IN THE HIGH COURT OF SOUTH AFRICA

FREE STATE PROVINCIAL DIVISION

Case No.: 3807/2020

Reportable: YES/NO

Of interest to other Judges: YES/NO

Circulate to Magistrates: YES/NO

In the matter between:

CLOETE MURRAY N.O.	First Applicant[1]
GERT LOUWRENS STEYN DE WET N.O.	Second Applicant
MAGDA WILMA KETS N.O. [In their capacity as joint liquidators of Phehla Umsebenzi Trading 48 CC (in liquidation) with registration number [....]	Third Applicant

and

MADALA LOUIS DAVID NTOMBELA	First Respondent[2]
SEFORA HIXSONIA NTOMBELA	Second Respondent

[1]First to third applicants will be referred to as the “applicants” or “liquidators”.

[2]First and second respondent will be referred to as the Ntombela family. They are married and their son has apparently been residing on the property with his family. The third respondent did not partake in the litigation.

HUGO & TERBLANCHE AUCTIONEERS	Third Respondent

In re:

MADALA LOUIS DAVID NTOMBELA	First Applicant
SEFORA HIXSONIA NTOMBELA	Second Applicant

and

CLOETE MURRAY N.O.	First Respondent
GERT LOUWRENS STEYN DE WET N.O.	Second Respondent
MAGDA WILMA KETS N.O. [In their capacity as joint liquidators of Phehla Umsebenzi Trading 48 CC (in liquidation) with registration number [....]	Third Respondent
HUGO & TERBLANCHE AUCTIONEERS	Fourth Respondent
PHEHLA UMSEBENZI TRADING 48 CC[3]	Fifth Respondent
PANGANATHANA MARIMUTHU	Sixth Respondent
NEERMALA MOODLEY	Seventh Respondent
WERNER CAWOOD N.O.	Eight Respondent
JOHAN CHRISTIAAN DE BEER N.O.	Ninth Respondent

[3]"Phehla".

VISHAL JUNKEEPARSAD &

COMPANY ATTORNEYS	Tenth Respondent
MERLY MOONSAMMY ATTORNEYS	Eleventh Respondent
THE MASTER OF THE HIGH COURT, PRETORIA	Twelfth Respondent

Coram: Opperman, J

Date of hearing: 13 April 2022

Delivered: The judgment was handed down electronically by circulation to the parties' legal representatives by email and release to SAFLII on 24 June 2022. The date and time for hand-down is deemed to be 24 June 2022 at 15h00

Summary: Reviewability of a decision by liquidators not to perform in terms of an unexecuted contract for the sale of residential immovable property entered into by the insolvent prior to its liquidation – stay of Rule 6(5)(d)(iii) Notice to ensure completion of Rule 53 – process

JUDGMENT

INTRODUCTION

[1] The deep core of the application for leave to appeal is the submission that (the) liquidators do not have to justify or validate a decision not to perform in terms of an unexecuted contract for the sale of an immovable residential property to the Ntombela family; entered into by the insolvent, Phehla Umsebenzi Trading 48 CC, prior to its liquidation.

[2] It is the applicants' case that the decision is not reviewable and the court had to adjudicate this point in the interlocutory application; the finding of which is also a subject of the application for leave to appeal. I will depict a summary of the comprehensive grounds for leave to appeal by the applicants later. This was the order *a quo*:

ORDER

1. The filing of the Notice in terms of Rule 6(5)(d)(iii) by the first to third and fifth respondents is provisionally set aside pending the finalisation of the process prescribed in Rule 53 dealing with reviews in the Uniform Rules of Court;

2. First to third and fifth respondents are ordered to make available to the applicants the record of the proceedings sought to be corrected and set aside and in terms of Rule 53(1)(b) and within fifteen (15) days of the date of this order;

3. The applicants may within ten (10) days after the record was made available to them deliver a notice and accompanying affidavit, amend, add to or vary the terms of their notice of motion and supplement the supporting affidavit in terms of Rule 53(4);

4. The first to third and fifth respondents may reply in terms of Rule 53(5);

5. The first to third and fifth respondents are afforded 10 (ten) days from the date of the filing of the papers and the conclusion of the Rule 53 process above in which to amend and file their Notice in terms of Rule 6(5)(d)(iii), if necessary;

6. The parties must each carry their own costs.

[3] The common law authority of the liquidators to take the decision is not in dispute. There are two major issues in contention; the reviewability of the decision of the liquidators in the circumstances of this case and the ruling on the Rule 6(5)(d)(iii) Notice.

[4] The respondents, *via* Advocate Rautenbach SC, reacted with a succinct reply in their heads of argument that reflects the second issue of the Rule 6(5)(d)(iii) Notice:

> 2. The respondents rely on various grounds of appeal totalling sixteen grounds.[4]
>
> 3. For purposes of this application for leave to appeal, it is submitted that it is not necessary to deal separately with each ground of appeal. This is so as the Respondents' approach towards any relief can be summarised by stating that the Applicants' reliance on the Notice issued by them in terms of Rule 6(5)(d)(iii) was premature and could only be done once certain steps were taken by the applicants in terms of Rule 53 of the Uniform Rules of Court.

[5] After an effective and brief depiction of the law he stated further that:

> 12. Accordingly, this Honourable Court was one hundred present correct in in (sic) "staying" the Rule 6(5)(d)(iii) Notice as the notice was premature in the circumstances. There is nothing to prevent this Court from "staying" or declaring a provisional bar against the Rule 6(5)(d)(iii) Notice. The Court is entitled to use inherent jurisdiction to make such order.

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[4]The grounds are actually referred to as "Sets of Grounds" in the Notice and not "a Ground of Appeal". There are 16 sets. The "Sets of Grounds for Appeal" contain numerous aspects within each set and also overlap on the issue of review.

13. In terms of the Order, what the Court did was to order that the provisions of Rule 53 should be followed before taking cognisance of a Notice in Terms (sic) of Rule 6(5)(d)(iii).

14. In this specific matter, it seems that the only defence that the Respondents had in the interlocutory application is that they submitted that there was no documentation in respect of a record. This never constituted compliance with Rule 53 in terms of which the applicants are entitled to an answer as far as the record and the deliberations are concerned. It is in this regard quite clear from the review application that there was correspondence between the respective parties, obviously required the Respondent to apply their minds in taking a decision on the matter (sic).

15. The decision-making process was not elaborated on in the interlocutory application and nor was anything provided as part of a record of such decision-making process.

16. As pointed out above, the Respondent have not complied with the Rule and have not reached the stage where they could validly file a Rule 6(5)(d)(iii) notice in terms of which a point of law could be adjudicated.

[6] I will return to the detailed evolvement of the events in the case. But, as introduction; the Ntombela family purchased the property in 2014 and their son and his family have been residing there ever since. The legal sentiments in section 26 of the

Constitution[5] and Rule 46A of the Uniform Rules of Court[6] should be regarded in the background.

[7] The property was valued for the auction by the liquidators at R2 030 000.00 and the market value to be R2 300 000.00.[7] The Ntombelas purchased the property for R2 500 000.00. They had already paid the R2 500 000.00.[8] The property was not transferred to the Ntombelas before liquidation.

[8] The liquidators bring the application for leave to appeal and drives the litigation. There was up until this moment, no input by the Master of the High Court; the twelfth respondent. This matter has, unacceptably so, dragged on since 2020.

[9] The liquidators maintain that they do not have a record of how the decision was taken and they also do not offer any reasons for their decision.[9] They took the decision and cannot; in terms of "trite law",[10] be questioned. The law might not be so trite if one studies the ten cases they base their submissions on; hence the referral of this matter to the Supreme Court of Appeal later.

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[5] 26. Housing. — (1) Everyone has the right to have access to adequate housing.
(2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right.
(3) No one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions.

