THE SUPREME COURT OF APPEAL
REPUBLIC OF SOUTH AFRICA

JUDGMENT

Case no: 103/09

THE STANDARD BANK OF SOUTH AFRICA
Appellant

and

THE MASTER OF THE HIGH COURT First Respondent
(EASTERN CAPE DIVISION)

BASIL **BRIAN** **NEL**

Second Respondent

MICHAEL LEO DE VILLIERS
Third Respondent

Neutral citation: *Standard Bank v The Master of the High Court* (103/09) [2010] ZASCA 4 (19 February 2010)

CORAM: Navsa, Ponnan, Maya, Snyders JJA and Griesel AJA

HEARD: **19 November 2009**

DELIVERED: **19 February 2010**
CORRECTED:

SUMMARY: **Liquidators occupying position of trust towards creditors and companies in liquidation – required to be independent and to regard equally the interest of all creditors – expected to carry out their duties without fear, favour or prejudice – standard not met – liquidators**

removed and fees reduced.

ORDER

On appeal from: Eastern Cape High Court, Grahamstown (Liebenberg and Plasket JJ sitting as court of first instance).

1. The appeal is upheld.

2. The second and third respondents are ordered to pay two thirds of the appellant's costs, such costs to include those consequent upon the employment of two counsel, to be paid by the second and third respondents in their personal capacities jointly and severally.

3. The order of the court below is set aside and substituted as follows:

'1. The third and fourth respondents are removed as joint liquidators of Intramed (Pty) Ltd (in liquidation).

2. The decision of the Master not to disallow or reduce the remuneration of the third and fourth respondents as joint liquidators of Intramed (Pty) Ltd (in liquidation) is reviewed, set aside and replaced with an order in terms whereof the remuneration of the second and third respondents is reduced by five per cent.

3. The third and fourth respondents are ordered to pay the costs of the application including the costs consequent upon the employment of two counsel where applicable, such costs to be paid by the third and fourth respondents in their personal capacities jointly and severally.'

JUDGMENT

NAVSA JA (PONNAN, MAYA and SNYDERS JJA concurring)

Introduction

[1] In the winding-up of companies liquidators occupy a position of trust, not only towards creditors but also the companies in liquidation whose assets vests in them. Liquidators are required to act in the best interests of creditors. A liquidator should be wholly independent, should regard equally the interests of all creditors, and should carry out his or her duties without fear, favour or prejudice.[1]

The Issue

[2] The central question in this appeal is whether the second and third respondents, Basil Brian Nel and Michael Leo De Villiers, in their capacity as joint liquidators of Intramed (Pty) Ltd (in liquidation), discharged their duties in the manner set out above and, if not, whether they should be removed as such. Allied questions, include, whether (a) they should, in terms of s 394(7)(a) of the Companies Act 61 of 1973 (the CA), be subject to the payment of a penalty, being double that paid out of Intramed's bank account other than for the sole benefit of Intramed, and (b) whether, in terms of s 384(2) of the CA, they should be subject to a reduction or disallowance of their fee. I shall, for the sake of convenience, refer to the second and third respondents as Nel and De Villiers respectively, to the appellant as Standard Bank and to Intramed (Pty) Ltd, both in its pre- and post-liquidation state, as Intramed.

The order of the Court below and leave to appeal

[1] See in this regard, Bertelsman *et al Mars: The Law of Insolvency* 9 ed (2008) pp293-294 and the authorities cited there.

[3] Standard Bank is a registered commercial bank and a proved creditor of Intramed. During April 2005 it launched an application in the Grahamstown High Court for an order that Nel and De Villiers be removed as joint liquidators of Intramed and sought extensive associated relief, including but not restricted to that set out in the preceding paragraph. The application was refused with costs (Liebenberg and Plasket JJ).[2] The present appeal is before us with leave granted, in part by the court below and in part by this court. The Master of the High Court was cited as the first respondent but took no part in the litigation.

The biggest commercial collapse in South Africa's history – the winding up of the Macmed group and the appointment of liquidators.

[4] Before being placed in liquidation, Intramed was a wholly-owned subsidiary of Macmed Healthcare Limited (Macmed). The latter conducted business through a host of subsidiaries. By all accounts the Macmed group of companies experienced exponential growth within a relatively short space of time. In 'modern' language the group was a 'high flyer'. During March 1999, shortly before its demise, Macmed entered into an agreement with Aspen Healthcare Holdings Limited, to acquire three of the businesses of South African Druggists Ltd (an Aspen subsidiary), one of which was to be housed in Intramed. The businesses were acquired and Intramed conducted a viable business. The acquisition of the Intramed business, particularly how it was funded, and the relationship between Macmed and Intramed, as will become apparent, were central features in prior litigation as they are in the present case.

[5] Both Macmed and Intramed were wound-up because they were unable to pay their debts. Macmed's failure was, at that time, widely regarded as the biggest commercial collapse in the history of South Africa. The winding-up of Macmed and its 45 subsidiaries and the associated litigation began slightly more than a decade ago.

[2] The judgment of the court below has been reported as *Standard Bank of South Africa Ltd v The Master of the High Court and others* 2009 (5) SA 13.

[6] Macmed was placed in provisional liquidation by the Pretoria High Court on 15 October 1999 and a final liquidation order issued on 9 November 1999. In the ensuing months Nel and five other persons were appointed first, as joint provisional liquidators and then, as the final joint liquidators of Macmed.

[7] Intramed was provisionally liquidated on 29 November 1999 and finally on 16 February 2000. On 29 November 1999 the Master appointed De Villiers a provisional liquidator of Intramed. On 3 December 1999 the Master appointed Nel as a joint provisional liquidator along with De Villiers. On the 31 May 2000 Nel and De Villiers were appointed as joint final liquidators of Intramed.

[8] Nel was not only appointed a joint liquidator of Macmed and of Intramed but of each of the other subsidiaries as well. It is safe to say that he was an influential figure in the liquidation process.

[9] The liquidations of Macmed and Intramed have significant financial importance. According to the first liquidation account Intramed has assets exceeding R170 m. According to the amended fourth liquidation account it has liabilities exceeding R230 m. Standard Bank is a judgment creditor of Intramed in the amount of R107 728 463.64. Standard Bank is also a major creditor of Macmed and a number of its other subsidiaries.

Standard Bank's complaints

[10] Standard Bank contends that Nel and De Villiers, instead of viewing the winding-up of Intramed as a distinct process, saw it as part of the winding-up of the entire group and improperly deferred to Macmed and its creditors. Standard Bank accuses Nel and De Villiers of both using, and failing to use, established mechanisms for ensuring the proper administration of estates in liquidation. It alleged that they acted in a manner favouring Macmed and prejudicing Intramed.

This, in the main, relates to the admission of a claim by Macmed in Intramed in the amount of R325m.

[11] Standard bank also accuses Nel and De Villiers of misappropriating Intramed's funds. They are accused of improperly using Intramed's monies to pay costs which a court in prior litigation, in relation to an application to review the Master's decision to reduce their fees, had ordered them to pay personally.[3] Standard Bank alleged that Nel and De Villiers had only repaid the monies with interest, after this fact had been uncovered by Standard Bank, and after it persisted in holding them to account.

[12] Furthermore, Standard Bank complains that a fee-sharing agreement between the liquidators of Intramed and the liquidators of Macmed was such, as to militate against a proper administration of Intramed's insolvent estate. Standard Bank asserts that Nel faced a conflict between his duty to Intramed and his duty to Macmed and what ultimately became his personal interest in both.

[13] It is necessary at this stage to proceed to consider the material details of Standard Bank's case, and to examine the response by Nel and De Villiers.

The R325m claim

[14] The present litigation arose principally, because of the differing views taken by Standard Bank on the one hand, and Nel and De Villiers on the other, in relation to the claim of R325m by Macmed in Intramed. That dispute has telescoped into one concerning the nature of the acquisition of the three businesses from South African Druggists (SAD), described above.

[15] As stated, Macmed conducted its business through subsidiaries, including Intramed. The acquisition of the three businesses was structured so as to obtain

[3] For the background and litigation history in relation to their fees see *Nel and another NNO v The Master (Absa Bank Ltd and others intervening)* 2005 (1) SA 276 (SCA).

maximum tax advantage for the group. This was done by way of more than twenty interlinked and extremely complex agreements.

[16] It is common cause that the agreements, which do not form part of the record of the proceedings, are extremely voluminous and complex and involved many parties. The terms of the agreements were sought to be explained in a letter dated 29 June 1999 from the company purportedly financing the acquisition, namely, Peregrine Finance (Pty) Ltd (Peregrine) to Absa Corporate Bank. I shall, for convenience, refer to the agreements as the Peregrine structure. The following, in summary, is what is recorded in the letter:

(i) The Macmed group is in the process of finalising the acquisition of certain businesses from South African Druggists Ltd at an all in cost of approximately R400 m. The businesses would be acquired directly by Macmed's subsidiary companies, including Intramed.

(ii) The financing options were either inter-company or external funding. Peregrine proposed a transaction in terms of which the purchasers, including Intramed, would obtain external funding. The proposal entailed Peregrine providing the purchasers a loan with a ten-year fixed interest rate. The loan entitled Peregrine to subscribe for ordinary shares in each of the purchases, in the loan amount at maturity date.

(iii) Peregrine would cede and assign all its rights and obligations in terms of the loan agreements to Willridge Investments (Pty) Ltd (Willridge), a trader in financial instruments and a subsidiary of Peregrine, for a purchase consideration of R401 m. At the inception of the transaction Willridge would forward sell the ordinary shares arising on conversion to investors, for delivery after ten years, for a consideration of R40 m, payable on signature of the agreement. Macmed would be offered an investment opportunity in ten-year fixed rate compulsory redeemable preference shares to be issued by Leoridge Investments (Pty) Ltd, a subsidiary of Peregrine and a preference share investment company. The preference shares would bear a market related dividend yield with dividends payable semi-annually in arrears.

(iv) Peregrine would advance conventional loan funding in the amount of R275m to Willridge for a period of ten years. In terms of the loan agreement interest and capital would be

repayable in equal instalments over the term thereof.

(v) Macmed would make a security deposit with Willridge in the amount of approximately R160m for a period of ten years. In terms of the deposit, Macmed would be entitled, but not obliged, to withdraw funds on a semi-annual basis in equal tranches over the term thereof.

(vi) Willridge would provide the purchasers with an additional loan facility in the amount of approximately R75m in terms of which the capital would be drawn down semi-annually in equal trances over a ten-year period. In terms of the additional loan facility, the interest rate would be fixed at a market related rate and the interest and capital would be repayable at maturity. The purpose of the additional loan facility is to provide purchasers with ongoing working capital for the performance of its business operations over the term ie ten years. The loan facility would be utilised in the production of income.

(ix) Macmed would be granted a put option by Willridge to put the preference shares issued by Leoridge to Willridge, in the event of a default by Leoridge.

(x) Holdings would issue a guarantee to Macmed in respect of all of the Peregrine companies' obligations.

[17] It appears from this letter that what was envisaged, were loans by Peregrine to each of the subsidiaries. It is equally clear from the letter that inter-company funding was rejected as an option. Put simply, if the letter is to be believed, it means that a loan by Macmed to the subsidiaries was not the chosen or preferred option.

[18] That notwithstanding, on 10 May 2000, the liquidators of Macmed proved a claim in Intramed of R325m on the basis that it was an amount owed by the latter to the former in respect of the acquisition of the relevant business from SAD. Nel and De Villiers were instrumental in the claim being admitted by the Master. It is common cause that the purchase price of the business was in fact R324 880 000. Thus, the claim of R325m lodged on behalf of Macmed was an amount of R120 000 in excess of the actual price of the business so acquired.

[19] To properly appreciate and address the present dispute, flashbacks and switching between different time periods are regrettably, intermittently necessary.

[20] The Peregrine structure took effect on 18 June 1999 when an amount of R325m was advanced by Peregrine to Intramed. Peregrine, in turn, subscribed for shares in Intramed at a subscription price in the amount of the purchase price. The capital sum would be repayable on 18 June 2009 but would be set-off against Peregrine's obligation to pay the subscription price. On the same day that it received the R325m from Peregrine, Intramed transferred that amount to Macmed. It is common cause that before the money was advanced by Peregrine to Intramed, Macmed provided the R325m to Willridge, a Peregrine subsidiary.

[21] Standard Bank adopts the position that, in supporting the claim Nel and De Villiers ignored the Peregrine structure, the accounting records of both Macmed and Intramed prior to the winding-up (which did not reflect a loan by the former to the latter), and evidence at the enquiry in relation to the winding-up of Macmed, where none of the witnesses confirmed the existence of the loan but rather where uncertainty was expressed concerning it.

[22] It was alleged on behalf of Standard Bank that subsequent to the winding-up of Intramed, and after the appointment of Nel and De Villiers as liquidators, an entry was made in the accounting records of Intramed reflecting a loan of R325m by Macmed to Intramed and that this could only have been done at their instance. The auditors qualified their report by stating that they were unable to verify the loan or confirm the amount owing to Macmed.

[23] It was pointed out that it is unusual for a claim of the size and nature of Macmed's claim to be admitted to proof without reference to supporting documentation and/or evidence. On the other hand, one finds supporting documentation that shows Intramed receiving R325m from Peregrine and then

transferring it back to Macmed.

[24] It was contended that the Peregrine structure had the effect that the R324 880 000 required for the acquisition of the Intramed business would never have to be repaid by Intramed other than from the proceeds of its share issue.

[25] An interest payment on the loan was made by Intramed to Peregrine on 17 September 1999, in the sum of R30 908 760, ostensibly in terms of the Peregrine structure. This is reflected in one of Intramed's bank statements. This, it is contended, is proof of the execution of the Peregrine structure in respect of which Peregrine is the creditor and Intramed the debtor.

[26] Standard Bank pointed to the fact that a share certificate was issued to Macmed on 18 June 1999 for 2000 shares in Leoridge Investments in respect of which stamp duty of R500 000 was paid as yet another example of the execution of the Peregrine structure.[4] Nel and De Villiers responded that this was a small price to pay to perpetuate a sham.

[27] Standard Bank refers to the fact that the Macmed parties had to pay Peregrine an amount of R3 300 000 every six months for putting the Peregrine structure in place. This assertion was, in effect, unchallenged. The first six-monthly payments appear to have been made.

[28] It was contended that Macmed has no legitimate claim against Intramed and that Nel and De Villiers supported the claim to Intramed's detriment and for their personal benefit.

