these reasons, Quintado submits that leave to appeal should be refused.

Issues

Jurisdiction

[27] The first issue to be determined is whether the application engages this Court's jurisdiction. This Court has jurisdiction to hear constitutional matters and any other matter provided that it raises an arguable point of law of general public importance that ought to be considered by this Court.[34] If this Court's jurisdiction is engaged, the next question is whether it is in the interests of justice to grant leave to appeal.

[28] The applicants seek to establish jurisdiction on both legs of section 167(3)(b) of the Constitution. They submit that the constitutional issue raised is that the directing mind doctrine should be developed to a flexible test in line with the Constitution. This doctrine or test is used to determine whether, in law, the acts of those who purport to represent a company can be attributed to the company. In *Boesak*,[35] where this Court had to determine whether the applicant's right to freedom and security of the person and fair trial rights were infringed, it held that "the question whether the interpretation of any legislation or the development of the common law promotes the spirit, purport

[33] *Vereins-Und Westbank AG v Veren Investments* [2002] ZASCA 36; 2002 (4) SA 421 (SCA).

[34] Section 167(3)(b) of the Constitution.

[35] *S v Boesak* [2000] ZACC 25; 2001 (1) SA 912 (CC); 2001 (1) BCLR 36 (CC) (*Boesak*).

and objects of the Bill of Rights" is a constitutional matter.[36] However, as held in *Loureiro*:[37]

> "[T]he mere fact that a matter is located in an area of the common law that can give effect to fundamental rights does not necessarily raise a constitutional issue. It must also pose questions about the interpretation and development of that law and not merely involve the application of an uncontroversial legal test to the facts."[38]

Therefore, this matter must pose questions concerning development of the common law and not be a mere application or misapplication of a settled or uncontroversial legal test.

[29] The High Court held that the test developed in *Canadian Dredge* should be applied in the context of a particular case and that a pragmatic approach is necessary.[39] As mentioned, the Court also endorsed other decisions of foreign jurisdictions which emphasise that a case by case, flexible approach to the doctrine ought to be followed.[40]

[30] The High Court also relied on *El Ajou*, in which the plaintiff unknowingly invested money into a fraudulent scheme, which ultimately ended up in the bank account of Dollar Land Holdings Limited. The England and Wales Court of Appeal held that to determine the directing mind of a company, it is necessary to look beyond the "formal position" – for example, who is the director of the company on paper – which might not be decisive.[41] It overturned the trial court's order dismissing the plaintiff's claim for £1.3 million and remitted the matter for the determination of quantum. The Court of Appeal recognised that the trial court, in determining the test,

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[36] Id at para 14.

[37] *Loureiro v Imvula Quality Protection (Pty) Ltd* [2014] ZACC 4; 2014 (3) SA 394 (CC); 2014 (5) BCLR 511 (CC).

[38] Id at para 33.

[39] High Court judgment above n 1 at para 25, relying on *Consolidated News Agencies* above n 18. Regarding the need to adopt a pragmatic approach to the doctrine, the High Court seemingly endorsed dicta from the English case of *El Ajou* above n 19.

[40] See above n 18 and the cases cited therein.

[41] *El Ajou* above n 19 at 696.

adopted a "pragmatic approach" and held that although the two courts reached a different conclusion, the trial court was "right to do so".[42]

[31] In *Simon N.O.*,[43] the High Court endorsed an approach where the question is "one of construction rather than metaphysics".[44] Our courts, by considering the useful jurisprudence of foreign jurisdictions, have therefore recognised that to determine the directing mind of the company, a rigid and inflexible test is inappropriate.[45] Rather, a test that is pragmatic and determined on a case by case basis is appropriate. In fact, the applicants themselves have argued that in the application of the doctrine "each case must be read in context" and "it calls for a pragmatic approach". This is exactly the approach proposed and followed by the High Court in this matter. Accordingly, there is no merit in the applicants' argument for the development of the directing mind of the company test into a "flexible test", because the test is already flexible.

[32] The applicants rely on *K* to argue that the issue relating to vicarious liability is a constitutional issue. In *K*, the applicant sought damages in delict against the Minister of Safety and Security after being raped by three police officers while they were on duty. This violation gave rise to a grievous infringement of her constitutional rights. The High Court and the Supreme Court of Appeal dismissed Ms K's claim for damages. The Supreme Court of Appeal held that on the existing principles of vicarious liability, the Minister of Safety and Security was not liable for the damages suffered by Ms K.[46] Before this Court, it was argued that if the Supreme Court of Appeal applied the common law rule correctly, the rule should be developed by taking into consideration the applicant's constitutional rights.[47] In *K*, the rights in the Bill of Rights that gave rise to the necessity to develop the common law were the applicant's right to freedom and

[42] Id.

[43] *Simon N.O. v Mitsui and Co Ltd* 1997 (2) SA 475 (W).

[44] Id at 530F citing *Lennard's Carrying Company v Asiatic Petroleum Ltd* [1915] AC 705 (HL).

[45] See for example *Simon N.O.* above n 41 and *Consolidated News Agencies* above n 18.

[46] *K* above n 30 at para 9.

[47] Id at para 14.

security of the person, her right to dignity, right to privacy and right to substantive equality.[48] Therefore, the need to develop the common law was undisputedly linked to Ms K's constitutional rights.

[33] During the hearing of this matter, counsel for the applicants contended that the directing mind of the company test had to be developed in line with the Constitution, specifically the right of access to courts in section 34. I do not agree that section 34 necessitates the development of the doctrine. It cannot be said that the applicants did not have access to the courts merely because the High Court applied the *Canadian Dredge* test in a manner that excludes the application thereof in this case. Further, the applicants' reliance on *K* for the development of this rule is misplaced. As stated above, in *K* there was a clear infringement of constitutional rights which necessitated the development of the common law. In this matter, the applicants were unable to direct this Court to any constitutional rights, other than the purported infringement of section 34, which have been violated.