[6] Rule 46A
(1) This rule applies whenever an execution creditor seeks to execute against the residential immovable property of a judgment debtor.
(2) (a) A court considering an application under this rule must—
(i) establish whether the immovable property which the execution creditor intends to execute against is the primary residence of the judgment debtor; and
(ii) consider alternative means by the judgment debtor of satisfying the judgment debt,
other than execution against the judgment debtor's primary residence.
(b) A court shall not authorise execution against immovable property which is the primary residence of a judgment debtor unless the court, having considered all relevant factors, considers that execution against such property is warranted.
(c) The registrar shall not issue a writ of execution against the residential immovable property of any judgment debtor unless a court has ordered execution against such property.

[7] Review Application (Index dated 31 May 2021) at page 23 paragraph 45.

[8] Review Application (Index dated 31 May 2021) at pages 17 and 18.

[9] There is an allegation by the Ntombelas that some correspondence by the liquidators might explain the decision.

[10] Bundle dated 29 March 2022: "Index: Application for leave to appeal" at Pages 20/36 to 21/37 at paragraphs 60 and 61. I will return to the ten cases cited later.

[10] The vulnerability of buyers that have paid the full price for immovable property and, in the instance, more than the price the property was valued for to be sold at the auction by the liquidators, is clear. The property is a primary residence. For an entity as the liquidator to claim absolute unaccountability and responsiveness is curious in the constitutional democratic epoch this country has embraced since 1994.

[11] The conundrum of the case is that the processes of the litigation have not taken its course and all the facts have apparently not been ventilated.

[12] The claim of the liquidators is based on the common law of insolvency and their interpretation of administrative law. Calitz[11] said it best in 2012 already on the phenomenon that the Law of Insolvency is slow to catch up with the Constitution, 1996:

> The South African Constitution is different: it … represents a decisive break from, and a ringing rejection of, that part of the past which is disgracefully racist, authoritarian, insular, and repressive and a vigorous identification of and a commitment to a democratic, universalistic, caring and aspirationally egalitarian ethos, expressly articulated in the Constitution.
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> In the case of Pharmaceutical Manufacturers Association of South Africa: In re Ex Parte President of the Republic of South Africa Chaskalson J confirmed that there is only one system of law in South Africa and that all law, including the common law, derives its force from the Constitution of the Republic of South Africa. As the supreme law of the land the Constitution has changed the face of our law dramatically in that legislation may now be tested by the courts in order to establish its constitutionality.
>
> The Constitution featuring a Bill of Rights was not in place when the Insolvency Act came into force. Consequently, the values and principles entrenched in the

[11] OBITER (Volume 33), Issue 2, *State Regulation of South African Insolvency Law – An Administrative Law Approach*, pages 457 to 481 at Introduction on pages 457 to 458, online ISSN 2709-555X | Print ISSN 1682-5853 published on 1 January 2012.

Constitution in many instances differ radically from the values, principles and policies that formed the foundation of the Insolvency Act. (Accentuation added)

[13] It is acknowledged that:

Courts are often not best-placed, both prescriptively and descriptively, to make decisions that require a choice among many legitimate policy options or the use of specialised knowledge and skills. At the same time, administrators cannot have free reign in decision-making. That would be the rule of bureaucracy, not the rule of law**.** For the rule of law to mean anything, we must be governed by laws and not by people. (Accentuation added)

Constitutionalised judicial review — especially of questions of law and fact — necessarily requires substantive consideration of the merits of the decision, to determine whether it is lawful, reasonable and procedurally fair. Yet, as eminent administrative lawyers have cautioned, in doing so judges should take care not simply to replace the administrator's decision, with their own view of what is right.[12] (Accentuation added)

[14] Kroon[13] pronounced that:

Section 33 (of the Constitution) spawned the Promotion of Administrative Justice Act 2 of 2000 (PAJA). This is not the occasion to discuss various shortcomings in the Act to which a number of commentators have drawn attention. Suffice it to say that, albeit imperfectly, the legislation gives the courts the sinews of war, *via* judicial review, against unconstitutional administrative excesses, and enables them, by appropriate intervention, more positively to develop an ethos conducive to the advancement of our founding constitutional values.

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[12]M.N. De Beer, *Reviewable Mistakes of Law and Fact,* The South African Judicial Education Journal, Volume 4, Issue 1, December 2021, JUTA, ISSN: 2616-7999 pages 65 to 87 at 87.
[13]Frank Kroon, Retired Judge of the Eastern Cape Division of the High Court, *The Rule of Law: The Role of The Judiciary and Legal Practitioners,* The South African Judicial Education Journal, Volume 1, Issue 1, April 2018, JUTA, ISSN: 2616-7999, pages 81 to 88 at 84.

[15] Due to the interlocutory nature of the proceedings that served before me I decided that:

[17] It is imperative to stress that this Court is not presently called upon to adjudicate any of the Rule 6(5)(d)(iii) objections; that is the issues of law raised against the review application. It is the view of the respondents at page 35 of their heads of argument that the Court is forced to; with regard to prayer 2 (that the applicants be supplied with the record of the proceedings sought to be corrected and set aside) to take cognisance of the competency of the review application. I cannot do this and must work from the premise that the applicants have a right to access the Court with a review application and it is for that Court to decide the viability of the review. In the meanwhile, the process must take its course as will be shown hereunder.

THE INTERLOCUTORY ISSUES

[16] Courts must fathom the issue to be adjudicated and not be let astray by the litigants. In *De Wet and another v Khammissa and others* (358/2020) [2021] ZASCA 70 (4 June 2021) the Supreme Court of Appeal remarked that:

> [14] This case demonstrates the importance of a court's central role in the identification of issues. It is only after careful thought has been given to a matter that the true issue for determination can be properly identified. That task should never be left solely to the parties or their legal representatives. Unfortunately, this is what happened in this case. The court *a quo* was apparently led astray by the arguments contained in the appellants' notice in terms of rule 6(5)(d)(ii), which it accepted uncritically.

[17] This is the relief wanted *a quo*:

> [1] This is an interlocutory application under the auspices of Rules 30/30A of the Uniform Rules of the Court seeking:

1. An order to set aside the notice in terms of Uniform Rule 6(5)(d)(iii)[14] filed by the first to third respondents in the main review application;

2. The applicants, secondly, seek an order against the first to fourth respondents to comply with the provisions of Rule 53(1)(b) and that is to supply to the applicants the record of the proceedings sought to be corrected and set aside; and

3. The applicants want an order for costs if the application is opposed.

[2] The case for the applicants now, in the main application and in the urgent application, is based on an unexecuted contract entered into by the insolvent before insolvency. The applicants seek an order in the main application whereby the liquidators' election not to ratify an executory contract by a liquidated Close Corporation before its liquidation in relation to immovable property, is reviewed and set aside.

[18] The opposition to the application turned on four issues:

1. Whether this interlocutory application can be validly brought in terms of Uniform Rule 30A in circumstances where the applicants' notice is based on the provisions of Rule 30?

2. Whether any of the relief claimed by the applicants in this interlocutory application can be granted in circumstances where the applicants failed to file their notice or the interlocutory application within the applicable time periods stipulated by Rule 30?

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[14] Rule 6(5)(d)(iii):
Any person opposing the grant of an order sought in the notice of motion must—
(i) within the time stated in the said notice, give applicant notice, in writing, that he or she intends to oppose the application, and in such notice appoint an address within 15 kilometres of the office of the registrar, at which such person will accept notice and service of all documents, as well as such person's postal, facsimile or electronic mail addresses where available;
(ii) within fifteen days of notifying the applicant of his or her intention to oppose the application, deliver his or her answering affidavit, if any, together with any relevant documents; and
(iii) *if he or she intends to raise any question of law only he or she must deliver notice of his or her intention to do so, within the time stated in the preceding sub-paragraph, setting forth such question.*
[Substituted by GG 39715 of 19 February 2016 – Regulation Gazette 10566, Vol 608.]