[29] Nel and De Villiers adopted the attitude that the Peregrine structure was a simulated transaction and that the true transaction was a R325m loan from Macmed to Intramed. It was submitted on their behalf that if that were not so, it

[4] See para (iii) of the Peregrine letter referred to in para 16.

would mean that Intramed would have received a business from SAD without giving any value in return. They point to the fact that Macmed supplied R325m to a Peregrine subsidiary, which amount was, in turn, provided by Peregrine to Intramed. They contend that the R325m was then utilised by Macmed to pay SAD for the business to be housed in Intramed. Their response in respect of the accounting records will be dealt with in due course.

[30] It is necessary to record that during May 1999, before the liquidation of Macmed, it took an opinion from one of the leading tax experts in South Africa, concerning the legality (and tax effectiveness) of the Peregrine structure. The opinion concluded that the Peregrine structure was not assailable by the South African Revenue Services. No concern or reservation was expressed about its genuineness.

[31] Mr Carel Braam Viljoen, who represented Peregrine at the time that the Peregrine structure was put in place, testified during the enquiry into the affairs of Macmed in terms of s 417 of the CA. He also testified in the course of a trial between Intramed and Standard Bank. At no time did he state that the transaction was a sham, nor was it ever put to him that it was a simulated transaction. In an affidavit in the present case in support of Standard Bank's case Mr Viljoen states:

'Had such a proposition been put to me I would have truthfully answered that it was not a simulated transaction and that the agreements constituting the Peregrine structure correctly reflected the intentions of the parties thereto.'

[32] Mr Hanson, a director of Macmed, who signed the Peregrine agreements, both on behalf of Macmed and Intramed, testified at the Macmed enquiry that the agreements were genuine. He provided an affidavit in support of Standard Bank's case and repeated that evidence. Nel's response to Hanson is that he was one of the Macmed directors who perpetrated a massive fraud on Macmed and that he cannot be believed.

[33] During May 2000 the joint liquidators of Macmed sought an opinion from two senior advocates on whether the Peregrine structure was a simulated transaction and on the effect of liquidation on it. The following is stated in the opinion:

'The companies intended to achieve precisely that which the primary purpose of the financing structure was aimed at. We found nothing in the contracts to suggest that the parties had a disguised intention. In this case there is a complete correspondence between the "…truth of the matter…" on the one hand and the writing on the other. Any attempt at the application of the maxim "*plus valet quod agitur quam quod simulate concipitur*" to the facts of this case will be fruitless. The Financial structure is not simulated.'

[34] This opinion was sought at the time that the Macmed claim was in the process of being admitted to proof by the Macmed liquidators. Either the claim preceded the opinion or was proved despite the opinion. It was at the very least persisted in, despite the opinion.

[35] The following conclusion by counsel in respect of the effect of liquidation is not unimportant:

'We are of the opinion that the liquidators are unlikely to undo the effects of the set-off or to recover any equity pursuant to any possible unwinding of the financial structure in any of the companies in the Peregrine interests.'

[36] Not content with this opinion, the Macmed liquidators took another, from two other counsel, which was supplied at the end of August 2000. Counsel considered the prior opinion and concluded that the agreement was a simulated transaction. The following is one of the listed bases for concluding that the agreement was a sham:

'*Ex facie* Intramed's financial records, Macmed made a direct loan to it in an amount of R325 million'.

[37] Another listed reason for the second opinion reads as follows:

'The R325 million apparently advanced by Macmed to Intramed for the acquisition of the business was reduced by set-off on loan account'.

[38] It is necessary to record that the second opinion is equivocal about the

effect of the liquidation on the Peregrine structure.[5] Importantly, the material part of the last paragraph of the second opinion reads as follows:

'In the premises we conclude that Consultant has a better prospect of pursuing the claims against Intramed based on the direct loan reflected in the latter's books of account.…'
All of this highlights that the book entries played a significant role in the conclusion reached in the second opinion concerning the legality of the Peregrine structure.

[39] The following extract of the evidence of Mr Viljoen (from the enquiry into the affairs of Macmed), which was referred to in the second opinion obtained by the liquidators of Macmed, reveals that the money that was supplied by Peregrine to Macmed emanated from Macmed. However, Mr Viljoen continues to explain the transaction as follows:

'Its an alternative to the conventional loan funding. So, in other words, it's a back-to-back transaction. They invest in our preference shares, the security deposit and the forward sale of shares. We then utilise that money that they have given us to give a loan to their subsidiary…'.

[40] This explanation appears to be in line with what is set out in paragraph (iii) of the Peregrine letter, (para 16 above), which contemplates Macmed receiving a dividend payable semi-annually.

[41] Possessed of two contradictory opinions, the liquidators of Macmed obtained yet another legal opinion. The third opinion, which is approximately four and a half pages long, refers to Mr Viljoen's evidence, the material part of which is set out above, and then agrees with the view expressed in the second opinion, namely, that the Peregrine structure was a simulated transaction. The second opinion records the following:

'Consultants will obtain no benefit from regarding the structure as a simulated transaction, cancelling the agreements constituting the structure or enforcing the agreements constituting the structure.'
This motivation is significant.

[42] It is clear that Nel was instrumental in the decision by the liquidators of Macmed to lodge a claim in Intramed. No opinion on the Peregrine agreement

[5] This is dealt with under the heading *THE EFFECT OF THE LIQUIDATION OF THE MACMED GROUP UPON THE STRUCTURE* in paras 56-62 of the second opinion.

was sought by Nel and De Villiers on behalf of Intramed. Standard Bank contends that neither Nel nor De Villiers took into account the Intramed perspective.

[43] Insofar as bookkeeping entries are concerned, what is set out hereafter is important. Up until the end of October 1999, almost three and a half months after the Peregrine structure took effect, neither the Macmed nor Intramed financial records, including Intramed's balance sheet, reflected a loan of R325m. Macmed, it will be recalled, was placed under provisional liquidation on 10 October 1999 and final liquidation on 9 November 1999. It is therefore clear that, until then, no loan to Intramed was reflected in its books of account.

[44] According to a chartered accountant, Mr Deon Millson, who was employed by Deloitte & Touche at the time and who had been engaged by the financial director of Intramed to examine the Macmed/Intramed inter-company accounts, it appears that an entry reflecting the loan was first made in Intramed's books of account on 8 December 1999. This was after Intramed had been placed in provisional liquidation and after De Villiers and Nel had been appointed joint provisional liquidators and had taken charge of the books of account. According to Nel, neither he nor De Villiers gave instructions to the auditors, Deloitte & Touche, to pass entries to reflect the loan.

[45] The audited financial statements of Intramed for the nine months ending 28 November 1999 (the day before Intramed's liquidation) disclose Macmed as a creditor of Intramed in respect of the alleged loan of R325 m. These statements bear the signature of Nel and De Villiers and are dated 15 January 2000 but appear, from what is said both by the principal deponent on behalf of Standard Bank and Nel, to have been signed a few weeks later. Deloitte & Touche qualified these financial statements signed off by Nel and De Villiers as follows:

'We were unable to confirm the amount owing to Macmed Healthcare Limited as at 28 November 1999 …'

[46] In a letter dated 10 December 1999 Deloitte & Touche state the following:

'It appears that R325m was borrowed from Peregrine Finance to repay Macmed for the purchase price of the Intramed business … Based on discussions with Braam Viljoen of Peregrine Finance and Johan Muller of Macmed, it is our understanding that the Peregrine loan was part of a group financing scheme which was automatically set-off on liquidation of Macmed. The full R325m would therefore appear to be payable to Macmed by Intramed. This matter is yet to be resolved. The R100m raised by the BoE bond has been offset against the R325m.'

Essentially, this is repeated in a letter dated 8 February 2000.

[47] In the review application referred to in para 11 above Mr Nel stated the following in his founding affidavit:

'20.12.1 The Intramed books of account were properly kept to reflect the trading assets and transactions. However the books of account incorrectly reflected the acquisition of the Intramed division and the funding thereof.

20.12.2 *The books of account, as at the liquidation date, were correctly written up and adjusted under the control of the liquidators to reflect the audited position of it at date of liquidation. This audit was finalised during February 2000 under the control of the liquidators.*' (My emphasis.)

[48] In the present case, Nel, in his answering affidavit states the following:

'299.3 It is the duty of liquidators to take control of all assets and business interests, including the books and records at date of liquidation, which De Villiers and I did on our appointments.

299.4 Therefore, anything that happens after date of liquidation, happens under our control. *I admit that the books and records were brought up to date and audited on our instructions and under our control.*

299.5 It does not follow that we influenced the structure or content of the books and records of Intramed and the audit thereof. We deny and take exception to the reference that we caused the Intramed books to be "corrected".' (My emphasis.)

[49] For completeness it is necessary to record that Mr Pereira one of the joint liquidators of Macmed in his affidavit filed in support of proof of Macmed's claim in Intramed stated that from evidence and documents at the enquiry, the joint liquidators of Macmed established that on 18 June 1999 Macmed had lent and advanced the sum of R325m to Intramed. There were no supporting documents

or evidence annexed to the affidavit. There was no reference to the Peregrine structure at all. This fact was therefore not brought to the attention of the presiding officer or the Master. Mr Pereira supplied a confirmatory affidavit from an attorney who was advising both the joint liquidators of Intramed and of Macmed.

The charge of misappropriation of Intramed funds

[50] During December 2001 Nel and De Villiers, purporting to act in their capacity as joint liquidators of Intramed, launched an application in the Grahamstown High Court, to review and set aside the Master's ruling that they were entitled to a total remuneration of only R3 250 000 in respect of the winding-up of Intramed. They sought an order declaring that they were entitled to the 'tariff amount' of remuneration in the amount of R21 049 941.74.[6] Nel and De Villiers did not seek the leave of the court to have the costs of the review application paid out of Intramed's funds. In that application five major South African banks were intervening respondents, all of whom were substantial creditors of Macmed or Intramed. They all supported the Master's ruling. Standard Bank was one of the intervening respondents.

[51] On 31 October 2002 a full bench of the Grahamstown High Court (Froneman J, Pillay AJ concurring), dismissed the application and ordered that the costs be paid by Nel and De Villiers personally. By this time an amount of R689 747.91 had been paid out of Intramed funds in respect of the review application.

[52] Aggrieved by the decision of the full bench, Nel and De Villiers appealed to this court. The appeal was dismissed on 1 April 2004. Van Heerden AJA said the following:

'[43] As I have indicated above, the appellants purported to bring their review application in their capacity as the duly appointed joint liquidators of Intramed,

[6] This application has briefly been alluded to in para 11 above.

contending that they were duly authorised in such capacity to institute the review of proceedings. As correctly pointed out by the Master in his answering affidavit, the appellants failed to annex any evidence which supported this contention. *The review proceedings were in fact proceedings which should obviously have been brought by the appellants in their personal capacity and not in their capacity as joint liquidators ─ the proceedings relate to their entitlement to remuneration and not to a matter falling within the ambit of their role as liquidators of the Intramed estate.* As contended by counsel for both the Master and the intervening respondents, the appellants were simply seeking to secure a higher fee for their services than that fixed by the Master. In so doing, they were acting in their personal capacities and not in any sense in the interests of the creditors of the Intramed estate. Indeed, the appellants were ─ and still are ─ acting against the interests of the creditors, solely for their own benefit. This being so, there is no reason whatsoever why the costs of the review application or of the appeal should be borne by the company in liquidation.'[7] (My emphasis.)

[53] It is admitted by Nel and De Villiers that, before and pending the appeal to this court against the decision of the Grahamstown High Court, Intramed's funds were used to pay the costs of the application to review the Master's ruling. From the time of the judgment of the full bench up until the time of the exchange of heads of argument in this court a further amount of R114 761.59 was paid out of the funds of Intramed in respect of the review application, bringing the total paid from Intramed's funds to R804 419.50.

[54] On 6 August 2003, pending the appeal to this court, the Master wrote to Nel and De Villiers querying the payment of costs for which they were personally liable out of Intramed's funds. The Master asked why these costs were reflected in the estate account and why estate funds were used to pay them.

[55] On 25 August 2003 De Villiers replied to the Master's query. It is necessary to quote the material parts of the letter:

'1 Kindly return to me all vouchers in respect of legal costs and I will separate legal costs pertaining to the Joint Liquidators' remuneration review proceedings against the Master from other legal costs. To the best of my recollection, no legal costs relating thereto incurred subsequent to the judgment issued on 31 October 2002 have been paid ex the Joint Liquidator's banking account.

2. Legal costs paid ex the Joint Liquidators banking account, which were ordered against the Joint Liquidators personally, are in addition to the quantum of the Joint Liquidators' remuneration the subject of appeal.

3. Leave to appeal was granted on 5 December 2002.

[7] *Op cit* fn 2.

4. Should the Appellate Division rule against the Joint Liquidators in the appeal proceedings, the Joint Liquidators will then be obliged to refund to the estate the costs of the review proceedings.
5. No legal costs relating to the review proceedings have been paid ex the Joint Liquidators' banking account.'

[56] Standard Bank contended, with some justification, that Nel and De Villiers appear in the letter to both admit and deny that costs were paid from the Intramed funds under their joint control. Furthermore, so Standard Bank submitted, words such as 'to the best of my recollection' are deliberately obfuscatory. Given the liquidators' obvious expertise in the field, coupled with their duty in terms of s 393(1) of the CA to keep a cash book, one would, according to Standard Bank, expect a more considered and precise response.

[57] On 10 May 2004, eight and a half months thereafter, and after the judgment of this court, De Villiers wrote to the Master once again, this time more emphatically. The relevant part of the letter reads as follows:

'Legal costs paid ex the Joint Liquidators' banking account were paid prior to the Judgment issued on 31 October 2002.'

This we now know to be untrue.

[58] On 20 January 2005, seventeen months thereafter, De Villiers, in a letter in response to a query by Standard Bank, wrote the following:

'Legal costs relating to the review proceedings per the Fourth Liquidation and Distribution Accounts, which were all incurred prior to 31 October 2002, were analysed and have been repaid to the estate by the Joint Liquidators.'

We now also know that outstanding monies, including interest, were finally repaid on 25 August 2005.

[59] When, at the outset, the Master challenged Nel and De Villiers' authority to bring the review application in Intramed's name, they responded by stating that they were acting in their official capacity as liquidators and consequently had authority to do so. It is equally clear that they were not specifically authorised to do so but purported to act in terms of the general authority of liquidators to litigate on behalf of the estate being wound-up.