[34] Counsel for the applicants was invited to address this Court on the difference between a pragmatic approach and a flexible approach. Counsel stated that the High Court, relying on several authorities,[49] acknowledged that the test was pragmatic, however it failed to apply it flexibly. This concession does not assist the applicants as it is trite that the wrong application of a settled or uncontroversial legal test does not constitute an arguable point of law.[50] Therefore, no constitutional issue is raised as the directing mind of the company doctrine is already recognised as a flexible, pragmatic doctrine. As held by this Court in *Fraser*,[51] "[a]n issue does not become a constitutional matter merely because an applicant calls it one".[52]

[48] Id.

[49] Above n 18 for the authorities relied on.

[50] *General Council of the Bar of South Africa v Jiba* [2019] ZACC 23; 2019 (8) BCLR 919 (CC) (*Jiba*) at para 59. In *Booysen v Minister of Safety and Security* [2018] ZACC 18; 2018 (6) SA 1 (CC); 2018 (9) BCLR 1029 (CC) at para 59 this Court also recognised that the application of an accepted legal test is not a constitutional matter.

[51] *Fraser v ABSA Bank Limited (National Director of Public Prosecutions as amicus curiae)* [2006] ZACC 24; 2007 (3) SA 484 (CC); 2007 (3) BCLR 219 (CC).

[52] Id at para 40.

[35] Further, the issue regarding the development of the common law was raised for the first time in this Court. Counsel for the applicants conceded that in the High Court, this case was not approached from a constitutional perspective. If there was a need for the development of the common law, this Court would have benefitted from the views of the High Court and Supreme Court of Appeal. This Court is reluctant to entertain a case involving the development of the common law as a court of first and last instance. It is only in exceptional circumstances that this Court would do so.[53] This case does not fall into that category.

[36] The arguable points of law of general public importance that this Court ought to consider, according to the applicants, are all related to whether the directing mind of the company doctrine has been met. Quintado submits that the arguable points of law fail on a factual basis, making the main basis for the application wholly academic and abstract. It is trite that an arguable point of law must not be one based on facts, and a totally unmeritorious point cannot be said to be arguable.[54] An arguable point of law must be exactly that – it must be a point of *law* and it must be *arguable*.[55]

[37] This matter, on the applicants' own version, contains three fundamental disputes of fact. The disputes of fact are material to the issues, they concern whether Quintado was in fact enriched by the payments or whether it was used as a mere conduit. This Court's jurisdiction cannot be established based on the necessity to determine facts.[56] To engage with the alleged arguable points of law, this Court would be required to determine the factual dispute: whether Quintado was enriched by the channelling of

[53] *Sarrahwitz v Maritz N.O.* [2015] ZACC 14; 2015 (4) SA 491 (CC); 2015 (8) BCLR 925 (CC) at para 21 and *Carmichele v Minister of Safety and Security (Centre for Applied Legal Studies intervening)* [2001] ZACC 22; 2001 (4) SA 938 (CC); 2001 (10) BCLR 995 (CC) at para 50. See also *Amod v Multilateral Motor Vehicle Accidents Fund* [1998] ZACC 11; 1998 (4) SA 753 (CC); 1998 (10) BCLR 1207 (CC) at para 33.

[54] *Paulsen v Slip Knot Investments 777 (Pty) Limited* [2015] ZACC 5; 2015 (3) SA 479 (CC); 2015 (5) BCLR 509 (CC) at para 21.

[55] *University of Johannesburg v Auckland Park Theological Seminary* [2021] ZACC 13; 2021 (6) SA 1 (CC); 2021 (8) BCLR 807 (CC) at para 43.

[56] *Jiba* above n 50 at para 50.

money through its bank accounts, and whether the Louw insolvent estate was impoverished. Therefore, this Court would first have to determine the factual disputes before determining whether its jurisdiction is engaged. This will be putting the cart before the horse.

[38] This is not to say that factual disputes can never be resolved by this Court. In *Rail Commuters*[57] this Court held that "[w]here, however, a separate constitutional issue is raised in respect of which there are disputes of fact, those disputes of fact will constitute 'issues connected with decisions on constitutional matters'".[58] The factual disputes in this matter are not connected to a separate constitutional issue. Instead, before this Court can even consider whether arguable points of law have been raised, it will be required to consider material factual disputes. This matter, in reality, turns on factual disputes and accordingly does not engage this Court's jurisdiction.

Conclusion

[39] It follows that the applicants have failed to establish that this Court's jurisdiction is engaged. As the threshold requirement has not been met, it is not necessary to consider the second leg of the enquiry, that is, whether it is in the interests of justice to grant leave to appeal. Accordingly, this Court is unable to determine the issues raised. Leave to appeal must be refused.

[40] The applicants sought condonation for the late filing of this application. As this Court lacks jurisdiction to entertain the matter, the condonation application does not bear consideration.

Costs

[41] There is no reason to deviate from the ordinary rule that costs follow the result.

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[57] *Rail Commuters Action Group v Transnet Ltd t/a Metrorail* [2004] ZACC 20; 2005 (2) SA 359 (CC); 2005 (4) BCLR 301 (CC) (*Rail Commuters*).

[58] Id at para 52.

Order

[42] The following order is made:

1. Leave to appeal is refused.
2. The applicants must pay the respondent's costs, including the costs of two counsel.

For the Applicants:	J A Van Der Merwe SC, J P White and M Adhikari instructed by Mostert and Bosman Attorneys
For the Respondent:	P A Van Eeden SC and D W Baguley instructed by Assheton-Smith Ginsberg Incorporated