3. Whether it is competent to claim relief to set aside the first to third respondents' Rule 6(5)(d)(iii) Notice in circumstances where there is, among others, a discrepancy between the applicants' grounds of complaints compared with the relief claimed in the interlocutory application?

4. Whether the interlocutory application is at all competent to address the failure, or rather inability, given the fact that no record exists as set out in paragraph 15 of the liquidators answering affidavit at page 31? The failure to file an application for the record in terms of Rule 53 but under Rule 30 that governs the setting aside of irregular proceedings, is fatal.

[19] The conclusion *a quo* on the above came to:

[53] This matter is unique in that the applicants were not given the opportunity to complete the litigatory process launched in terms of Rule 53. Whether the Rule 53 process is the correct one, is to be decided in the main application.

[54] The law in regard to Rule 53 must thus be adhered to and as read with Rule 6. The litigation to invoke Rule 6(5)(d)(iii) was not completed because the record has not been supplied. The applicants are correct in their submission that they cannot continue with the Rule 53-process if the record is not supplied. The founding papers, unlike in a pure Rule 6 application, only comes to finalization after the record has been provided and the applicants had the opportunity to file a supplementary affidavit to vary, amend or add to their initial founding affidavit. The Rule 6(5)(d)(iii) Notice was indeed premature; it follows with logic that the Rule 6(5)(d)(iii)-proceedings may only follow after the founding papers have been concluded.

[55] The respondents maintain there does not exist a record; the applicants maintains that it does exist albeit in the unusual form of correspondence and other communications. A record will have to be supplied by the respondents and they must have due regard to the fact that it may not be a conventional one. I reiterate: "It may be a formal record and dossier of what happened before the

tribunal, but it may also be a disjointed indication of the material that was at the tribunal's disposal. In the latter case it would, I venture to think, include every scrap of paper throwing light, however indirectly, on what the proceedings were, both procedurally and evidentially. It does include all the documents before the Executive Committee as well as all documents which are by reference incorporated in the file before it."

[56] The respondents have a right to raise any question of law. They may institute Rule 6(5)(d)(iii) proceedings but not now. To dismiss the notice abruptly and wipe it of the table will not be conducive to their right to access to Court. I will therefore grant them permission to access the Court on the same papers duly supplemented after the Rule 53 process has been finalised.

[57] All the parties contributed to the consternation and confusion in the case and they will have to carry their own costs.

[58] ORDER

1. The filing of the Notice in terms of Rule 6(5)(d)(iii) by the first to third and fifth respondents is provisionally set aside pending the finalisation of the process prescribed in Rule 53 dealing with reviews in the Uniform Rules of Court;

2. First to third and fifth respondents are ordered to make available to the applicants the record of the proceedings sought to be corrected and set aside and in terms of Rule 53(1)(b) and within fifteen (15) days of the date of this order;

3. The applicants may within ten (10) days after the record was made available to them deliver a notice and accompanying affidavit, amend, add to or vary the terms of their notice of motion and supplement the supporting affidavit in terms of Rule 53(4);

4. The first to third and fifth respondents may reply in terms of Rule 53(5);

5. The first to third and fifth respondents are afforded 10 (ten) days from the date of the filing of the papers and the conclusion of the Rule 53 process above in which to amend and file their Notice in terms of Rule 6(5)(d)(iii), if necessary;

6. The parties must each carry their own costs.

THE DEVELOPMENT OF THE CASE

[20] The Ntombelas brought an application against the then respondents in case no. 3807/2020 on the 9th of October 2020 on an urgent basis to suspend the sale of a property, Erf 3398 plus improvements thereon. On 9 October 2020 I ordered as follows:

1. Non-compliance with the provisions of the Rules relating to time periods and the manner of service referred to hearing and dealing with the matter as one of urgency in terms of the provisions of Rule 6(12) of the Court is condoned;
2. The auction and sale of the property ERF 3398 plus improvements thereon are stayed and interdicted in the interim, pending the finalisation of the review application to be instituted by the applicants before 9 November 2020;
3. The applicants to pay the wasted costs of the interdicted and stayed auction of 9 October 2020;
4. The applicants to pay the wasted costs of the first, second, third and fifth respondents of the hearing on 8 October 2020.

[21] I refused prayer 3 of the urgent application that the then first, second and third respondents shall take steps necessary to transfer the property into the name of the Ntombelas. Specific performance was not ordered nor entertained.

[22] The facts that lead to the urgent application are that the Ntombelas had various discussions with Mr. Marimuthu, the sixth respondent and representative of the fifth respondent (Phehla), about the acquiring of the property with the improvements. The property is a house for residential purposes.

[23] The property in issue is ERF 3398 Bloemfontein Ext 3, Bloemfontein, Mangaung Metropolitan, Free State Province.

IN EXTENT: 2901 (Two thousand nine hundred and one square metres)

Held by Deed of Transfer No. T16518/2011.

[24] The registered owner of the property is Phehla Umsebenzi Trading 48 CC, Registration Number: 2004/054809/23 (“Phehla”) duly represented by Neermala Moodley (“the seller”).

[25] Ms. Moodley and Mr. Marimuthu are married to each other in community of property and are in business together.

[26] The Ntombelas paid various sums of money over to Mr. Marimuthu in payment of the sale that took place and they even took possession of the property through their son and his family in the beginning of 2014. The property has since been used and regarded by the son and his family as their primary residence.

[27] Well aware of the importance of the formalization of the transaction in writing and after inquiries, the Ntombelas were referred by Mr. Marimuthu and Ms. Moodley to the tenth respondent as their attorneys, to prepare an agreement in respect of the sale and the transfer of the property. The agreement was signed on 6 August 2015. Ms. Moodley signed as seller and Mr. Ntombela as the purchaser.

[28] The purchase price was to the amount of R 2 500 000.00. The sum of R 2 300 000.00 had already been paid by the purchaser as on 6 August 2015. The amount of R200 000.00 had to be paid on the signing of the agreement.

[29] From time to time the Ntombelas made inquiries as to when the transfer process will be finalised. It is their version that they were assured that the process is ongoing. Later it transpired that the seller was reluctant to sign the agreement.

[30] The Ntombelas had no knowledge whatsoever of the financial position of Phehla, the fifth respondent. The reason for the delay in the transfer was alleged to have been the procurement of clearance certificates due to accounts issues experienced at the Mangaung Metropolitan Municipality. The son, occupying the property as primary

residence, made inquiries in 2018 at the tenth respondent's offices and was assured that the seller signed the transfer documents.

[31] Around mid-2019 the Ntombelas instructed their attorneys of record to assist and follow up with the tenth respondent about the transfer. The inquiries were to no avail and they wanted to turn to the Legal Practise Council for assistance.

[32] On the 21st of November 2019 the tenth respondent informed that their mandate has been terminated and the eleventh respondent was appointed.

[33] The business rescue practitioners were allegedly fully aware of the fact that the property was sold for its real value. The whole issue of the property was apparently dealt with in the Court Order of Case number 93289/2015 on 6 June 2018. The interpretation of the Court Order by the Ntombelas is that the property was legally sold to them and that it was not subjected to business rescue.

[34] The factual and legal conundrum that eventuated is that since the property has not been registered in the Ntombelas' name and Phehla having been liquidated, the property fell into the hands of the liquidators.

[35] On 18 September 2020 the liquidators wrote a letter requesting a copy of the written sale agreement and proof of payment. It was apparently submitted.

[36] In middle September 2020 the Ntombelas became aware of the fact that the property was going to be sold on auction on the 9th of October 2020. Desperate notices and letters were written to the liquidators just for them to be informed that they as the liquidators are not bound to the sale agreement concluded prior to the liquidation of Phehla and they have elected not to ratify the sale as they are entitled to do. The liquidators informed that the auction will go ahead.