[60] Even after it became clear to everyone that repayments were due by Nel and De Villiers it took approximately 16 months after the dismissal of the appeal by this court before they repaid the total owing to the Intramed estate. According to Nel and De Villiers, this was, inter alia, due to protracted correspondence with PriceWaterhouseCoopers (PWC) in whose employ Nel had formerly been. There appears to have been an arrangement between Nel and PWC in relation to the fees earned from the Macmed liquidation. The further complication was the fee-sharing arrangement between Macmed's joint liquidators. It appears that they had agreed to share both the fruits and the liabilities that might ensue from the review application. Their contribution to the costs in the review application also had to be recovered. These aspects will be dealt with further when the fee-sharing arrangement is discussed later in this judgment.

[61] Perhaps, because of what is set out at the end of the preceding paragraph and because of Standard Bank's persistent efforts to extract every cent, including interest due to the Intramed estate, the repayment took place in drips and drabs over the period 7 June 2004 to 25 August 2005.

[62] The following is noteworthy. Standard Bank initially proved a claim in Intramed at the first meeting of its creditors held in Port Elizabeth on 10 May 2000 in an amount of R107 728 463.64. Almost six months later, on 2 November 2000, Nel and De Villiers lodged a report with the Master in accordance with the provisions of s 45 of the Insolvency Act, in terms whereof they requested him to expunge the applicant's claim. The challenge by the liquidators to the validity of the claim, ironically, was based on a lack of authority, namely that the agreements on which Standard Bank relied had not been executed in accordance with the terms of Intramed's articles of association and that those who signed the agreements lacked authority. On 12 January 2001 the Master expunged Standard Bank's claim in Intramed. This led to litigation. Standard Bank was successful in the trial that ensued — on 20 August 2004 the

Johannesburg High Court delivered judgment in its favour. This led to Standard Bank being reinstated as a creditor. From 12 January 2001 to 20 August 2004 Standard Bank had lost its status as a proved creditor in Intramed and consequently lost the right to vote at or call meetings of creditors. Costly and protracted litigation also ensued between BoE bank and Nel and De Villiers, acting in their capacities as liquidators of Intramed in relation to the expungment of BoE's claim of R100 m. Similarly, the question in that case was whether the loan agreements and the underlying securities, in respect of which Intramed was ostensibly a party, were duly authorised. BoE bank was successful in the Port Elizabeth High Court and on appeal to this court.[8]

[63] Standard Bank submits that in dealing with the two claims referred to in the preceding paragraph Nel and De Villiers were intent on careful scrutiny of existing valid documents, because of the unstructured relationship between Macmed and Intramed prior to liquidation, whereas they admitted Macmed's claim of R325m without any substantiating documents and in the face of controverting evidence.

[64] In responding to Standard Bank's objection to the fourth account, inter alia, on the basis of what Standard Bank alleged was the misappropriation of funds in relation to the review application, De Villiers in a letter dated 10 May 2004, wrote the following:

'Before doing so I reiterate that Standard Corporate and Merchant Bank (SCMB) are not a proved creditor in the above estate. You have disallowed their claim pursuant to the provisions of section 45(3) of the Insolvency Act and Regulation 3 of the Regulations framed under the Insolvency Act … SCMB are consequently not a proved creditor and therefore do not have *locus standi* to lodge objection to the account.' [9]

Here, instead of simply dealing with the merits of the objection, which involved an important matter of principle, Nel and De Villiers dealt with Standard Bank's *locus standi*.

[65] Nel and De Villiers, in dealing with the charge that they had improperly

[8] See the judgment of this court in *De Villiers and another NNO v BOE Bank Ltd* 2004 (3) SA 1 (SCA).

[9] This refers to the expungment of the claim described in para 62.

used Intramed's funds in the review application, state that they believed that they were acting on authority and furthermore that they had done so on legal advice that they were entitled to bring the application in Intramed's name.

[66] Nel states further, that the advice he received, subsequent to the judgment of the full bench, was to the effect that since the whole of the judgment and cost order was on appeal to this court there was no reason to repay the amount in respect of the review application at that stage.

[67] Revealingly, in dealing with the issues raised in the review application, Nel states the following:

'In bringing the review application, we were assisted and advised by Tabacks Attorneys and senior and junior counsel. They advised us that the application ought to be brought in our official capacity. We are not lawyers, and had no reason not to accept their advice. After the judgment in the First Court had been delivered, we again sought advice. We separately obtained advice from three eminent silks. *The weight of advice*, which we received, was that an appeal ought to be lodged and that it had good prospects of success. *It was implicit in the advice* that it was not wrong for us to have brought the review in our official capacities. Again, we had no reason not to accept it. …' [10] (My emphasis.)

[68] We were informed by counsel representing Nel and De Villiers that one of 'the eminent silks' had advised against the appeal. This must mean that they had been advised by at least one eminent senior counsel that the prior and continuing use of Intramed funds was improper.

[69] Notwithstanding that fact and what this court had said concerning the review application as set out in para 52 above Nel states adamantly and unrepentantly that Standard Bank and the intervening creditors were, 'at all times aware of the fact that De Villiers and I launched the application in our official capacities'.

[70] In the present case Nel submitted that the Grahamstown High Court and Macmed did not make a specific ruling in relation to the application being brought

[10] In the reproduction of the quote I have omitted the names of the legal practitioners referred to.

in their official capacities, but merely held that the Master's view in this regard could be addressed by way of an appropriate cost order.

[71] Tellingly, Nel states the following in his answering affidavit:

'De Villiers and I were led to believe that this was a landmark case and the outcome was in the best interest of the insolvency profession, the Master and creditors and more particularly financial institution creditors and therefore the costs would be costs in the liquidation.'

I shall deal with the implications of this statement in due course.

[72] Insofar as interest on the Intramed monies is concerned, the following statement by Nel in his answering affidavit is significant:

'I accept that the repayment could have been made sooner after the outcome of the appeal and it is for this reason that De Villiers and I have decided to pay interest on the amount paid in respect of the costs of the fees review, although we have not been called upon to do so by the Master. Initially I was of the view that, as we had not been called to pay interest at the time by the Master, no interest should be payable. However, this view has changed on the advice of our legal advisors and interest has now also been repaid.'

[73] It is worth noting that despite the negative outcomes in the review litigation and the criticisms of this court, Nel and De Villiers nonetheless, in resisting the application for their removal in the court below, initially did so in the name of Intramed. Thankfully they did not persist in doing so.

The fee-sharing arrangement

[74] It is necessary to deal briefly with this aspect of Standard Bank's case. According to Nel, the fee-sharing arrangement between himself and De Villiers in regard to the Intramed estate was a 42.5/57.5 per cent split in favour of the latter, who was responsible for the day-to-day administration of the Intramed estate. Nel states that there was a fee-sharing arrangement between the joint liquidators of Macmed and those of all of the 45 subsidiary companies. It is these fee-sharing arrangements that Standard Bank contends were improper and predictably gave rise to the conflict that Nel and De Villiers could and should have foreseen and avoided.

[75] In its founding affidavit the bank articulated its concern about the 'conclusion of fee-sharing or other financial arrangements with persons who are not liquidators of Intramed but who are liquidators of Macmed, a proved creditor of Intramed, but whose claim is disputed by the applicant'.

[76] At that stage the bank was not aware of the nature or terms of the fee-sharing arrangements. It was uncertain about its very existence.

[77] For present purposes it is necessary to record in some detail what is said by Nel at various places in his answering affidavit in relation to the fee-sharing arrangement. First:

'The joint liquidators of Macmed, because of their direct and indirect involvement in the investigation, interrogation and administration of the Macmed Healthcare Ltd group entered into a fee sharing agreement amongst them. This agreement took place in the first week of taking control of Macmed and its group of subsidiary and associated companies. It did not include any other joint liquidators appointed with anyone of them in any of the subsidiary liquidated companies and therefore had no bearing on the carrying out of their duties as joint liquidators in each of the liquidated companies in which they were appointed. The fee sharing agreement took place before the liquidation of the subsidiary group companies, including Intramed.'

[78] At another juncture, the following is stated:

'It is common practice in group estates for liquidators to agree to share fees. The association of Insolvency Practitioners of SA, the professional body regulating the affairs of the insolvency practitioners, recognises the sharing of fees amongst liquidators.'

Particulars about what is sanctioned by the Insolvency Practitioners of SA are not provided.

[79] Later, the following appears, in relation to the review application:

'166.1 De Villiers repaid 57,5% of the funds, because he would have received 57,5% of the fees had the application to Court been successful.

166.2 PWC repaid 42,5% of the funds because PWC would have received 42,5% had the Court application been successful.

166.3 PWC repaid the funds as a result of the relationship between myself and PWC as explained herein above.

166.4 PWC had to recover the funds from the joint liquidators of Macmed because of the fact

that the said joint liquidators would have shared in the fees in the proportion of one sixth of 42,5% each, had the application to Court been successful. This was done pursuant to the fees agreement between the joint liquidators of Macmed as explained in the above paragraphs.'

[80] For reasons that will become apparent there is no need to deal with every complaint by Standard Bank concerning the fee-sharing arrangement.

The rejection of a request for a meeting

[81] This complaint by Standard Bank relates to the admission of the claim of R325m by Macmed in Intramed. On 14 October 2004 Standard Bank requested that a meeting of creditors be convened by Nel and De Villiers with a view to interrogating the validity of the claim. If the Macmed claim were to be discounted then Standard bank would, in terms of the size of its claim of R107 728 463.64, overwhelmingly have represented the greater part of the total value of all claims proved against the estate. Even if the Macmed claim were taken into account the Bank's claim would exceed one-fourth in value of the total of the proved claims.

[82] On 27 October 2004 the request was rejected by Nel and De Villiers as follows:

'No purpose will be served by either debating the issue by way of correspondence or by calling a meeting of the Intramed creditors.'

[83] In a letter to the Master dated 22 November 2004 Nel and De Villiers said the following:

'Standard Bank is of the view that the joint liquidators of Intramed should call a meeting of proved creditors of Intramed to debate the issues raised in their letter dated 14 October 2004. The joint liquidators of Intramed, in their letter dated 27 October 2004, advised Standard Bank that they are of the view that no purpose will be served by calling a meeting of the Intramed creditors. We are still of same view, not only that it will serve no purpose by calling a meeting of Intramed creditors, but because, if we accept that Macmed, as proved creditor, can vote at the said meeting, that the creditors in value will vote against the joint liquidators of Intramed bringing an application to set aside the Macmed claim. In addition, the minority concurrent creditors, because of the complexity of the Peregrine agreements, (26 agreements in all) would not understand nor interpret the legal issues raised therein or as presented by Macmed and/or Standard Bank. The costs of such expungement application would be prohibitive and would, as a result of the

protracted Court case without any clear indication of success, absorb most of the benefits which the concurrent creditors may expect in the event the Macmed claim is not expunged by the Courts. There are various other scenarios that would be introduced to the equation in the event of Macmed claim is expunged one of which is the introduction of a new creditor Willridge (Peregrine) claim for an amount of R325m.'

[84] With reference to s 41 of the Insolvency Act[11] 24 of 1936 (the IA), the Court below held that Nel and De Villiers were mistaken in not recognising that they were obliged to call the meeting at the request of a creditor representing one-fourth of the of the value of all claims proved. The Court below held further, that Nel and De Villiers were mistaken about Macmed being able to outvote Standard Bank. Section 52(6) of the IA provides:

'[A] creditor may not vote on the question as to whether steps should be taken to contest his claim or preference.'

It went further, stating that the fact that the issue had been debated before was no basis for refusing to convene a meeting to decide it. Finally, the Court below was critical of the attitude adopted by Nel and De Villiers that the minority concurrent creditors would not understand the complexities of the Peregrine structure, stating that it was irrelevant to the decision whether to convene a meeting or not.

[85] However, the Court below did not consider the failure to call a meeting a sufficient basis for the removal of Nel and De Villiers. The court concluded that Standard Bank's complaint concerning the R325m claim was without foundation as the two liquidators acted on legal advice as they did in respect of the use of Intramed funds in the review application. Furthermore, the court below held that no prejudice had been suffered by the estate as all the monies had been repaid. However, the court below erred in stating (at para 7) that the capital amount owing had been repaid by August 2004. It was in fact only repaid a year later. The court below concluded that the fee-sharing arrangement was unobjectionable. The present appeal is directed against all these conclusions.

[11] Section 41 provides: 'The trustee of an insolvent estate may at any time and shall, whenever he is so required by the Master or by a creditor or creditors representing one-fourth of the value of all claims proved against the estate, convene in the manner prescribed by subsection (3) of section *forty*, a meeting of creditors (hereafter called a general meeting of creditors) for the purpose of giving him directions concerning any matter relating to the administration of the estate and shall state in such notice the matters to be dealt with at that meeting.'

Failure to prove an Intramed claim of R100m in Macmed

[86] This relates to three loans made by BoE bank to Intramed totalling R100 m, which Intramed, in turn, lent Macmed. This complaint, as will become evident, is inextricably linked to the disputed claim.

[87] As indicated in para 62 above, BoE bank initially proved its claim in the amount referred to in Intramed but this claim was later expunged by the Master at the instance of Nel and De Villiers. This led BoE to institute an action in the Port Elizabeth High Court in which it succeeded in establishing its claim. Nel and De Villiers appealed that decision but this court dismissed the appeal.[12]

[88] After the judgment of this court the result was that Intramed owed BoE R100m while Macmed contended that it was owed R325m by Intramed. Nel and De Villiers took the view that set-off applied and that Macmed's claim in Intramed stood to be reduced to R225m. This, of course, assumes the validity of the Macmed claim. Consequently, Nel and De Villiers refused to prove Intramed's claim of R100m in the Macmed estate. Once again, the court below considered that Nel and De Villiers, acting on legal advice, did not behave improperly.

Other material facts

[89] In dealing with Standard Bank's complaint that the amount of R325m was R120 000 more than the actual purchase price of the business which was R324 880 000, Nel and De Villiers merely state that the amount was an approximation and has been reduced to R225 m. This is a reference to the R100m set-off referred to in the preceding paragraph. There is therefore, in effect, no explanation for the excessive claim. The claim of R225m, it should be added, even allowing for the set-off still exceeds what can legitimately be claimed by approximately R120 000.

[12] See note 6.