[37] There were apparently oral negotiations between the attorneys of the applicants and the liquidators that they undertook to ratify the sale agreement on proof of payment

of the purchase price. This was conditional as long as the sale was not below market value. The property was valued as being R2 300 000.000. The applicants purchased the property for R2 500 000.000. The conversation took place on 17 September 2020.

[38] The Ntombelas now took the decision of the liquidators on review in terms of Rule 53 of the Uniform Rules. The Notice of Motion in terms of Rule 53 dated 9 November 2020 was filed on 10 November 2020 at the Free State Division of the High Court.

[39] The Ntombelas launched the review application against the liquidators within the time limits as were stipulated by the Court. They served the application on 9 November 2020 on the liquidators and filed at Court on 10 November 2020. They claimed for the following:

> 1. That the decision taken by the first, second and third respondents recorded in a letter of the respondents attached to the founding papers to sell the said property known as Erf 3387, Bloemfontein Ext 3 with the improvements thereon be reviewed and set aside;
> 2. That the first, second and third respondents, as liquidators of the fifth respondent, be ordered to sign all transfer papers necessary to enable the Deeds Offices to transfer the property to the applicants;
> 3. That in the event of this application being opposed, the first, second and third respondents be ordered to pay the applicants' costs, which costs shall be taxed on the scale as between attorney and client, including the costs of two Counsel, one which is Senior Counsel.

[40] On 30 November 2020 the first, second and third respondents ("the liquidators") delivered a Notice in terms of Rule 6(5)(d)(iii). The liquidators wanted for the following relief:

> 1. Firstly, that the applicants are enjoined from making an application to have the liquidators' decision reviewed and set aside; and

2. Secondly that the applicants are enjoined from claiming and ordering specific performance against the liquidators.

[41] The review has not taken its course because the record remained outstanding. The liquidators wanted an application for condonation for the late filing of the application for an order to compel them to supply the record and the dismissal of the Rule 6(5)(d)(iii) objections.

THE APPLICATION FOR LEAVE TO APPEAL

[42] The application for leave to appeal is extensive in words and objections. As I indicated; the core issue is the fact that the applicants do not want for the matter to be reviewed because they submit for it to not be legally reviewable. It is the golden threat that runs through the application for leave to appeal.

[43] The facts are *sui generis* and the parties have complicated the matter with their conduct and manner of litigation. The case must be dealt with and finalized in the interest of justice. The rules are for the Court and not the Court for the rules; any conduct that does not comply with the Constitution is illegal.

[44] The Supreme Court of Appeal might view the issues differently than the Court below and must the issues be ventilated and decided upon for once and for all. If the issues are not adjudicated here and now, specifically the reviewability, it will in any event conclude in an appeal at the end of the case and the matter delayed to the detriment of justice.

[45] The grounds for appeal, summarized as best as possible and not purported to be exhaustive, are:

1. “The Court should have found that the claim for specific performance against the applicants in the main review application is incompetent and bad in law, and will consequently render review proceedings, even if competent,

nugatory." (At page 4/20 paragraph 4 of the Bundle: "Index: Application for leave to appeal" dated 29 March 2022 ("the Bundle")). The reviewability issue features in this ground.

2. "The Courts summary recorded at paragraph [5] of the judgment of the issues to be decided, ignores and fails to meaningfully deal with the second point *in limine* and particularly the third point ignores the point *in limine* raised by the applicants embodied in paragraphs 27 – 32 of the answering affidavit, being to the effect (as summarised) that the initial notice in terms of Rule 30/Rule 30A did not raise an objection insofar as it relates to the applicants' notice in terms of Rule 6(5)(d)(iii) and the reliance thereon is improper. The extension of the ambit of the complaint, by way of the application at issue, is inappropriate and ought not to have been countenanced by the Court." The reviewability issue features here. (Page 6/22 at paragraphs 7 and 8 of the Bundle)

3. "The Court erred to engage "unusual remedies" to adjudicate the merits of the interlocutory application and instead ought to have merely applied Uniform Rules 53, 6 and 30A, respectively". (Page 14/30 at paragraph 39 of the Bundle)

4. "In reaching aforesaid conclusion, the Court erred by conflating a party's entitlement to add to, supplement or vary the terms of its notice of motion and supporting affidavit in a review application upon receipt of a record, with a party's ability to file a replying affidavit in review proceedings." (Page 16/32 at paragraph 46 of the Bundle)

5. "The Court erred by making a finding of fact that a record existed which the applicants had to provide…" (Page 18/34 at paragraph 53 of the Bundle)

6. "In analysing and relying on various authorities, the Court erred by approaching the enquiry to the entitlement to a record without any heed to the question whether the proceedings sought to be reviewed, are in fact reviewable." (At page 19/35 at paragraphs 58 & 60 of the Bundle)

7. The seventh ground again goes to the reviewability of the conduct of the liquidators. (Page 23/39 at paragraph 68 of the Bundle)

8. The eighth ground is again aimed against the reviewability of the conduct of the liquidators. (Page 25/41 at paragraph 78 of the Bundle)

9. “In its analysis of the case and pertinent issues, the Court erred by failing to give an accurate account of all of the issues that are germane to the main review application and specifically failed to deal with any of the issues and factual disputes raised by the applicants in opposition to the main review application.” (Page 26/42 at paragraph 80 of the Bundle)

10. “In paragraphs [46] to [50] of the judgment, the Court erred by conflating and confusing the various points *in limine* raised by the applicants with other points *in limine*, and also with the issue of the production of the record.” Again, reviewability is the underlying issue. (At Page 28/44 paragraph 86 of the Bundle)

11. “The Court erred by failing, entirely, to adjudicate the second point *in limine* raised by the applicants.” The issue is about the record and reviewability. (Page 33/49 at paragraph 96 of the Bundle)

12. “The Court erred by failing and/or refusing to deal with the third point *in limine.*” “The Court erred by failing to appreciate and find that a record in terms of Rule 53(1)(b) can and should only be provided once a party has established as a jurisdictional fact, that the proceedings are in fact reviewable.” (Page 35/51 at paragraphs 103 and 105)

13. “The Court erred by failing and/or refusing, entirely, to deal with the fourth point *in limine*, *alternatively*, by implicitly finding against the applicants in respect of the fourth point *in limine* in that the Court ordered the production of a record under Rule 53(1)(b) whilst declining to expressly deal with the pertinent issue of reviewability.” Again, reviewability is the issue. (Page 36/52 at paragraph 111)

14. “The Court erred by disregarding the evidence of the applicants set out in the answering affidavit to the main review application and the answering affidavit to the interlocutory application, without any basis or justification for doing so.” (Page 40/56 at paragraph 121)

15. “In paragraph [56] of the judgment the Court correctly finds that the applicants have a right to raise any question of law, but incorrectly concludes that such points in law may only be raised after the Rule 53 process has been finalised.” (Page 41/57 at paragraph 126)

16. “The costs of the interlocutory application should have been borne by the first and second respondent on a punitive scale.” (Page 43/59 at paragraph 135)

PRECEDENT QUOTED BY THE APPLICANTS ON THE NON-REVIEWABILITY OF THEIR DECISION

[46] The discussion of Plasket, JA in December 2021 on “*The Understated Revolution: The Development of Administrative Law in the Appellate Division of the Supreme Court of South Africa in the 1980s and 1990s*”[15] gives insight into the principles to be applied when the reviewability of the actions of entities such as liquidators are adjudicated. Some of the cases quoted by the applicants, similarly, show the development of this task. None of the cases relied upon by the applicants causes an inference or carries a statement that the conduct of liquidators in instances as in this case, are not reviewable.