[90] In respect of the Macmed claim in Intramed it is necessary to record the following. The Macmed claim was proved at the first meeting of creditors of Intramed on 10 May 2000. It was reflected in the first and second account in Intramed. These accounts were subsequently confirmed by the Master in 2001. Pursuant thereto and on behalf of Intramed, Nel and De Villiers paid dividends of R15 647 916.13 and R6 706 249.77 ─ a total of R22 354 165.90 ─ to Macmed. In the court below, Standard Bank, wisely, did not seek to interfere with the payment of these dividends under the first two accounts. The most recent liquidation and distribution account in Intramed is the amended fourth account. It was lodged with the Master by Nel and De Villiers in accordance with s 403 of the CA and lay for inspection from 10 to 24 December 2000. It reflects an amount of slightly less than R36m as part of the free residue account. These are monies available for distribution to proved creditors. If, on proper examination of the Macmed claim, it emerges to be invalid the destination of the free residue will change significantly. It is that end which in part motivates the present litigation exercise.

[91] In dealing with the review application in relation to their fees in the winding-up of Intramed Nel and De Villiers are on record as stating that the application was considered a landmark case by professional liquidators and that they were supported in the application by their professional association.

Conclusions

[92] I shall deal first with the claim of R325m. Section 45 of the IA provides:

‘(1) After a meeting of creditors the officer who presided thereat shall deliver to the trustee every claim proved against the insolvent estate at that meeting and every document submitted in support of the claim.

(2) The trustee shall examine all available books and documents relating to the insolvent estate for the purpose of ascertaining whether the estate in fact owes the claimant the amount claimed.

(3) If the trustee disputes a claim after it has been proved against the estate at a meeting of

creditors, he shall report the fact in writing to the Master and shall state in his report his reasons for disputing the claim. Thereupon the Master may confirm the claim, or he may, after having afforded the claimant an opportunity to substantiate his claim, reduce or disallow the claim, and if he has done so, he shall forthwith notify the claimant in writing: Provided that such reduction or disallowance shall not debar the claimant from establishing his claim by an action at law, but subject to the provisions of section *seventy-five*.'[13]

[93] It is clear that once a claim is proved a liquidator is under an obligation to examine all available books and documents. The mere admission of a claim does not ratify it or make it *res judicata*.[14] The importance of corroborating documents is clear. The presiding officer is obliged to deliver every document in support of the claim to the trustee. In the scheme of things, liquidators are required to examine all available books and documents for corroboration or comparison. In *Estate Friedman v Katzeff* 1924 WLD 298 the court, in dealing with a similar section in the previous Insolvency Act 32 of 1916, said the following at 304:

'In my view there can be no doubt that the word "shall" where used in sec. 43 of the Act is peremptory and not directory, and it is therefore the duty of the Court to see that the provisions of the Statute are complied with.'

The liquidator's duties in this regard are therefore peremptory.

[94] In *The Law of Insolvency* Catherine Smith suggests that in addition to books and documents '…clearly the trustee may also have regard to any evidence given by the insolvent and other witnesses'.[15] This suggestion is apt. It accords with the duties and obligations of a trustee referred to in para 1 above.

[95] In *Estate Wilson v Estate Giddy, Giddy & White & Others* 1937 AD 239 at 245 De Wet JA stated the following:

'By virtue of section 43 of the Insolvency Act it is the duty of the trustee to examine every claim proved against the estate and to satisfy himself that the estate is indebted to

[13] This section must be read with s 339 of the CA which provides:
'In the winding-up of a company unable to pay its debts the provisions of the law relating to insolvency shall, in so far as they are applicable, be applied *mutatis mutandis* in respect of any matter not specially provided for by this Act.'

[14] *Bank of Lisbon and South Africa Ltd v The Master* 1987 (1) SA 276 (A) at 287G.

[15] Third edition 1998 at p 227.

the creditor in the amount of the claim. It seems to me that for this purpose the trustee is entitled to a clear and unambiguous statement of the *causa debiti* and in this case the trustees were justified in objecting to the contradictory statements in the proofs of debt.'

[96] In *Commentary on the Companies Act*[16] the learned authors, under the title *Duty thoroughly to acquaint himself with the affairs of the company and to act openly*, state the following concerning a liquidator:

'He owes a duty to the whole body of members and the whole body of creditors, and to the court, to make himself thoroughly acquainted with the affairs of the company, and to suppress nothing and conceal nothing, which has come to his knowledge in the course of the investigation, which is material to ascertain the exact truth.'[17]

[97] Furthermore, a liquidator must act with care and diligence. In *Commentary on the Companies Act* the learned authors state the following:

'A liquidator must act with care and skill in the performance of his duties. He has a duty to exercise particular professional skill, care and diligence in the performance of his duties, and will incur liability if he fails to display that degree of care and skill which, by accepting office, he holds himself out as possessing. Thus a high standard of care and diligence is required of a liquidator. He must act reasonably in the circumstances. The test as to what is or is not reasonable in any given circumstances is not whether the conclusion arrived at is reasonable, but is that of a reasonable man "applying his mind to the conditions of affairs", which means "considering the matter as a reasonable man normally would and then deciding as a reasonable man normally would decide". Relevant here is the fact that in cases of uncertainty or doubt, the liquidator has the opportunity of safeguarding himself either by obtaining the directions of the Master or the court or by obtaining the directions of the creditors or members. Where, in such circumstances, the liquidator, for example takes upon himself the burden of deciding on the validity of a claim, he also takes upon himself the risk of its turning out that the payment constituted a misapplication of the funds under his control.'[18]

[98] I have a deep sense of disquiet about the manner in which Nel and De Villiers treated the claim of R325m. The parties were agreed that this court cannot reach a definitive conclusion concerning the Peregrine structure and its effect or its validity. Standard Bank submitted that the claim was not properly assessed or interrogated.

[99] The evidence of Viljoen, the pre-liquidation accounting records of Macmed

[16] M S Blackman, R D Jooste, G K Everlingham, M Larkin, C H Rademeyer, J L Yeats Vol 3 at 14─376.
[17] *Ex Parte Clifford Homes Construction (Pty) Ltd* 1989 (4) SA 610 (W) at 614.
[18] *Op cit* 14─378.

and Intramed, the concerns expressed by Deloitte & Touche, the interest payment of approximately R30m, the subscription for shares by Macmed and Leoridge Investments, the stamp duties paid, the six monthly payments for putting the Peregrine structure in place, of which R3 300 000 had already apparently been paid, the subscription by Peregrine for shares in Intramed at a subscription price equal to the purchase price, which meant that Peregrine would, upon maturity date be an equity holder in Intramed, were all matters deserving earnest consideration. It is clear that these issues were not given the attention they deserved. Such consideration as given was perfunctory and dismissive.

[100] In *Commentary on the Companies Act* the learned authors state the following:

'Where a group of companies is placed in liquidation, the conflicts of interest involved in acting as the liquidator for more than one of those company may, in the circumstances, result in the court refusing to appoint the liquidator of one of the companies as the liquidator of another or, where that appointment has already been made, in removing him from office as liquidator of another or other companies within the group.'[19]

[101] What is distressing is that Nel did not appreciate the conflict situation he found himself in. As the liquidator of Macmed seeking to prove a contentious claim in Intramed he was motivated by the interests of a creditor. As liquidator of Intramed, together with De Villiers, he was obliged to consider the interests of the debtor.

[102] In weighing up the genuineness of the claim of R325m the Intramed perspective was improperly ignored. The conflict should have been recognised and guidance sought on the position Nel and De Villiers found themselves in.

[103] The reliance by Nel and De Villiers on legal advice is too glib. Nel and De Villiers informed the second and third opinions they received. The accounting records, quite clearly, played an important role in the conclusions arrived at. Nel

[19] *Op cit* 14–382.

is a chartered accountant and must, together with De Villiers, have been aware of the importance of the qualification of the financial records of Intramed by Deloitte & Touche. It was admitted that the financial statements were finalised after Intramed and Macmed had been placed in liquidation, under the control of Nel and De Villiers. It could not be otherwise. It does not appear from either the second or third opinions that this fact was brought to the attention of counsel. Nor does it appear that they were informed about the historical financial records up until the end of November 1999.

[104] As rightly pointed out in the first opinion obtained by Nel and De Villiers, a party alleging that the transaction was a simulated one bears the onus of proving it.[20] There is some force in Standard Bank's contention that on the documentary and other information available to Nel and De Villiers the scales were tipped the other way.

[105] Furthermore, the opinion from the leading tax expert, which did not interrogate the genuineness of the transaction, appears not to have received sufficient, or any, consideration. A further question arises: Why was a second opinion sought by the Macmed liquidators, with Nel and De Villiers being the driving force? In addition, it could rightly be asked, why, whilst in the process of seeking the opinion or after obtaining it, they nonetheless persisted with the claim. Despite the existence of the opinion, Nel and De Villiers as joint liquidators of Intramed failed to dispute the claim. This was done in the face of controverting documentary evidence and the qualification by Deloitte & Touche. This clearly demonstrates the conflict that Nel found himself in and should have been more attuned to.

[106] Whereas accountants are not required to have legal knowledge in general they ought to know the importance of substantiating documents. So too, must liquidators. The latter must at the very least have knowledge of the relevant legal

[20] See *Zandberg v Van Zyl* 1910 AD 302 at 314.

principles relating to their duties and functions. But, even if they did not in this particular instance, their conduct was lacking in simple common sense and devoid of logic to the extent that it is difficult to resist the conclusion that they were improperly motivated.

[107] It is not insignificant that in the second and third opinions the prospect of recovery from sources other than Intramed was rated as minimal. The third opinion, which is four and a half pages long, built on the second. The reliance on legal advice must be viewed against what is set out in the preceding paragraphs. In my view, in respect of the claim of R325m, Nel and De Villiers did not comply with their duties as liquidators in accordance with the standards referred to by the authorities set out earlier in this judgment.

[108] Standard Bank's complaint concerning the failure by Nel and De Villiers to prove the Intramed claim of R100m in Macmed is subsumed by the complaint concerning the R325m. If the latter claim is valid there might be justification for set-off. But set-off only arises if the Macmed claim of R325m is valid.

[109] The failure to call the meeting of creditors relates to and impacts on the claim of R325m. Standard Bank, having been ousted for a long time as a participating creditor in the Intramed estate because of the expungment of its claim, was intent on having the Macmed claim discussed and its validity debated. The court below was correct in its conclusion concerning the decision by Nel and De Villiers not to accede to the request for a meeting. It did not regard that fact on its own as a basis for their removal as liquidators. In my view, the failure to call the meeting has to be seen against the totality of the circumstances set out above.

[110] I turn to deal with the charge of misappropriation of monies. It must be stated at the outset that counsel on behalf of Nel and De Villiers was rightly constrained to concede that, insofar as the use of monies for the review

application is concerned, their conduct was not beyond reproach. He submitted that it should however be seen in context and that we should be cautious and alive to the fact that we are now judging their conduct with the benefit of hindsight.

[111] In 4(3) *Lawsa* para 236 Blackman states:

'[A] liquidator stands in a 'fiduciary relationship towards the company and its members and creditors. As such, he occupies a position in some ways analogous to that of a trustee.'

[112] In *Commentary on the Companies Act*[21] the following appears:

'The liquidator stands in a fiduciary relationship to the company of which he is the liquidator, to the body of its creditors as a whole, and to the body of its members as a whole.

As a fiduciary, the liquidator must at all times act openly and in good faith, and must exercise his powers for the benefit of the company and the creditors as a whole, and not for his own benefit or the benefit of a third party or for any other collateral purpose. He must act in the interests of the company and all the creditors, both as individuals and as a group. He must not make a decision which would prejudice one creditor and be of no advantage to any of the other creditors or to the company.

He may not act in any matter in which he has a personal interest or a duty which conflicts, or which might possible conflict, with his duties as liquidator of the company.'

[113] It is self-evident that monies in the estate of the company being wound-up cannot be put to private use by the liquidators. For a liquidator to act in that fashion is the very antithesis of what should rightly be expected of a liquidator. It is equally clear that litigation undertaken has to be in the best interest and for the benefit of the company being wound-up.

[114] My first concern is the suggestion that the review application was seen as a landmark case for the benefit of liquidators. The extract from Nel's affidavit referred to in para 71 above is instructive. It confuses or seeks to run together the interests of the 'insolvency profession', the Master and creditors. Intramed's funds were not available for the personal benefit of Nel and De Villiers. Neither could such monies be used to fund a test case for the liquidation industry generally.

[21] *Op cit* at 14–380–14–381.

[115] Second, there was no specific authorisation by the creditors of Intramed in relation to the review application and it faced opposition from the Master. As stated by this court in relation to the review application: '[T]hey were acting in their personal capacities and not in any sense in the interests of the Intramed estate. Indeed, the appellants were ─ and still are ─ acting against the interests of the creditors, solely for their own benefit'. [22]

[116] Third, despite the judgment of the Grahamstown High Court in terms of which Nel and De Villiers were ordered to pay the costs personally, they nevertheless continued to use Intramed funds to pay their legal costs including those of an appeal to this court. This was done despite the Master's protestations.

[117] Fourth, despite the emphatic critical comments by this court concerning their conduct, they failed to promptly repay the amounts they had used to fund their personal litigation. Throughout, they demonstrated an obstinate resistance to being held to account. At one stage, instead of dealing with Standard Bank's objection in principle, they sought rather to challenge its *locus standi*. It took approximately 16 months after the decision of this court before all the monies utilised were paid back.

[118] Having rightly made the concession that their conduct was not beyond reproach counsel representing Nel and De Villiers was hard-pressed to justify or explain their extreme tardiness in repaying the monies improperly utilised.

[119] Once again, the reliance on legal advice does not excuse the behaviour of Nel and De Villiers. At the outset the warning lights ought to have flashed. Their expertise and experience in matters financial ought to have made them particularly aware that personal costs and motivations should be kept strictly

[22] See para 52 and note 2.

distinct from professional obligations and responsibilities and should not intrude to contaminate the winding-up process. When two courts in succession pronounced on their liability and responsibility they ought to have responded with due promptitude and demonstrated appropriate contrition. The opposite occurred. Even accepting that they had dispatched supporting vouchers to the Master's office the conclusion is inescapable that they demonstrated a reckless disregard concerning the use of Intramed's funds. Having undertaken to the Master, when faced with his protests, to repay the legal costs if held personally liable, one would have thought that they would have kept a separate record of those payments, yet it appears that they did not. The question might rightly be asked why they did not have recourse to books of account in which legal costs would necessarily have been recorded.