[47] The cases quoted by the applicants were consulted when the matter was adjudicated *a quo*; I did however rule that the reviewability is not relevant in the interim and should be decided by the court that will deal with the review itself. This is because all the facts were not on the table as yet. If I erred in the decision, the cases quoted by the applicants, did not rule against the reviewability of the decisions of liquidators. The

[15]The South African Judicial Education Journal, Volume 4, Issue 1, December 2021, JUTA, ISSN: 2616-7999 at pages 1 to 18.

facts of this case demonstrate a glaring need for judicial overview of the autocratic conduct of liquidators. I could not find precedent on the issue at the time of writing this judgment and before.[16]

[48] Mars[17] gave some guidance with reference to the Sarrahwitz – case from the Constitutional Court:

> **(i)** The writers resolved that indeed and in terms of the common law, on sequestration of an immovable property sold by the insolvent but not transferred, ownership passes to his trustee.
> **(ii)** The contract of sale is not terminated, modified or in any way affected by the sequestration of the estate of one of the parties.
> **(iii)** The exception is that the trustee cannot be compelled by the other party to perform the contract.
> **(iv)** The trustee may therefore either enforce or repudiate the contract.
> **(v)** If he decides to enforce the contract, he must fulfil all the insolvent's outstanding obligations under it.
> **(vi)** Should he decide not to perform in terms of the contract, the purchaser cannot claim transfer of the land even if he has paid the full purchase price unless it falls within the exception created by the Constitutional Court

[16]See *De Wet and another v Khammissa and others* (358/2020) [2021] ZASCA 70 (4 June 2021) that deals with the reviewability of a decision of the Master of the High Court.
[17]Bertelsman *et al, Mars: The Law of Insolvency in South Africa* (10th Edition), JUTASTAT e-publications, Internet: ISSN 2224-4743, at 12.2 Effect on contracts for the acquisition of immovable property, 12.2.2 Sequestration of seller's estate, pages 249 to 253.

in *Sarrahwitz v Maritz NO* 2015 (4) SA 492 (CC)[18] and he only has a concurrent claim for damages for non-performance of the insolvent's contractual obligations.

(vii) The protection afforded to instalment-sale buyers under section 21 and section 22 of the Alienation of Land Act 68 of 1981 is an option but problematic.

[49] I am with Cameron, J and Froneman, J in their concurring minority judgment that the vulnerable consumer in these scenarios needs protection; and equity in protection.

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[18] The case first and foremost turns on the right to housing and the protection of vulnerable purchasers. The Alienation of Land Act 68 of 1981 per sections 21 and 22 apparently fail to give cash purchasers same protection (right to transfer) as instalment purchasers and the Constitutional Court amended the provisions to provide equal protection to all vulnerable purchasers in event of the insolvency of a seller.
The facts are that in September 2002, Mr Posthumus entered into a contract for the sale of a house to Ms Sarrahwitz. She paid cash and took occupation in October 2002. But Mr Posthumus did not transfer the house into her name and in April 2006 his estate was sequestrated. The first respondent, who was appointed trustee of Posthumus' insolvent estate, refused to transfer the house to Ms Sarrahwitz on the ground that it formed part of the insolvent estate.
Ms Sarrahwitz approached the High Court for an order for transfer but her application was refused on the ground that the common law and not the Act regulated the transfer of the house and that the common law supported the trustee's position. Her subsequent approaches to the full bench of the High Court and the Supreme Court of Appeal failed for the same reason.
Ms Sarrahwitz's problem was that, as a cash buyer, she did not enjoy the protection afforded to instalment-sale buyers under section 21 and section 22 of the Alienation of Land Act 68 of 1981. The Act provides that a buyer of residential property who pays the purchase price in two or more instalments over a period of one year or longer is entitled to demand transfer if the seller becomes insolvent. In an application for leave to appeal to the Constitutional Court, Ms Sarrahwitz for the first time raised constitutional principles, arguing that the common law and the Act unconstitutionally failed to protect vulnerable cash buyers like her.
The majority judgment (per Mogoeng CJ) ruled that this case was about the protection of the poor and vulnerable from homelessness. Given the absence of the exceptional circumstances required for the development of the common law, the court would instead approach the matter through a proper interpretation — premised on the constitutional rights to housing, dignity and equality — of section 21 and section 22 of the Alienation of Land Act. The purpose of the Act is to protect vulnerable buyers of residential property was beneficial, yet its failure to extend its protection to buyers other than instalment buyers impaired the abovementioned constitutional rights in an unjustified and irrational manner. Cash buyers and those who paid within a year should also be protected. Hence the appropriate remedy would be to read into the Act words that conferred a right on vulnerable buyers who paid cash or who paid in less than one year to take transfer of the property in the event of the seller's intervening insolvency, which right would only arise if the buyer were likely to become homeless if transfer did not take place. In the event the first respondent would be ordered to transfer the house to Ms Sarrahwitz. (Paragraphs [16] – [17], [21], [27] – [29], [35], [57], [68] and [74] – [78] at 499B – E, 500D, 502E – 503F, 505E – H, 513A – B, 515I – 516B and 517E – 519D.)
In a concurring minority judgment (per Cameron J and Froneman J) found the order in the main judgment would be concurred in with the reservation that it might lead to the striking-down of beneficial consumer-protection legislation because it failed to protect everyone equally. This would intrude too far into legislative territory. It was also difficult to assess the limits of vulnerability that would entitle buyers who paid the full purchase price to the same protection as instalment buyers. The Constitution, moreover, did not protect against homelessness in absolute terms. Rather, it provided that no one could be evicted from his or her home without an order of

The effect of the conduct of Cloete Murray and his colleagues might cause eviction and grave loss to a sincere buyer. The Constitution do not protect against homelessness and loss in absolute terms. Rather, it provides that no one could be evicted from his or her home without an order of court made in consideration of all relevant circumstances. This will demand judicial oversight of the decisions of the liquidator.

[50] The cases that the applicants rely on do not tackle the reviewability of the decisions of the liquidator nor does it order for it to be adjudicated at a stage where all the facts are not on the table and on the specific facts of this case.

[51] The applicants conflate the authority to elect not to ratify the terms of an unexecuted contract, entered into by an insolvent prior to insolvency, with the reviewability of the decision of the liquidators.

[52] I must unfortunately burden the judgment with a summary of the core issue(s) and findings in the cases the applicants rely on because of the allegation that it was not considered. I will quote directly from the cases to avoid contentions of erroneous interpretation.

> I *Grey's Marine Hout Bay (Pty) Ltd and others v Minister of Public Works and others* 2005 (6) SA 313 (SCA).
>
> This case does not deal with the reviewability of the liquidator's decisions and the facts and litigants are not comparable to the matter *in casu*. The discussion on administrative action and access to courts in terms of section 33 of the Constitution is of value.
>
> Flynote:

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court made in consideration of all relevant circumstances. Hence the less intrusive and more appropriate remedy in the present case would have been to protect Ms Sarrahwitz's possessory rights by refusing an eviction order. (Paragraphs [84] – [86], [90] – [91] and [97] – [100] at 520F – 521B, 522A – E and 523G – 524C.).

Administrative law - Decision of functionary - Validity of - Administrative decision to lease property to a tenant - Legislative prohibitions against and requirements for use of property - Such immaterial to validity of decision to lease property - Functionary not thereby purporting to permit tenant to use property unlawfully or relieve it of any obligations it might have under any law.

Administrative law - Administrative action - What constitutes - At core of definition of 'administrative action' in s 1 of Promotion of Administrative Justice Act 3 of 2000 is idea of decision of administrative nature taken by public body or functionary - Definition to be construed consistently, whenever possible, within meaning attributed to administrative action as used in s 33 of Constitution - Although definition purporting to restrict administrative action to decisions that as a fact 'adversely affect the rights of any person', such literal meaning could not have been intended, but rather that it has capacity to affect legal rights - Thus administrative action is conduct of bureaucracy in carrying out daily functions of State that necessarily involves application of policy with direct and immediate consequences to persons - Decision by Minister of Public Works to lease State land in harbour to tenant made in exercise of public power conferred by legislation in ordinary course of administering property of State and with immediate and direct legal consequences to others, thus constituting administrative action.

Administrative law - Administrative action - Validity of - Decision by Minister of Public Works to lease State land in harbour to tenant - Procedural fairness of - Right to procedural fairness conferred by s 3(1) of Promotion of Administrative Justice Act 3 of 2000 only in respect of administrative action that 'materially and adversely affects the rights or legitimate expectations of any person' - Not shown by other tenants in harbour that their rights, or prospective rights, or even interest falling short of prospective right, adversely affected by decision - Also not shown that other tenants had legitimate expectation that property would be left vacant or that they would be consulted or invited to comment before decision made -

Furthermore, no grounds shown for finding the Minister's decision arbitrary or irrational under s 6 of Act - Decision valid.

II *Motala v Master, North Gauteng High Court* 2019 (6) SA 68 (SCA).

The case concerns the appointment of liquidators and the reviewability of the decision of the Master of the High Court on such appointments. It does not compare to the matter *in casu*; again, but for the discussion on an administrative action that is valuable. This case concerns the following:

Administrative law — Administrative action — What constitutes — Compilation by High Court Master of panel of persons suitable for appointment as liquidator or trustee — Constituting administrative action.

Insolvency — Trustee — Master's panel of persons suitable for appointment as liquidator or trustee — Removal from panel — Grounds for.

Insolvency — Trustee — Rights and duties — Duty to be scrupulously honest.

Company — Winding-up — Liquidator — Master's panel of persons suitable for appointment as liquidator or trustee — Removal from panel — Grounds for.

Company — Winding-up — Liquidator — Duties — Duty to be scrupulously honest.

Costs — Constitutional litigation — Proper approach — Unsuccessful party in constitutional litigation against state — Relevant considerations in deciding whether unsuccessful party should not be mulcted in costs.

III *State Information Technology Agency Soc Ltd v Gijima Holdings (Pty) Ltd* 2018 (2) SA 23 (CC) concerns the issue of self-review by Organs of State. It is not helpful *in casu*:

Administrative law — Administrative action — Review — Organs of state may not use PAJA to review their own decisions — Promotion of Administrative Justice Act 3 of 2000.

Review — Grounds — Legality — Organs of state may bring legality reviews of their own decisions.

IV *Ellerine Brothers (Pty) Ltd v McCarthy Ltd* 2014 (4) SA 22 (SCA) confirmed the effect of the *concursus* on a lease, specifically on the right to cancel it. This case did not deal with the reviewability of the decision of the liquidators.

Flynote: Sleutelwoorde

Insolvency — Effect — On uncompleted contracts — Lease — Impact of *concursus creditorum* on right to cancel lease.

Headnote: Kopnota

In this case E leased premises to company T. Ultimately T failed to pay the rent and E gave it notice to pay within seven days, failing which E would have the right to cancel the agreement. Five days later a third party lodged an application with the registrar of the high court for the liquidation of T, so establishing a *concursus creditorum*. Six days afterwards E gave T a letter cancelling the lease. In issue was the effect of the concursus on the lease, specifically on the right to cancel it.

Held, that the *concursus creditorum* neither altered nor suspended the rights of the parties under the contract, and that the right to cancel, which arose after the creation of the concursus, had been validly exercised by E. (Paragraphs [1], [10], [12] – [13] and [15] at 23C – E, 26D – G, 27E – G, 28A – C, 28H and 29A.)

V *Minister of Defence and Military Veterans v Motau and others* 2014 (5) SA 69 (CC).

The value in this case is again the determination of administrative action that is reviewable.

Headnote: Kopnota

In this case the Minister of Defence and Military Veterans terminated Maomela Motau and Refiloe Mokoena's membership of Armscor's board of directors in terms of s 8*(c)* of the Armscor Act. (Armscor is the Armaments Corporation of South Africa (SOC) Ltd and the Armscor Act is the Armaments Corporation of South Africa Ltd Act 51 of 2003.) The section provides that 'a member of the Board must vacate office if his or her services are terminated by the minister on good cause shown'.

In response the pair applied to a high court to set aside the decision on grounds in the Promotion of Administrative Justice Act 3 of 2000 (PAJA) (error of law, procedural unfairness, ulterior motive and irrationality); and by reason of the minister's failure to show 'good cause' as required by s 8*(c)*. This caused the minister to appeal directly to the Constitutional Court. (Paragraphs [17] – [20] at 78A – 79B.)

There the first issue was whether the dismissal decision was executive or administrative action. PAJA excludes from the definition of administrative action, and from its review ambit, the exercise of executive powers and functions (s 1). Such powers include developing and implementing national policy and performing executive functions provided in national legislation (ss 85(2)(b) and (e) of the Constitution). However, PAJA's definition of administrative action includes the executive power of implementing national legislation (s 85(2)(a) of the Constitution), which has been held ordinarily to constitute administrative action. Thus, determining the nature of the dismissal power was necessary to

deciding whether it was administrative action. (Paragraphs [27], [30] – [31] and [33] at 80F – 81B, 82B – D and 82F – 83C.)

In this regard a power most closely related to formulating policy was likely to be executive, while a power most closely related to applying policy was likely to be administrative. Pointers in making this determination were the source of the power; constraints imposed on its exercise; and whether it was appropriate to subject its exercise to the more rigorous standard of administrative law review. (Paragraphs [38] – [39], [41] and [43] – [44] at 84F – 85C, 85E – G and 86B – E.)

Here the dismissal power was more executive than administrative in nature. This because it was an adjunct of the power to make defence policy; it was a high-level power; and the minister was afforded a broad discretion in exercising it. It constituted performance of an executive function (s 85(2)*(e)* of the Constitution), rather than implementation of national legislation (s 85(2)*(a)*), and was thus not administrative action, and not subject to review under PAJA. (Paragraphs [47] and [49] – [51] at 87E – F.)

The second issue was whether the minister had good cause to terminate the services of Motau and Mokoena (s 8*(c)* of the Armscor Act). The court held that she had and that it was constituted of the Armscor board's delays in entering into service-level agreements with the Department of Defence, and by the board's failure to complete procurement projects timeously. The minister had also had justification to single out Motau and Mokoena for dismissal. (Paragraphs [25], [57] – [58] and [62] – [63] at 80B – C, 91B – F and 92E – 93A.)

The third issue was whether the minister's decision was rational: whether her exercise of the dismissal power related rationally to the purpose of that power. The court held that her decision was rational because there was a rational link between dismissing Motau and Mokoena and addressing the failures of Armscor. (Paragraphs [69] and [71] at 94C – E and 95A – B.)

The fourth issue was whether there were any procedural constraints on the minister's exercise of the s 8*(c)* power. The court held that there were — the minister had to comply with the procedure for removal of directors in ss 71(1) and (2) of the Companies Act 71 of 2008: that Act provided the process and the Armscor Act the substantive criterion for removal of members of the Armscor board. Here, though, the minister had failed to comply with the Companies Act and so had acted unlawfully. (Paragraphs [25], [72], [76] and [80] at 80B – C, 95C – D, 97C – E and 98D.)

But in the exceptional circumstances of the case, it would not be just and equitable to set aside the minister's decision and to reinstate Motau and Mokoena. It would be sufficient to declare that the minister's conduct was unlawful and to draw her attention to the proper procedure to be followed in making such dismissal decisions. (Paragraphs [86] and [94] at 100C – 101B and 102D – G.)

By contrast, the minority would have upheld the decision of the high court and dismissed the appeal. In its view the minister's decision was administrative action; the minister ought to have heard Motau and Mokoena before making it; and her failure to do so rendered the decision procedurally unfair and required it to be set aside. (Paragraphs [95], [100] – [101], [127] and [129] at 103A – B, 104A – C, 111C and 111E.)

VI *Affordable Medicines Trust and others v Minister of Health and others*

2006 (3) SA 247 (CC).