[120] Months after they had been challenged on the issue they stated unequivocally that the costs had been repaid. Years later, without the excuse of absent vouchers, the matter remained unresolved. Had they been ordinary litigants this would have been unacceptable. Given the high standards required of liquidators in the winding-up of companies it is unconscionable and wholly deplorable.

[121] We have not been supplied with the details of the policy of the Association of Insolvency Practitioners of SA concerning fee-sharing arrangements. In his affidavit Nel states that arrangements between liquidators, such as the one in relation to the Macmed winding-up process, are common place.

[122] For reasons that are apparent it is not necessary to deal with every one of Standard Bank's complaints concerning the fee-sharing arrangements.

[123] In the present case I have a difficulty in understanding why the Macmed liquidators had an interest in the application by Nel and De Villiers in reviewing the Master's ruling on their fees and why they were expected to and in fact did

contribute to the costs of that litigation. The Macmed liquidators appear to have paid that contribution personally. That does not, however, excuse their participation in Intramed's affairs. The inflated fees of approximately R21m which Nel and De Villiers consider themselves entitled to in relation to their winding-up of Intramed would have had a serious impact on the estate. This was a matter on which the views of the creditors ought to have been specifically sought and in respect of which they ought to have had a say. The conflict inherent in the situation described above was regrettably lost on Nel and De Villiers and on the other joint liquidators of Macmed. It would be surprising if this kind of conduct was sanctioned by their professional association.

[124] Standard Bank prays for the removal of Nel and De Villiers as liquidators in Intramed. Section 379(2) of the Companies Act 61 of 1973 provides:

'The Court may, on application by the Master or any interested person, remove a liquidator from office if the Master fails to do so in any of the circumstances mentioned in subsection (1) or for any other good cause.'

The relevant circumstances mentioned in subsec (1) are as follows:

'*(b)* that he has failed to perform satisfactorily any duty imposed upon him by this Act or to comply with a lawful demand of the Master or a commissioner appointed by the Court under this Act; or

…

(e) that in his opinion the liquidator is no longer suitable to be the liquidator of the company concerned.'

[125] In *Hudson and others NNO v Wilkins NO and others* 2003 (6) SA 234 (T) (at para 13) the following appears:

'[13] A liquidator *may* be removed from office if there is sufficient suspicion of partiality or conflict of interest, since a liquidator must be and appear to be independent and impartial. He or she must be seen to be independent since his duties as liquidator may require him or her to investigate. (See *Re Giant Resources Ltd* [1991] 1 Qd R 107 at 117; *Re National Safety Council of Australia (Vic Division)* [1990] VR 29 ([1989] 15 ACLR 355 (SC Vic); *City of Suburban Ltd v Smith* [1998] 28 ACSR 328 (FC of A) at 336.) A Court will exercise its discretion to remove a liquidator if it appears that he or she, through some relationship, direct or indirect, with the company or its management or any particular person concerned in its affairs, is in a position of actual or apparent conflict of interest. In exercising that discretion Bowen LJ in *Re Adam: Eyton Ltd: Ex parte Charlesworth* (1887) 36 Ch D 299 at 306 said:

"Of course fair play to the liquidator himself is not to be left out of sight, but the measure of course

is the substantial and real interest of liquidation." '

[126] In *Ma-Afrika Groepbelange (Pty) Ltd v Millman and Powell NNO* 1997 (1) SA 547 (C) at 561H-J the following is stated:

'Good cause for the removal of a liquidator has also been held to have been shown where a liquidator has not been independent. This was the *ratio* of the judgment in *Re Sir John Moore Gold Mining Co* (1879) 12 ChD 325 (CA) at 332, where a liquidator was removed because his "interests may conflict with his duty". See also *Re P Turner (Wilsden) Ltd* (1986) 2 BCC 99, 567 (CA) at 99, 570 and *Re London Flats Ltd* [1969] 2 All ER 744 (Ch) at 752E-F, where it was held that a liquidator should be "wholly independent" and that the removal of a liquidator should be "in the interests of every one concerned in the liquidation." '

[127] In 4(3) *Lawsa* under the titles *Companies* and *Winding-up* M S Blackman at para 281 states the following:

'The court will remove a liquidator if some unfitness, in the wide sense of that term, is shown in the liquidator, whether it be from personal character or from his connection with other parties or from circumstances in which he is involved. Thus, even though no bad faith was alleged, the court removed a liquidator where he had become so engrossed in his own view that he was unable to see the reasonableness of the proposals of those interested in the liquidation and threw obstacles in their way; … where it was prima facie established that the liquidator and two directors were liable to account to the company for certain sums and the liquidator refused to take proceedings against the directors; …'

Further on, the following appears:

'Although there may be no individual characteristic in itself sufficient on which to base a conclusion that a liquidator is unfit, there may be a number of circumstances which combined might force the court to that conclusion. Also, the court might take into account some unfitness on the part of the liquidator together with what might be in the interests of those persons interested in the liquidation. A relevant factor is also the costs that would be incurred if another liquidator has to come in and complete the work that the present liquidator has already done. Thus, in the circumstances, the court will be less likely to discharge a liquidator towards the end of the winding-up, after he has become acquainted with the affairs of the company, than it would early in the winding-up. Although each one of these considerations taken singly might not be sufficient to justify the removal of the liquidator, taken together they might be.'

[128] It is clear that in respect of the claim of R325m Nel and De Villiers have lost all objectivity and improperly preferred the Macmed claim without properly interrogating and verifying it. The comments by Van Heerden AJA set out in para

52 above are apposite. It does not appear that in that case this court was made aware of the fee-sharing arrangement which would have significantly ameliorated the impact of the cost order on Nel and De Villiers personally.

[129] As stated above, counsel representing Nel and De Villiers, rightly conceded that their behaviour in relation to the cost of the review application was from the outset not beyond reproach. Chronologically, their behaviour in relation to the use of Intramed's funds became progressively worse. In addition they were obstructive, evasive and unrepentant to the end.

[130] In relation to that aspect of the fee-sharing arrangement referred to above Nel and De Villiers failed to appreciate the conflict in which they found themselves and its effect on them.

[131] A precursor to the decision by the Grahamstown High Court on the application to have Nel and De Villiers removed was a challenge by them to Standard Bank's *locus standi*. The challenge on that issue culminated in an appeal to this court in which Standard Bank was successful. This court recorded that Nel and De Villiers were not 'litigation shy'.[23]

[132] It is a cause for concern that so much time has passed since the Macmed group was placed in liquidation. We have been informed that much work in relation to the Intramed estate has been done and is nearing completion. Against that consideration is the fact that Nel and De Villiers have played a major part in the delay by way of costly, protracted and unnecessary litigation. If the Macmed claim is disregarded Standard Bank overwhelmingly represents the majority of value of creditors in the Intramed estate. That it is willing to put up with a further delay in the winding-up of the estate is not insignificant. The R325m claim is clearly the remaining major issue and one in respect of which Nel and De Villiers cannot bring objectivity to bear. The totality of circumstances set out above

[23] *Intramed (Pty) Ltd (in liquidation) v Standard Bank of South Africa Ltd* 2008 (2) SA 466 (SCA) at para 20.

compellingly leads to the conclusion that it is not in the best interests of the liquidation that they continue to serve as joint liquidators of Intramed.

[133] Liquidators must realise that they perform important functions. The Master, creditors and importantly courts rely on them. In the liquidation process they are expected to act impeccably. The profession must be under no illusion that courts, in appropriate circumstances, when called upon to do so will act to ensure the integrity of the winding-up process.

[134] Standard Bank contends that in terms of s 384(2)[24] of the CA, Nel and De Villiers' fee in the winding-up of Intramed should be disallowed or reduced. Furthermore, Standard Bank submitted that Nel and De Villiers should be liable to pay a penalty in terms of s 394(7)[25] of the CA in an amount of R1 608 839, being double the amount they used from Intramed funds to pay the costs of the review application.

[135] Removal of a liquidator is an extreme step. It certainly impacts on his or her reputation. It was submitted on behalf of Nel and De Villiers that we give consideration to the fact that they are nearing the end of their careers. Moreover, so it was submitted, they have expended effort and much hard work to the benefit of Intramed and creditors by, for example, continuing to trade in Intramed despite objections by BoE bank, which resulted in a significant increase in its value, which ultimately redounded to the benefit of creditors.

[24] 'The Master may reduce or increase such remuneration if in his opinion there is good cause for doing so, and may disallow such remuneration either wholly or in part on account of any failure or delay by the liquidator in the discharge of his duties.'

[25] Section 394(7)*(a)* provides:
'7) *(a)* Any liquidator who without lawful excuse, retains or knowingly permits his co-liquidator to retain any sum of money exceeding forty rand belonging to the company concerned longer than the earliest day after its receipt on which it was possible for him or his co-liquidator to pay the money into the bank, or uses or knowingly permits his co-liquidator to use any assets of the company except for its benefit, shall, in addition to any other penalty to which he may be liable, be liable to pay to the company an amount not exceeding double the sum so retained or double the value of the assets so used.
(b) The amount which the liquidator is so liable to pay, may be recovered by action in any competent court at the instance of the co-liquidator, the Master or any creditor or contributory.'

[136] Bearing in mind what is set out in the preceding paragraph I am not of the mind to impose a penalty in terms of s 394(7) of the CA. However, having regard to the nature and gravity of the misconduct, considering the protracted, costly and unnecessary litigation engaged in by Nel and De Villiers, and taking into account what can rightly be demanded of liquidators, it is my view that they should be deprived of 5 per cent of their fee. The Master was requested to disallow or reduce their remuneration and refused to do so.

[137] Finally, there is the question of the costs of Standard Bank. Counsel representing the bank correctly accepted that the founding affidavit was prolix. It made trawling through the record extremely difficult. It had the unhappy consequence of a lengthy response. Oftentimes less is more. Recently both in respect of the record and heads of argument legal representatives have acted to the contrary. Mindful of the unnecessary time and resources expended in the present case I am of the view that the bank should be deprived of a third of its costs.

[138] The following order is made:

1. The appeal is upheld.
2. The second and third respondents are ordered to pay two thirds of the appellant's costs, such costs to include those consequent upon the employment of two counsel, to be paid by the second and third respondents in their personal capacities jointly and severally.
3. The order of the court below is set aside and substituted as follows:

'1. The third and fourth respondents are removed as joint liquidators of Intramed (Pty) Ltd (in liquidation).

2. The decision of the Master not to disallow or reduce the remuneration of the third and fourth respondents as joint liquidators of Intramed (Pty) Ltd (in liquidation) is reviewed, set aside and replaced with an order in terms whereof the remuneration of the second and third respondents is reduced by five per cent.

3. The third and fourth respondents are ordered to pay the costs of the application including the costs consequent upon the employment of two counsel where applicable, such costs to be paid by the third and fourth respondents in their personal capacities jointly and severally.'

_____

M S NAVSA
JUDGE OF APPEAL

GRIESEL AJA dissenting

[139] I have read the judgment of Navsa JA, but respectfully disagree with his conclusion that the appeal should succeed. The relevant facts have been fully summarised in my colleague's judgment as well as in the judgment of the court below. It is accordingly not necessary to repeat the factual background herein, save to the extent necessary to explain my reasoning in respect of particular aspects.

[140] With regard to the application for removal of the joint liquidators, which forms the backbone of the present appeal, Standard Bank relies on five main grounds. Before dealing *seriatim* with the individual grounds of complaint, I wish to make some general remarks which, in my view, militate against the removal of the liquidators at this stage of the winding-up process.
[141] First, my colleague rightly points out[26] that removal of a liquidator is 'an extreme step'. From the authorities cited by him,[27] it further appears that removal of a liquidator is 'a radical form of relief which will not be granted unless the Court is satisfied that a proper case is made out therefor'.[28] For the reasons set out below, I am not persuaded that the bank has made out a proper case for such radical relief.
[142] Second, a court will be less inclined to remove a liquidator at a late stage in the winding-up process than it would be to replace him or her at an early stage.[29] In the present case, the liquidators were appointed more than ten years ago. By the time Nel deposed to his answering affidavit in these proceedings, on

[26] Para 135 above.
[27] Paras 124–127 above.
[28] *Ma-Afrika Groepbelange (Pty) Ltd v Millman and Powell NNO*, para 126 above, at 566B–E.
[29] *Ma-Afrika Groepbelange, loc cit*; *Hudson NNO v Wilkins NO*, para 125 above, in para 18 of the judgment.

30 August 2005, the process of winding up was at 'a very advanced stage'. Thus Nel stated:

'Save for the dispute over the Macmed claims, the remaining steps are to prepare a final liquidation and distribution account, report to the Master and pay out the remaining dividends. No purpose would be served in replacing De Villiers and me now as liquidators, as the administration of the Intramed estate is, for all practical purposes, almost complete. The appointment of other liquidators would only result in incurring additional costs for the Intramed estate to the prejudice of the other creditors.'

Since the aforesaid date the court below, during the first round of the current proceedings, refused to expunge the Macmed claim,[30] with the result that the issue relating to that claim can no longer be said to be outstanding. It can be accepted, therefore, that the process of winding up is by now – more than four years later – virtually complete. To remove the liquidators at this very late stage will, in my view, amount to a *brutum fulmen*.

[143] Third, a court must be satisfied that removal of the liquidator(s) will be to the general advantage and benefit of *all* persons concerned or otherwise interested in the winding-up of the company in liquidation.[31] In the present instance, 91 claims totalling R667 million (subsequently reduced to R567 million) were proved against Intramed at the first meeting of creditors, back in May 2000. As observed by Mr Nel, '(i)t is noteworthy that the applicant is not supported in this application by any of the other proved creditors in Intramed . . .' Not only is the application not supported by any of the other creditors, but the bank has not adduced any evidence – and accordingly has not discharged the onus of proving – that removal of the joint liquidators will be to the general advantage and benefit of all persons interested in the winding-up of Intramed.

[144] Fourth, in refusing to order removal of the liquidators, the court below exercised a judicial discretion. Leaving aside the question whether this was a

[30] Cf High Court judgment, para 31.

[31] *Ma-Afrika Groepbelange (Pty) Ltd v Millman and Powell NNO*, para 126 above, at 566D.

'narrow' or a 'wide' discretion,[32] I have not been persuaded that any grounds exist which would entitle this court on appeal to interfere with the exercise of the high court's discretion.