The case provides a good exposition of the supremacy of the Rule of Law as decreed in the Constitution when the legality of conduct of an entity that has consequences in the public sphere, must be adjudicated. It does not deal with the reviewability of a liquidators' conduct.

Flynote: Sleutelwoorde

Practice - Applications and motions - Notice of motion - Amendment of - When granted - Amendments will always be granted unless made in bad faith, or will cause injustice to other parties which cannot be cured by costs order or parties cannot be put back for purposes of justice in same position as they were when pleading, etc. sought to be amended was filed - Question in each case is what interests of justice demand.

Constitutional law - Public power - Exercise of - Control of - Sections 1*(c)*, 2 and 172(1)*(a)* of Constitution establishing commitment to supremacy of Constitution and rule of law - This meaning that exercise of all public power subject to constitutional control - Exercise of public power must comply with Constitution as supreme law and doctrine of legality as part of that law - Both Legislature and Executive constrained by principle that they may exercise no power and perform no function beyond that conferred on them - In this sense Constitution entrenches principle of legality and provides foundation for control of public power.

Constitutional law - Human rights - Right to choose trade, occupation or profession freely - Meaning of such right as entrenched in s 22 of Constitution - More at stake than one's right to earn a living - Freedom to choose vocation intrinsic to nature of society based on human dignity - One's work part of one's identity and constitutive of one's dignity - Legal impediments to choice of profession not to be countenanced unless clearly justified in terms of broad public interest - But in modern world of human interdependence and mutual responsibility regulation of vocational activity for protection of both the persons involved and of community at large affected by it to be expected and welcomed - But such regulation not to be arbitrary or capricious.

Constitutional law - Human rights - Right to choose trade, occupation or profession freely - Meaning of such right as entrenched in s 22 of Constitution -

Two sentences of s 22 to be read together as defining content of right - Implicit, if not explicit, from text of s 22 that right having two components: right to choose a profession, and right to practise chosen profession - Section 22 contemplating that chosen profession would be practised and protects both right to choose a profession and right to practise it.

VII *Bryant & Flanagan (Pty) Ltd v Muller and another NNO* 1978 (2) 807 (A).

This case is pre-constitution and deals with the undisputed right of the liquidator to ratify or “continue with the executory contract”. It has no value in the adjudication of the reviewability of the conduct of liquidators.

Flynote: Sleutelwoorde

Company - Winding up - The liquidator - Executory contract not specifically provided for in Insolvency Act entered into by company prior to liquidation - Liquidator vested with a discretion either to abide by or terminate contract - intention must be clear - Act 61 of 1973 s 339 - Liquidators choosing to continue with an executory contract - Liquidators thereby binding themselves to pay in full for pre-liquidation work, no fresh contract having been entered into in lieu thereof.

Headnote: Kopnota

A trustee in insolvency, and thus a liquidator of a company in liquidation (see s 339 of Act 61 of 1973), is invested with a discretion to abide by or terminate an executory agreement not specifically provided for in the Insolvency Act which was concluded by the company in liquidation before its liquidation. Such agreement does not terminate automatically on the company being placed in liquidation. The liquidator must make his election within what, regard being had to the circumstances of the cases, is a reasonable time. Should he elect to abide by the agreement the liquidator steps into the shoes of the company in liquidation and is obliged to the other party to the agreement to whatever counter prestation is

required of the company in terms of the agreement. No right in law resides in the liquidator to abide by the contract and at the same time unilaterally make a stipulation derogating from the other party's rights under the contract.

The respondent had entered into a building contract with the T company. While building was in progress T was placed under liquidation and the appellants were appointed liquidators. At the time of liquidation T owed the respondent an amount for work already performed. The appellants took up the attitude that respondent only had a concurrent claim for such work. Appellants obtained an order declaring that they were not obliged to pay as a preferent claim any amounts owing to the respondent save and except an amount for repairing a beam. On an appeal this order was reversed: the Court holding that, if the appellants chose to continue with such an executory contract, they thereby bound themselves to remunerate the other party in full for the pre-liquidation work. In a further appeal the Court had regard to a letter written by the appellants, from the terms of which the Court found that the appellants had elected to abide by the contract, and had not entered into any fresh contract.

Held, that by so doing the appellants bound themselves to fulfil the obligation undertaken by T under the contract and therefore no ground existed for interfering with the order of the Court *a quo*. The decision in the Natal Provincial Division in *Bryant & Flanagan (Pty) Ltd v Muller and Another NNO* 1977 (1) SA 800 confirmed.

VIII *Du Plessis and another NNO v Rolfes Ltd* 1997 (2) SA 354 (A).

The judgment, just as the above, rules on the manner in which the selection of the liquidators to ratify or not ratify the contract after liquidation of the contractor must be dealt with. It has nothing whatsoever to do with the reviewability of the election of the liquidators and their duty towards constitutional conduct.

Company - Winding-up - The liquidator - Contracts - Election whether to continue with contract after liquidation of contractor - Continuation an act of administration and payments made under contract are expenses of administration - Such expenses, together with value of performance by other party, may swell or diminish free residue available to general body of creditors - Prudent liquidator taking such factor into account in making election.

Company - Winding-up - The liquidator - Executory contracts - Election whether to continue with contract after liquidation of contractor - No general principle that exercise of election to abide by executory main contract necessarily carrying with it election to abide by executory subcontracts, whether nominated or not - Notwithstanding that subcontract referred to in main contract and that main contract referred to in subcontracts, main and subcontracts separate and independent.

Company - Winding-up - The liquidator - Executory contracts – Election whether to continue with contract after liquidation of contractor - Whether or not liquidator electing to abide by contract a question of fact, not of law - If question to be decided by process of inference, conclusion drawn to be consistent with all proved facts - Where contractor relying upon conduct by liquidator as constituting election to abide by contract, such conduct to be unequivocal.

Headnote: Kopnota

The Insolvency Act 24 of 1936 is not a codification of the common law of insolvency, although it is based on the common law with certain modifications. It follows that the common law of insolvency, save only to the extent that it may have been changed by the Insolvency Act or is inconsistent with it, is still of application. At common law a liquidator or trustee is not bound to perform unexecuted contracts entered into by an insolvent before insolvency unless he, in conjunction with the general body of creditors, considers that such performance will be in their interests. If a trustee elects to abide by an executory contract he

must perform all the obligations of the insolvent. He must also give reasonable notice of his intention to continue with the contract, otherwise the other party to the contract may treat the contract as being at an end and hold the insolvent estate liable for any damages that it might have suffered as a consequence thereof. The claim for such damages is a concurrent one and does not form part of the costs of administration. (At 363C/D--H.)

If, however, the trustee elects to continue with the contract after liquidation, this is an act of administration and the payments which he has to make under the contract are the expenses of administration. Such expenses, taken in conjunction with the value of the performance of the other party, may swell or diminish the free residue available to the general body of creditors. This is, of course, a factor to which a prudent trustee or liquidator would have regard in arriving at a decision whether or not to terminate an executory contract or to abide by it. (At 364A--B.)

The decision in the Witwatersrand Local Division in *Rolfes Ltd v Du Plessis and Another NNO* reversed.

IX *Nedcor Investment Bank v Pretoria Belgrave Hotel (Pty) Ltd* 2003 (5) SA 189 (SCA) deals with whether the seller's claim for the balance of the purchase price is against the liquidator as expense incurred in the estate's administration or whether the seller to be regarded as secured creditor after the first mortgage bond holder? It does not deal with reviewability as an issue but the court did apply its inherent jurisdiction to judicial oversight of the conduct and decisions of the liquidators.