[145] Finally, in terms of s 381 of the Companies Act, the Master has wide-ranging powers of control over liquidators. The fact that the Master, who has not been criticised for undue partiality towards the Intramed liquidators, has not seen fit – with knowledge of Standard Bank's complaints – to exercise any of his powers in terms of s 381, is a factor entitled to considerable weight in considering the present application.
[146] With that prelude, I now turn to deal with the merits of the individual grounds for removal advanced on behalf of Standard Bank and do so in the same sequence as did my colleague.

The Macmed claim

[147] Much time and paper was spent on the question of the validity of the Macmed claim. Indeed, this was described by Standard Bank as one of the main issues to be decided in the litigation and one of the prayers (para 1.6) contained in the notice of motion was specifically aimed at expungement of the Macmed claim as contained in the amended fourth liquidation and distribution account. As mentioned earlier, Standard Bank's claim in this regard was duly dismissed by the court below during the first round,[33] hence the court's observation, during the second round, that '(w)e do not have to consider the validity of the Macmed claim'.[34] Instead, the focus shifted to the question whether Nel and De Villiers acted inappropriately by not disputing the Macmed claim. But therein lies the rub because, without a thorough examination of the validity of that claim (including the intricate 'Peregrine structure' which underlies it), it is virtually impossible to pass any judgment on the conduct of the liquidators in their treatment of the claim. Yet this is precisely what Standard Bank's complaint demands of the court: as pointed out in its heads of argument, the bank's central contention is a simple one: 'the proof of the Macmed claim ignores the Peregrine structure and in these

[32] Cf *Naylor v Jansen* 2007 (1) SA 16 (SCA) para 14; *Giddey NO v J C Barnard and Partners* 2007 (5) SA 525 (CC) para 19.
[33] High Court judgment para 31.
[34] High Court judgment para 36.

circumstances the Intramed liquidators (who knew the true and full facts) ought to have recommended to the Master that he expunge it'.

[148] Without the benefit of full evidence – including cross-examination – on this aspect, it is impossible to find, in my view, that the liquidators' conduct in relation to the Macmed claim fell short of the required standard and that it justifies their removal. A careful reading of the evidence shows, in any event, that the Intramed liquidators did not blithely accept the claim. Shortly after Macmed's claim was proved at the first meeting of creditors, during May 2000, Nel forwarded a copy of the claim (together with certain other claims) to Intramed's attorney, Brooks, with the request, on behalf of Intramed: 'Please review in terms of the evidence given at the enquiry and opinions received'.

[149] A month or so later, in their report to the second meeting of creditors of Intramed, Nel and De Villiers reported as follows:

'The claims of the ultimate holding company Macmed Healthcare Limited and BOE Bank Limited require investigation. There is an obvious duplication of approximately R100 million. Claims proved at the first meeting of creditors should total approximately R567 million and not R667 million.'

[150] The record shows that Nel and De Villiers did indeed investigate the two claims mentioned in the report and decided in due course not to challenge the Macmed claim. This was done on the basis of legal advice received from their attorney, Brooks, to the effect that the claim was in order. His advice, in turn, was supported by counsel's opinion obtained by the Macmed liquidators.

[151] The one aspect on which all parties agreed was that the Peregrine structure was one of some complexity. In the judgment of the court below during the first round, the court gave a brief summary of what the Peregrine structure entailed, the correctness of which was apparently accepted by counsel on both sides and was repeated in the second judgment.[35] It was precisely because of the complexity of the series of transactions comprising the Peregrine structure that the Macmed liquidators found it necessary to seek counsel's opinion. Subsequently, a second and a third opinion was obtained. In this context, my colleague poses the question: 'Why was a second opinion sought by the Macmed liquidators, with Nel and De Villiers being the driving force?'[36] With respect, the way I read the evidence, it was the Macmed liquidators, at the behest of the bank creditors of Macmed, who obtained all three opinions. Nel

[35] High Court judgment para 35.

[36] Para 105 above.

pointed out in this regard that, having obtained the first opinion, the Macmed liquidators were instructed by the bank creditors of Macmed – including Standard Bank – to obtain the second and third opinions from counsel:

'The Macmed liquidators obtained the second Peregrine opinion late in August 2000 which second opinion was also debated with the Macmed banks, including [Standard Bank].

. . . The Macmed liquidators were then instructed by the bank creditors to obtain a third opinion relating to the Peregrine Structure which opinion the Macmed liquidators obtained in November 2000. The third opinion, after it had been obtained, was also debated with the Macmed banks at an informal meeting of creditors. The Macmed banks instructed the Macmed liquidators not to proceed with any action against Peregrine in regard to the Peregrine Structure and accepted the effect of the unwinding of the Peregrine Structure and consequently the validity of the Macmed claim against Intramed of R325 million.'

[152] Both the second and third opinions reaffirmed the simulated nature of the Peregrine structure. This construction was thereupon accepted, not only by the liquidators of Macmed and the relevant creditors (including Standard Bank), but also by Nel and De Villiers on behalf of Intramed. It was on this basis that the Macmed claim was reflected in the successive liquidation and distribution accounts of Intramed, all of which were in due course confirmed by the Master. The first three accounts went unchallenged, whereas Standard Bank's challenge of the fourth account was unsuccessful, as noted earlier. In terms of s 407(4)(a) of the Companies Act, Standard Bank had the opportunity to take the Master's decisions on review within fourteen days from the date on which the decisions were made. This was not done. Moreover, pursuant to confirmation of the first account, and on 9 March 2001, the liquidators paid a dividend of R15,6 million to Macmed based on its claim of R225 million. Pursuant to confirmation of the second account, and on or about 4 October 2001, the liquidators paid a further dividend to Macmed in the amount of R6,7 million. Standard Bank did not apply to have either the first or the second liquidation and distribution account re-opened in terms of s 408. Instead, it launched various abortive attempts to have the Macmed claim expunged: thus, at a general meeting of creditors of Macmed, the bank attempted to persuade the creditors to abandon the Macmed claim

against Intramed. Not surprisingly, the bank failed to obtain any support for its proposal. It then attempted to persuade Nel and De Villiers to convene a meeting of the Intramed creditors to discuss expungement of the Macmed claim, but this request was turned down. The bank did not pursue their efforts to convene a meeting of Intramed creditors, but instead applied unsuccessfully to the court below, in the first part of the present proceedings, to have the Macmed claim expunged. Having been turned away at the front door, as it were, the bank now comes to the back door, relying on the same facts and seeking a different – and far more drastic – remedy. In my view, they should again be turned away.

[153] In the circumstances as outlined above, the Intramed liquidators were fully entitled, in my view, to regard the said structure as a simulation which had 'unwound' upon the winding up of Macmed. As Nel summed up the position in his answering affidavit: 'We always believed the transaction to have unwound, as is borne out by the subsequent conduct of all parties concerned'.
[154] Nel's reliance on the subsequent conduct of the parties and their understanding of the effect of the series of agreements finds support in the judgment of this court in *Aussenkehr Farms (Pty) Ltd v Trio Transport CC*,[37] where the question for decision was posed as follows:

'Where the parties to a contract are agreed on its meaning, is it open to a third party to contend for a different meaning even if that does accord with the apparent meaning of the written document reflecting the agreement?'[38]

Lewis AJA answered the question as follows:

'Where the parties dispute the meaning of a term then a court must necessarily look to the wording of the provision itself to determine its correct construction. But where they agree on its meaning, even though the provision appears objectively to reflect a different understanding, it would be absurd to insist on binding them to a term upon which neither agrees only because of a third party's insistence on reliance on the apparent meaning of the provision.'[39]

[37] 2002 (4) SA 483 (SCA).
[38] Para 23.
[39] Para 25.

[155] Applied to the facts of the present case, it appears from the evidence that the parties to the Peregrine structure regarded the agreements to have 'unwound' upon liquidation of Macmed and its subsidiaries. This is borne out by the fact that Peregrine never proved a claim against Intramed because, as Nel put it, '(i)t clearly never was the intention that Peregrine would ever have a claim against Intramed'. In these circumstances, it would indeed be 'absurd', as suggested in *Aussenkehr, supra*, to disregard the understanding and attitude of the parties and to look, instead, through a magnifying glass at the abstract meaning to be gleaned from the battery of 21 agreements comprising the elaborate Peregrine structure in order to attribute a different meaning to those agreements as the one accepted by the parties.

[156] In *Caldeira v The Master*[40] the duties of a trustee (or liquidator) in terms of s 45(3) of the Insolvency Act were stated as follows by Levinsohn J:

'This section enjoins the trustee, if he disputes the claim, to report to the Master his reasons for doing so. It seems to me that if a trustee disputes the claim he must have a reasonable belief based on facts ascertained by him that the insolvent estate is not in fact indebted to the creditor concerned. Mere suspicion about the claim would not be sufficient. This belief would, I think, generally arise after the examination of the Company's records and the conclusion derived from the records that the indebtedness does not exist or has been extinguished. Of course, the facts giving rise to the belief may not necessarily be derived from the company's records, they could arise, for example, from the records of an interrogation conducted at the meeting of creditors.'

[157] Having regard to this test and to the evidence of Nel and De Villiers, it is clear to me that they did not have a reasonable belief that Intramed is not in fact indebted to Macmed.

[158] However, as far as Nel and De Villiers are concerned, the matter did not end there. As explained by Nel:

'After we came under pressure from the applicant to expunge the Macmed claim we again obtained advice. We were again advised that our approach was proper and appropriate and that we ought not to succumb to the pressure being exerted by the applicant.'

[40] 1996 (1) SA 868 (N) at 874D–E, quoted with approval in the High Court judgment, para 37.

[159] I do not regard it necessary to go into greater detail regarding either the validity of the Macmed claim or the Peregrine structure. Suffice it to state that I am unable to fault the liquidators for having decided, on legal advice, to disregard as a simulation the convoluted series of transactions between Macmed, the Peregrine Group and Intramed and to accept, instead, the simple commercial reality of the transaction as an inter-company loan from Macmed to Intramed in an amount of R325 million. That amount was reduced by R100 million as a result of recognition of BOE's claim in that amount for which Intramed was held liable.[41]

[160] For these reasons, I am, with respect, unable to share my colleague's conclusion[42] that in relation to the Macmed claim Nel and De Villiers did not properly comply with their duties as liquidators; far less that their conduct justifies the ultimate penalty of removal.

***'**Misappropriation' of Intramed's funds*

[161] With regard to this complaint, Standard Bank in its affidavits and in argument before us persistently likened the liquidators' position with that of an attorney misappropriating trust money for his or her own purposes. Reliance was placed in this context, by way of example, on *Law Society of the Cape of Good Hope v Budricks*.[43] In my opinion, however, this analogy is wholly inapposite. In that case it was held that Budricks had 'misappropriated trust money and administered trust funds in a reckless and cavalier manner without any regard for his duties as an attorney'.[44] It was further found that Budricks had methodically misappropriated large sums of money over a substantial period of time.[45]

[162] This differs totally from the present situation, where Nel and De Villiers acted on responsible legal advice to the effect that the application for review of the Master's decision regarding their fees ought to be brought in their official capacity as part of the administration of the estate. Nel explains:

[41] 2004 (3) SA 1 (SCA).
[42] Para 107 above.
[43] 2003 (2) SA 11 (SCA).
[44] Para 7.
[45] Para 11.

'In bringing the review application, we were assisted and advised by Tabacks Attorneys (Mr Brooks) and senior and junior counsel (J Eksteen SC and P Daniels). They advised us that the application ought to be brought in our official capacity. We are not lawyers, and had *no* reason not to accept their advice. After the judgment in the First Court had been delivered, we again sought advice. We separately obtained advice from three eminent silks (Slomowitz SC, Terblanche SC and Trengove SC). The weight of advice, which we received, was that an appeal ought to be lodged and that it had good prospects of success. It was implicit in the advice that it was not wrong for us to have brought the review in our official capacities. Again, we had no reason not to accept it.'

[163] With the benefit of hindsight, Nel added:

'. . . (W)e respectfully point out that where our advice initially received from our attorneys and counsel could have been wrong, such advice was sought and received on a *bona fide* basis by us and whilst our advice has proved to have been wrong, we respectfully point out that such advice could have been given reasonably in the light of the judgment in *Collie NO v The Master* 1972 (3) SA 623 (A).'

[164] In response, Faul on behalf of Standard Bank stated that 'no reasonable lawyer could *bona fide* have given the advice to which Mr Nel testifies; and no reasonable person could have accepted and acted upon it'. I find this an astonishing proposition: not only did Nel and De Villiers choose to consult several experienced and eminent legal practitioners; but two experienced and learned judges in the court below did not uphold the bank's criticism of the liquidators' conduct in this regard.

[165] Be that as it may, the complaint regarding the alleged 'misappropriation' of Intramed's funds has been fully dealt with and rejected by the court below.[46] I associate myself with its reasoning as well as the conclusion reached and do not find it necessary to add anything further in that regard.

[46] High Court judgment, paras 12–30.

The fee-sharing arrangement

[166] The essential features of the fee-sharing arrangement have been alluded to above.[47] It is important to note that it is only the fee-sharing arrangement between the six Macmed liquidators that is being frowned upon by Standard Bank. Its deponent, Faul, stated unequivocally in his replying affidavit that he has no quibble with the fee-sharing between Nel and De Villiers in their capacities as joint liquidators of Intramed, nor does he object to Nel's fee-sharing arrangement with his erstwhile employer, PriceWaterhouseCoopers. What he objects to is the fee-sharing arrangement that prevails among the six Macmed liquidators, ie 'cross-company fee-sharing', as he calls it. It is clear, therefore, that this particular complaint cannot support an application for De Villiers' removal as he was not a party to that arrangement.

[167] As for Nel, he answers this complaint in the passage quoted by my colleague.[48] Mr Brian Cooper, one of the other Macmed liquidators and a practising attorney with 47 years experience of insolvency matters, testified to the same effect, describing the fee-sharing arrangement as 'a standard practice amongst liquidators' where a group of companies are being wound up.
[168] In these circumstances, I am unable to find, as contended for by Standard Bank, that the fee-sharing agreement *per se* is improper to the extent that it justifies the removal of a liquidator. Not only is the basis of the bank's complaint questionable; the bank's attitude also appears to be highly selective: if the bank is correct that Nel acted improperly by entering into the fee-sharing arrangement with his co-liquidators in Macmed, then it must necessarily follow that each of the other five Macmed liquidators is equally guilty of impropriety; yet the bank has not sought the removal of any of those co-liquidators. Similarly, on the bank's reasoning, Nel's conduct is equally improper in each of the 45 other Macmed subsidiaries in which he has been appointed as liquidator, where the same fee-sharing arrangement prevails; yet his removal has not been sought in any of those companies. The inference is irresistible that this complaint by the bank, far from being a substantive ground for removal, is a mere makeweight in an effort to bolster the bank's case against Nel. This tends to lend credence to Nel's assertion that the bank 'appears to be motivated by a personal vendetta against

[47] Paras 77–78 above.
[48] Para 78 above.

the liquidators of Intramed'.
[169] With regard to the fourth and fifth complaints, namely the failure by the liquidators to prove a claim for R100 million against Macmed and their failure to convene a meeting of Intramed creditors at the request of the bank these complaints, as rightly pointed out by Navsa JA,[49] are intimately interlinked with the validity of the Macmed claim. In the light of my conclusion regarding the Macmed claim, it follows that these two grounds of complaint likewise cannot sustain an application for removal of the liquidators.[50]
[170] To sum up, for the reasons set out above, I am of the view that the bank has failed to make out a sufficient case for the removal of Nel and De Villiers as liquidators of Intramed.

Reduction of the fees

[171] One of the further forms of relief claimed (and granted by my colleague),[51] was the claim for a reduction of the fees of the liquidators in terms of s 384(2) of the Companies Act.

[172] Again, I find myself in agreement with the high court's reasoning regarding this claim.[52] I am accordingly of the view that this claim was likewise rightly dismissed by the high court.
[173] In all the circumstances, I would have dismissed the appeal with costs, including the costs of two counsel.

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B M GRIESEL
Acting Judge of Appeal

PONNAN JA

[174] I have had the benefit of reading the judgments of my colleagues Navsa and Griesel. At the outset I should perhaps state that I take a dimmer view of the liquidators' conduct than my learned colleagues. I accordingly am unable to agree with the conclusion reached by Griesel AJA that the appeal ought to fail. In my view, like Caesar's wife, liquidators should be beyond reproach. In this case

[49] Paras 108–109 above.
[50] See also the High Court judgment, paras 63–80.
[51] Para 136 above.
[52] High Court judgment paras 87–94.

their counsel conceded before us that their conduct was not. It ought to have been, given the fiduciary position occupied by them. What remains therefore is to determine whether they have conducted themselves such as to warrant their removal from office. Navsa JA has concluded that they have and should be removed as liquidators. I agree. The cumulative effect of the various factors alluded to by Navsa JA, in my view, compel that conclusion. I nonetheless deem it necessary, because my criticism of the conduct of the liquidators is more strident, to write a separate judgment. In doing so I shall not cover terrain already traversed by my learned colleagues, but shall restrict myself to a consideration of those aspects that point irresistibly to the conclusion that the joint liquidators are unsuitable to continue to occupy that office in the Intramed estate in liquidation.

[175] It is so that more than 10 years have elapsed since the liquidators were first appointed. But that hardly counts in the liquidators favour. If anything that protracted period redounds to their discredit. Much of the blame for the delay in finalizing the process must be laid squarely at the door of the liquidators themselves. After all they embarked upon litigation on a scale that I can only describe as unprecedented for liquidators. I accept that the length of time is an important consideration. As is the stage that the liquidation process has reached. But that can hardly trump the necessity for a court to ensure that the standard of performance of officers such as liquidators shall be as high as is practicably possible. It may well be that the liquidation process has reached a fairly advanced stage. But that no doubt is only on the supposition that the Macmed claim of R325m is a good one. If that claim is revisitedthen the current liquidation and distribution account may well become obsolete. In that event the liquidators' removal from office, with the consequence that those who succeed them may in due course consider afresh a fairly substantial claim in the estate in liquidation, in and of itself, puts paid to the notion that their removal would amount to a *brutum fulmen*. If on the other hand, after proper scrutiny the Macmed claim is allowed, there ought to be no tangible disruption to the liquidation process by the introduction of new liquidators – the new liquidators could simply continue from

where their predecessors left off. It would be unpalatable to countenance the notion that liquidators who have made themselves guilty of serious misconduct should not be removed from office simply because it is late in the liquidation process.

[176] Standard Bank is a substantial creditor of Macmed and many of its subsidiaries including Intramed. Very early in the administration of Intramed, claims of inter alia R190m, R100m and R325m were proved against it by Standard Bank, Boe Bank and Macmed, respectively. Shortly thereafter the liquidators recommended to the Master that the claims by the banks should be expunged. A far more charitable stance was adopted by the liquidators in respect of the Macmed claim. After protracted and expensive litigation, the banks' claims, albeit in a lesser amount in the sum of R107m in the case of Standard Bank, were restored. From the time of expungement until restoration of their claims, the banks lost their status as proved creditors in Intramed. They thus lost their right to vote at meetings of creditors. Standard Bank, not without some justification, has formed the view that the liquidators have unreasonably become so engrossed in their own view as to the validity of the Macmed claim in the Intramed estate, that they are incapable of subjecting that claim to the scrutiny that it reasonably requires. In those circumstances, so it contends, the only remedy available to it is to seek the removal of the liquidators. It is so that they are not supported by other creditors, but given the value of its claim in the Intramed estate, that is of little moment. After all, s 379(2) of the CA entitles it to approach the court for the removal of the liquidators.

[177] Section 45 of the IA casts a duty upon the liquidators to examine every claim and to satisfy themselves that the estate is indeed indebted to the creditor. Given the contradictory statements advanced in support of the claim, it would appear that the liquidators failed in the discharge of that duty. It is thus, on the view that I take of the matter, against the interests of the liquidation that they remain in office. On behalf of the liquidators it was submitted that the debate as to the validity of the Macmed claim is a difficult one, and turns in part on the correct legal treatment of the Peregrine structure – which the parties were agreed was a transaction of some complexity. That being so, one would expect a natural reticence on the part of the liquidators to admit the Macmed claim as readily as they have done. Somewhat surprisingly the liquidators have been far less vigilant in their scrutiny of the Macmed claim than they were in respect of the Standard Bank and BoE claims. In respect of the former they had greater cause for scepticism. That lack of consistency evokes strong feelings of disquiet. It is so that the threshold for the admission of claims at a meeting of creditors is relatively low. All that is required is that prima facie proof of a claim should be produced. That is understandable in the context of an insolvent estate. The claim admitted to proof at the meeting of creditors is a provisional one. Only thereafter does the liquidator acquire the duty set forth in s 45 of the IA to examine 'all

available books and documents' to ensure that the claim in fact exists.

[178] The claim for R325m (although in fact R 324 880 000) was proved by Macmed as one for moneys lent and advanced. Nel admits that 'there is no reference to the Peregrine structure in the affidavit in support of the Macmed claim'. In fact, Pereira, one of the joint liquidators of Macmed, who deposed to an affidavit in support of its claim, stated:

'On 18 June 1999 Macmed lent and advanced the sum of R325 million to Intramed to enable Intramed to pay the purchase consideration of R325 million to Aspen for the Intramed division as referred to above'.

That clearly contemplates a payment by Macmed to Intramed. Such a claim one would imagine would be easy enough to formulate and equally simple to prove. But that is not the case here. Nel in his answering affidavit states:

'I admit that, as the books had not been completely written up to record all transactions as at date of liquidation , the books of Intramed, prior to its winding up, do not disclose . . . the existence of the loan of R325 million owing by Intramed to Macmed prior to liquidation on 29 November 1999.'

And yet in response to the criticism that they had not properly examined the Macmed claim in terms of s 45 of the Act, Nel states:

'As I have already explained we examined the claim and satisfied ourselves as to the validity of Macmed's claim and decided not to dispute the claim, particularly in that it agreed with the books and records of Intramed as at date of liquidation i.e. 29 November 1999 as audited by Deloitte & Touche. . . .'

[179] But as Navsa JA makes plain, up until the end of October 1999, some three-and-a-half months after the Peregrine structure came into effect, the financial records of neither Macmed nor Intramed reflected a loan of R325m. It was only after the provisional liquidation of Intramed and the liquidators had taken charge of Intramed's books of account that an entry reflecting a loan was made for the first time in Intramed's books. In a note to the financial statement the loan is described as a 'long term loan that arose on the acquisition of the net assets, trade marks and goodwill as at 1 March 1999. The loan is unsecured and interest free. The terms of repayment have not been specified'. As is once again evident from the judgment of Navsa JA, Deloitte and Touche stated that they 'were unable to confirm the amount owing to Macmed as at 28 November 1999'. In fact on 24 November 1999, Millison of Deloitte and Touche wrote in reference to the Macmed loan: 'this matter is yet to be resolved'. Dealing with the Deloitte and Touche qualification, Nel states:

'However, it appears that the only reason the auditors qualified their report is because of them not

receiving any supporting documentation i.e. the Peregrine Agreements, to confirm their conclusion that there was a loan of R225 million owing to Macmed by Intramed'.

If that is indeed so, the obvious question that it prompts is: What information did the auditors rely upon in concluding that there was in fact a loan owing by Intramed to Macmed? Nel suggests in answer to that question:

'This [the existence of the loan] appears to have been based on the information received during their discussions with Viljoen and Muller, resulting in the entries they instructed Intramed to pass in its books'.

[180] In sum therefore to once again borrow from Nel:

'Deloitte & Touche's interpretation of the information and discussions with Viljoen and Muller resulted in the raising of a Macmed loan account in Intramed's books in the amount of R325 million'.

If what Nel says is to be taken at face value, the auditors had not had sight of the Peregrine Agreements. No other documents in support of the existence of a loan are to be found in the record of some 1400 pages. It is unclear what other information – none in the fairly voluminous record has been specified – had to be interpreted. The high water mark therefore appears to be the rather speculative hypothesis that discussions with Viljoen and Muller yielded sufficient proof in support of the existence of a loan. Although details of those discussions have not been divulged and whilst whatever was said did not appear to satisfactorily resolve the issue for the auditors, particularly Millison, it somewhat surprisingly appears to have persuaded the liquidators.

[181] To use, as the liquidators do, the ex post facto entry that had been generated in the books of Intramed after its provisional liquidation and whilst the books were already in their custody as proof of the existence of the loan is nothing short of disingenuous. To say under oath as Nel does that they had decided not to dispute the claim because it agreed with the books and records of Intramed as at the date of liquidation may well be patently dishonest. But it may not be necessary to go that far. That attitude is also difficult to reconcile with Nel asserting:

'It is surprising that [Standard Bank] would place reliance on the accounting records of Intramed or Macmed or any of the companies in the Macmed group'.

And yet, it would seem, that is precisely what Nel himself purports to do.

[182] It, to my mind, is difficult to discern precisely why in the face of the Peregrine Agreements, the liquidators have admitted the Macmed claim as blithely as they did. The reason appears to be that the liquidators dispute the validity of the Peregrine Agreement. In that regard Nel states:

'The whole dispute between the parties relating to [the Peregrine] agreement stems from the fact that the applicant, and more particularly the deponent to [Standard Bank's] founding affidavit, . . . persistently refuses to accept that the Peregrine Structure was a simulated transaction and that a Court will give effect to the real intention, which differs from the simulated transaction and that, even if the Peregrine Structure was not a simulated transaction, the whole structure unwound on the default by either party which occurred with the liquidation of Macmed'.

Nel further states:

'I deny that the Peregrine structure was fully implemented and confirm that it unwound on the liquidation of Macmed on 15 October 1999. This is confirmed and accepted by Viljoen of Peregrine, the liquidators of Macmed and De Villiers and myself in our capacity as liquidators of Intramed. Proof of acceptance of the Macmed claim confirms this'.

It is difficult to reconcile those emphatic assertions with the evidence of Hanson, a Macmed director, or Viljoen, who represented Peregrine at the time that the Peregrine structure was put in place and that it was not a simulated transaction. As is evident from the judgment of Navsa JA, both Hanson and Viljoen stated under oath that the agreements were genuine. It needs be added that when Viljoen testified at the Macmed enquiry, it was never put to him that the Peregrine structure was a sham. Moreover, Nel's statements disregard the legal opinions to the contrary that the transaction was not simulated and that 'the companies intended to achieve precisely that which the primary purpose of the financing structure was aimed at'. Whether the Peregrine structure was fully implemented or unwound on the liquidation of Macmed are matters that the liquidators of Macmed and Intramed could not possibly have personal knowledge about. That being so, Nel must know that his confirmation of that state of affairs, without divulging the source of his information, is of little value. It also stretches credulity that Nel could invoke their acceptance of the Macmed claim as a factor in support of the suggestion that the Peregrine agreement was not fully implemented or unwound.

[183] Standard Bank contends that there is no evidence of payment of a loan by Macmed to Intramed. Nel's response is:

'I admit that the amount of R325 million was received by Intramed on 18 June 1999 from Pregrine Finance, a subsidiary of the Peregrine Group, which received the funds from Macmed and round-tripped it back to Macmed through Intramed, in the course of the implementation of the Peregrine Structure'.

This is reiterated by Nel when he states:

'I admit that Intramed received R325 million from Peregrine Finance on 18 June 1999 and on the

same day transmitted the sum of R325 million to Macmed'.

But Nel himself later puts it somewhat differently, when he states:

'There was no need for Intramed to finance the acquisition of its business from Macmed by way of a loan from Peregrine Finance in terms of the Peregrine Structure. Macmed had already acquired and funded the acquisitions and placed the business in Intramed with effect from 1 March 1999, culminating in an inter-company loan for R325 million.'

All of that being so, to simply characterise the Macmed claim as a loan - more so a loan by it to Intramed - as the liquidators have done, is untenable, more especially as Nel's description is not only in itself contradictory but also at odds with Pereira's, particularly with reference to the date of the alleged loan. Nel seeks to explain these apparent contradictions as follows:

'The Peregrine structure was no more than a simulated transaction for tax efficiency purposes. The loan of Macmed to Intramed of R 325 million arose on the acquisition of the Pharmacare Intramed business and assets by Macmed and transferred to Intramed with effect from 1 March 1999. The flow of funds and the date, 18 June 1999, thereof do not indicate the date of acquisition and corresponding debt. The intended transaction was the placing of the Intramed business into Intramed (Pty) Ltd culminating in a loan of R325 million owing by Intramed to Macmed at 1 March 1999'.

[184] Nel dismisses Standard Bank's concerns in these terms:

'[Standard Bank] completely disregards the true nature of the transaction and the real intention of the parties thereto. It appears that [Standard Bank] has become bogged down by irrelevant detail and that it cannot "see the wood for the trees"'.

Far from allaying Standard Banks's fears, it regrettably is precisely that attitude on the part of the liquidators that has contributed to the prevailing atmosphere of distrust. On the one hand Nel is quite adamant in asserting that a valid loan was advanced by Macmed to its subsidiary Intramed. On the other he states: 'The Macmed group during the years 1998 and 1999 was no more than "an empire of smoke and mirrors". . . '.

In those circumstances, Standard Bank's central contention is simple, namely that, admitting the Macmed claim not only ignores the Peregrine Agreement, but also the reality that the Macmed group was in fact an empire of smoke and mirrors. Accordingly, so the contention proceeds, the Intramed liquidators, who were alive to the true facts, ought to have recommended to the Master that he

expunge it.

[185] Like Navsa JA, I too am of the view that the reliance by the liquidators on legal advice as a justification for their conduct is glib. At no stage, as Navsa JA points out, was a legal opinion sought and obtained on behalf Intramed in respect of the Macmed claim. Furthermore, it is not without significance that the attorney concerned, after some 6 years of advising the liquidators to the group of companies, withdrew as attorney in the matter because of a conflict of interest. Why it took that long for the realization to dawn that it is wholly improper for an attorney to dispense legal advice to both debtor and creditor in respect of the same claim has not been explained. It can hardly be justified on the basis that both the debtor and creditor were companies in liquidation from the same stable, especially since the claim in question was from the outset a contentious one, whose validity was in dispute. The withdrawal of the attorney because of a conflict appears not to have provoked any anxiety in the liquidators about their own position and the potential conflict that they found themselves in. Nor did it prompt them to solicit an opinion on behalf of Intramed as to the validity of the Macmed loan.

[186] As Navsa JA records, the parties were agreed that we cannot reach any definitive conclusions about the Peregrine agreement or the effect of liquidation on it. Nor is it necessary at this stage do to so. It suffices for present purposes to record, as Navsa JA has done (para 99) that there is much in the evidence that points to a genuine intent on the part of the parties to conclude a binding agreement and a serious endeavour on their part to implement its terms. Indeed as Navsa JA demonstrates all of the parties to the contract went some way in implementing its terms. In those circumstances it hardly seems appropriate for the liquidators ex post facto and in the absence of all of the parties to the contract to adopt a contrary stance in respect of its enforceability. It follows that the assertion of a loan by Macmed is deserving of scrupulous interrogation by the liquidators. That, the liquidators have steadfastly refused to do. In that, they have failed in their duty. I have set out what Nel himself says about the Macmed claim in greater detail than is absolutely necessary because it illustrates, I daresay, that on the face of it the Macmed claim appears to be a dubious one. On the view that I take of the matter, a reasonable liquidator in the diligent discharge of his duty would have subjected that claim to a more thoroughgoing and searching scrutiny. Moreover, they would not simply have ignored or disregarded the many contrary

indicators alluded to by Navsa JA. Instead the stance adopted by the liquidators manifests a closed mindset in relation to that claim and a desire either wittingly or unwittingly to advance the interests of Macmed at the expense of Intramed. All of those factors, in my view, may well in the ordinary course be sufficient to disqualify a liquidator from continuing to act as such. But here, there is an additional factor, a telling one – namely the alleged misappropriation - one that at the same time tips the scales against the liquidators and disabuses my mind of the personal anguish and reticence that it has suffered in supporting so drastic a step as their removal from office.

[187] It can hardly be in dispute that a liquidator must hold the funds under his trusteeship separately from his own, preserve those funds with a degree of diligence beyond that which he applies to his own funds and above all else never use funds under his trusteeship for his own personal purposes. The liquidators repeatedly deny that the use of Intramed's funds to pay for the fee review application amounts to misappropriation. Their failure, even after the criticism of their conduct by this court, to acknowledge their wrongdoing and to show appropriate contrition for their conduct is in and of itself a matter for grave concern.

[188] When the fee review application was launched during December 2001 the liquidators did not seek the leave of the court to have the costs paid out of Intramed's funds. They merely sought an order that the Master pay the costs if he opposed the application. The Master contended from the outset that they were not entitled to approach the court *nomine officio* but ought to have done so in their personal capacities. On 31 October 2002 the high court dismissed the fee review application and ordered the liquidators to pay the costs, including those of intervention by 5 banks, personally. By then an amount of R689 747.91 had been paid out of Intramed's funds. From then until the exchange of heads of argument in the SCA, a further R114 761.59 of Intramed's funds were utilized. The total thus stood at R804 419.50. The Master, after perusal of the first draft of the fourth liquidation and distribution lodged during August 2003, enquired why the liquidators were 'of the opinion that these costs should be reflected in the estate account and secondly why were estate funds used to pay these items'. In response De Villiers sought return of 'all vouchers in respect of legal costs' to 'separate the costs pertaining to the fees review application from other legal costs'. He added that to the best of his recollection no legal costs relating to the fee review application had been paid out of Intramed's bank account subsequent

to the judgment of the high court. That as we well know was untrue. Some eight and a half months later and presumably after sufficient time had elapsed for him to have ascertained what the true position was, that assertion was repeated in a further letter to the Master. Responding to the allegation that De Villiers had misled the Master, Nel suggests that: 'This did not purport to be an exhaustive answer to the Master's query. . . '.

That response, in my view, is disingenuous and lacking in candour.

[189] Section 393 (1) of the Companies Act provides:

'Immediately after his appointment a liquidator shall open a book or other record wherein he shall enter from time to time a statement of all moneys, goods, books, accounts and other documents received by him on behalf of the company'.

Had the liquidators complied with the obligation imposed upon them by the section, it would not have been necessary for them to have sought and obtained return of the vouchers from the Master in order to answer the Master's query or to resort to the qualifier 'to the best of his recollection'. Moreover, it would seem that the vouchers were sought for the limited purpose of identifying and separating the liquidator's personal costs from Intramed's legal costs. That, as well, only in respect of the 4th Liquidation and Distribution Account. Tellingly, Standard Bank later ascertained that further costs had been included in earlier liquidation and distribution accounts. Of this, Nel states:

'At the time, it did not occur to De Villiers or I that some of the review costs might already have been expensed in earlier accounts. … After [Standard Bank] made that allegation, De Villiers uplifted all the vouchers in respect of legal costs in the 2nd and 3rd Accounts from the Master, in order to investigate the matter. His investigation showed that legal costs relating to the review application had been expensed in the 2nd Account to the extent of R43,822.49 and in the 3rd Account to the extent of R232,424.13'.

[190] The judgment of the SCA was handed down on 1 April 2004. The SCA held that the application should obviously have been brought by the liquidators in their personal capacity and not in their capacity as joint liquidators. Of the SCA judgment, Nel states: 'We accept that the Supreme Court of Appeal determined that the application for review ought not to have been brought in that manner, and that we ought to bear the costs personally. We have, to the best of our ability, investigated, reconciled and audited all of the legal costs pertaining not only to the review proceedings, but also to our challenges to the Master with which everything started. We have repaid all of the review legal costs to the estate, including interest'.

Once again one is confronted by a qualifier. In this instance it is 'to the best of our

ability'. Elsewhere Nel states:

'The reconciliation has been prepared by De Villiers and audited by me and we verily believe it to be correct in all respects. We believe that each and every cent that was paid by Intramed has been repaid with interest. Should it, however, appear that we missed any amount (which we seriously doubt) we shall immediately attend to the repayment of such amount together with interest thereon at the applicable rate. We never intended to act to the detriment of the estate and we still do not intend to do so'.

Here too, the language employed is deliberately coy and cagey. Thus they 'believe' the reconciliation to be correct in all respects. Similarly, they 'believe' that every single cent has been repaid. Not content with those hollow assertions, they add, should it 'appear' – to whom is not disclosed (is it expected that someone else should perform a further auditing function) - that they 'missed' any amount, and then for good measure a further qualifier 'which we seriously doubt' is added. Syntactically, it is as if they have suddenly chosen to talk in tongues. Plainly, such obfuscatory language is not what a court is entitled to expect from experienced chartered accountants, auditors and liquidators such as these.

[191] In response to the allegation that there was an inordinate delay in effecting repayment, Nel says:

'The sum of R507,492.02 was duly refunded in June and August 2004 … I deny that this constituted an unreasonable delay. We first had to consider and obtain advice on the effect of the judgment, and then to make the appropriate arrangements for the repayment of the review legal costs. In my case that required obtaining the money from PWC and arranging with the other Macmed liquidators for repayment of their contributions to the review legal costs. . . . '

That as we well know is simply untrue. Repayment in fact occurred at irregular intervals and in varying amounts over the period 7 June 2004 to 25 August 2005. In all some 16 months were to elapse from the date of dismissal of the appeal by this court, before the full amount was repaid. Thus by the time the application, the subject of the present appeal, was launched in the court below an amount of R43 822.49 remained outstanding. The final payment was only effected on 25 August 2005, three days before the liquidators delivered their answering affidavits in the matter. Standard Bank suggests that such conduct is manifestly cynical and calculated, as it enabled the liquidators to proclaim in their answering affidavit that all moneys had been repaid. It is difficult not to agree with that

submission.

[192] Notwithstanding the fact that the liability to repay was the joint and several obligation of the two of them, Nel endeavours to explain the delay in effecting repayment promptly thus:

'In fact, the Macmed Joint liquidators had a group fee sharing agreement, and they in turn, agreed to share my review legal cost in the same proportion as the fee sharing agreement. The collection of these *pro rata* costs (for me) from the Macmed Joint liquidators caused the delay and PWC on receipt of these payments, immediately paid the funds to Intramed'.

It is unclear to me why any private fee sharing arrangement can be invoked as justification for the delay. Simply put, the liquidators who were held by this court to be personally liable for those costs, had an obligation to promptly repay it to Intramed. If they had a right of recourse in terms of some private treaty to others, and there was some delay in recovering, that delay ought to have been for their account and not that of Intramed. Instead, they conducted themselves as if their own obligation to Intramed extended no further than the repayment of their share in terms of their private fee sharing agreement.

[193] Nel illustrates alarmingly poor judgment and introspection when he states:

'Intramed, as a result of interest being paid on the review costs paid by Intramed, has suffered no loss and therefore any allegation of tardiness is irrelevant'.

Later, Nel states:

'We are . . . criticized for our initial failure to pay interest when we refunded the review legal costs to Intramed. Shortly after the decision of the Supreme Court of Appeal, I considered the issue of payment of interest and formed the view that we ought to pay the interest when called upon to do so by the Master, which the master has not done to date. . . . However, we took advice, firstly from Brooks, and then from counsel. After we were advised that interest ought to be paid, we set about determining the appropriate amount. We have paid the review legal costs and the interest thereon. I deny that we acted improperly in this regard'.

First, it reflects poorly on Nel that he believed that their obligation to pay interest only arose if called upon by the Master to do so. They had used Intramed's funds to advance their personal interest as this court had already emphatically told them. In those circumstances there ought to have been no doubt that the highest

degree of promptitude was required in restoring Intramed to the position it would have been in, but for the ill advised use of its funds. The unauthorized use of Intramed's funds, once frowned upon by this court, demanded nothing less. Sheer embarrassment ought to have compelled return of Intramed's funds together with interest, not a demand from the Master. Further, Nel's statement is revealing for what it does not divulge. It does not tell us when the advice was obtained and more importantly when in relation to that advice the interest was paid to Intramed. Attorney Brooks in his affidavit, states:

'. . . I advised the Intramed liquidators that they should repay to the Intramed estate all the costs, and interest thereon . . . I cannot recall the exact date on which I advised the Intramed liquidators. I am advised that the Intramed liquidators, within a reasonable time, repaid the costs and interest to the Intramed estate'.

What the reconciliation statement does show, however, is that interest was not paid until after the launch of the present application in the high court, suggesting that Brooks may have been misled by his clients as to when payment was effected by them.

[194] None of this merited the consideration of the high court. The high court put it thus (paragraphs 28 and 29 of its judgment):

'The Supreme Court of Appeal handed down its judgment on 1 April 2004. The capital was refunded in June and August of that year. Apart from the delay occasioned by identifying what had to be repaid, the delay was also occasioned by Nel and de Villiers taking legal advice, by the time it took Nel to collect contributions from the Macmed liquidators as part of the fee sharing agreement and because of the time taken to rectify certain mistakes that had been made. The bank attempts to make much of this delay but, once Nel and de Villiers had committed themselves to pay interest, there was no prejudice caused to Intramed by a delay of a few months. . . .'

With the greatest respect to the high court, it appears to have been uncritical in its acceptance of the version advanced by the liquidators. It is unclear what legal advice was sought after the SCA judgment or why that would necessarily have contributed to the delay. What is clear is that the liquidators acted for the most part in flagrant disregard of the judgment of this court. I have already dealt with the liquidators awaiting contributions from the Macmed liquidators and why that ought not to avail them. I, unlike the high court, would hesitate to characterize

their conduct as a commitment to pay interest. As I have sought to show, initially, and for some time thereafter, they demonstrated a marked reticence to pay interest. The real and substantive criticism of the high court judgment though is its finding that 'the capital was refunded in June and August' 2004. That with respect to the high court is wrong in fact. The same can be said of its conclusion that no prejudice was caused to Intramed 'by a delay of a few months'. These findings are plainly unsustainable. It follows therefore that the high court ought to have reached a contrary conclusion to that reached by it on this aspect of the case.

[195] Ultimately, even Nel was constrained to concede: 'De Villiers and I acknowledge that certain overlapping and technically incorrect charging has taken place. However, in the context of the group, I believe this is acceptable'.

That damning concession, which did not even merit mention in the judgment of the high court, illustrates that they failed in the discharge of a most rudimentary function for liquidators, namely the keeping of proper books of account. Given the obligation imposed upon them to do so, that dereliction should not be countenanced.

[196] Nel asserts:

'I deny that De Villiers and I placed our own interests above those of Intramed and point out that we acted on legal advice at all times.'

The refrain on the part of the liquidators, namely that they acted on legal advice, does not avail them in respect of their conduct in relation to repayment of Intramed's funds. After the judgment of this court, there is simply no evidence of them having acted on legal advice in taking all of 16 months to repay those moneys. Nor, given the authority of this court, could I imagine, that such advice would have been given. If anything, properly analysed, the evidence suggests that in taking as long as they did in effecting payment of all of the capital plus interest, they may actually have acted contrary to legal advice.

[197] It follows, in my view, that the appeal must succeed and I accordingly concur in the order proposed by Navsa JA.

V M PONNAN

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JUDGE OF APPEAL

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