Flynote: Sleutelwoorde

Company - Winding-up - The liquidator - Executory contracts - Contract for sale of business, inclusive of immovable property, movables and liquor licence - Transfer of immovable and movable property having taken place before liquidation - Part of purchase price outstanding - Whether seller's claim for

balance of purchase price lying against liquidator as expense incurred in estate's administration or whether seller to be regarded as secured creditor after first mortgage bond holder – Liquidator having no right to cancel contract - Liquidator's duty to realise assets in estate for benefit of creditors - Liquidator must admit seller as creditor - In realising assets, liquidator not making election to abide by contract - Claim by seller for balance of purchase price not expense in administration.

Headnote: Kopnota

The respondent had entered into a written agreement with the W company (W) in terms of which the respondent sold to W its hotel business, inclusive of its immovable property, all movables and the hotel liquor licence as a going concern for R1 450 000. The purchase price was payable by a deposit secured by a first mortgage bond on the immovable property in favour of the bank and the balance of R400 000 payable on 31 December 1999 secured by a second bond in favour of the respondent. The deposit was paid, the movables were delivered and the immovable property registered in the name of W 6 July 1998. The two bonds were duly registered. On 2 February 1999 the appellant lodged an application for the liquidation of W. On 1 March 2000 W was placed under final liquidation. The respondent brought an application for an order that its claim for the balance of the purchase price be paid as part of costs of administration. The application was granted. In the present appeal the issue was whether respondent's claim for the balance of the purchase price lay against the liquidator as an expense incurred in the estate's administration or whether the respondent was to be regarded as a secured creditor ranking after the appellant's first mortgage bond.

Held, that in the present case the immovable property had been registered in W's name and the movables delivered to W prior to the *concursus creditorum*. The property had vested in W before the *concursus*. It had become part of the insolvent estate and had to be dealt with accordingly. There was no further

obligation on the part of respondent that had to be performed. (Paragraph [7] at 192H/I - J.)

Held, further, that it was not necessary for the liquidator to pay the outstanding balance of the purchase price before selling the property. The balance of the purchase price was not yet due at the time of the *concursus* and no right to cancel had accrued at *concursus*. The liquidator could not cancel the sale and insist on returning the *merx* and refuse to admit the respondent as creditor. It was the duty of the liquidator to realise the assets in the estate for the benefit of creditors. In so doing she was not making an election to abide by the contract. (Paragraph [7] at 193A/B - C.)

Held, accordingly, that the claim in respect of the purchase price was not an expense in the administration. (Paragraph [8] at 193C/D.) Appeal allowed.

X *Walker v Syfret* 1911 AD 141 does not assist the court to decide the reviewability of the liquidators' decision to ratify pre-liquidation contracts.

Flynote: Sleutelwoorde

Company - Liquidation - Debentures - Cession of Action - Negotiable Instrument - Set-off or Compensation - Insolvency - Concursus Creditorum.

Headnote: Kopnota

W and two others undertook for valuable consideration to pay the liabilities of the G. Company, including certain 1,700 debentures of £100 each previously issued by the Company and payable to bearer. Thereafter the Company was ordered to be wound up, and the plaintiff with knowledge that the Company was in liquidation, obtained cession for value of 280 debentures from his brother W., whose claim for £28,000, if proved by him in the liquidation, would have been extinguished, inasmuch as his share of the liabilities which he and two others had

undertaken to pay was in excess of £28,000: - *Held*, that under the circumstances the plaintiff had no greater rights in respect of the debentures, even regarded as negotiable instruments, than W himself would have had it he had proved thereon instead of selling them to the plaintiff.

The decision of the Cape Provincial Division (1910, C.P.D., 520) upheld.

THE PRINCIPLES WHEN ADJUDICATING AN APPLICATION FOR LEAVE TO APPEAL

[53] The atmosphere of this case reminds of the words of the Constitutional Court in *Shinga v The State and another (Society of Advocates (Pietermaritzburg Bar) intervening as Amicus Curiae); S v O'Connell and others* 2007 (2) SACR 28 (CC) that defined the judicial character of the task conferred upon a presiding officer in determining whether to grant leave to appeal. Although having heard the evidence and having made a ruling; the judge is called upon to consider whether another Court may reach a different conclusion. This requires a careful analysis of both the facts and the law that have supported the judgement *a quo* and a consideration of the possibility that another Court may differ either in relation to the facts or the law or both. This is a task that has been carried out by High Court Judges for many years and it is a judicial task of some delicacy and expertise. *It should be approached on the footing of intellectual humility and integrity, neither over-zealously endorsing the ineluctable correctness of the decision that has been reached, nor over-anxiously referring decisions that are indubitably correct to an appellate Court.*

[54] The right to appeal is, among others, managed by the application for leave to appeal. It may not be abused but the hurdle of an application for leave to appeal may never become an obstacle to justice in the post-constitutional era. Section 17 of the Superior Courts Act 10 of 2013 is the law:

17. Leave to appeal. —

(1) Leave to appeal may only be given where the judge or judges concerned are of the opinion that—

(a) (i) the appeal would have a reasonable prospect of success; or

(ii) there is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration;

(b) the decision sought on appeal does not fall within the ambit of section 16 (2) (a); and

(c) where the decision sought to be appealed does not dispose of all the issues in the case, the appeal would lead to a just and prompt resolution of the real issues between the parties.

[55] The interpretation of the Rules and the law has evolved in case law since 2013.

1. In numerous cases[19] the view is held that the threshold for the granting of leave to appeal was raised with the induction of the 2013 legislation. The former assessment that authorization for appeal should be granted if "there is a reasonable prospect that another Court might come to a different conclusion" is no longer applicable.

2. The words in section 17(1) that: "Leave to appeal *may only* be given…" and section 17(1)(a)(i) that: "The appeal *would have* a reasonable prospect of success" are peremptory. "*If* there is a reasonable prospect of success" is now that: "*May only* be given if there *would be* a reasonable prospect of success." A possibility and discretion were therefore, in the words of the legislation and consciously so, amended to a mandatory obligatory requirement that leave may not be granted if there is not a reasonable prospect that the appeal will succeed.

[19] *Mont Chevaux Trust v Goosen and others* (LCC14R/2014) 3 November 2014; *South African Breweries (Pty) Ltd ("SAB") v Commissioner of the South African Revenue Services ("SARS")* [2017] ZAGPPHC 340 (28 March 2017); *ABSA Bank Ltd v Transcon Plant and Civil CC and another* [2020] ZAKZPHC 19 (23 June 2020) and *Adonisi and others v Minister for Transport and Public Works: Western Cape and others and a related matters* [2021] 4 All SA 69 (WCC).

3. It must be a reasonable prospect of success; not that another Court may hold another view. The Court *a quo* may not allow for one party to be unnecessarily put through the trauma and costs and delay of an appeal. In *Four Wheel Drive v Rattan N.O.* 2019 (3) SA 451 (SCA) at paragraph [34] the following was ruled by Schippers JA (Lewis JA, Zondi JA, Molemela JA and Mokgohloa AJA concurring):

[34] There is a further principle that the Court *a quo* seems to have overlooked — leave to appeal should be granted only when there is 'a sound, rational basis for the conclusion that there are prospects of success on appeal'. In the light of its findings that the Plaintiff failed to prove *locus standi* or the conclusion of the agreement, I do not think that there was a reasonable prospect of an appeal to this Court succeeding that there was a compelling reason to hear an appeal. In the result, the parties were put through the inconvenience and expense of an appeal without any merit.

4. It is trite that the views of Courts may differ but that there will not be, automatically, interference with the judgment of the Court *a quo*. The vital way of thinking of the Courts of Appeal is that the trial Court experienced the hearing, the conduct of the parties and their Counsel and the evidence in all its forms; and that interference will not be a given just for a difference in opinion by the Court sitting on appeal. The Supreme Court of Appeal reiterated this stance in its judgment on 31 July 2020 in *AM and another v MEC Health, Western Cape* (1258/2018) [2020] ZASCA 89; Such findings are only overturned if there is a clear misdirection or the trial Court's findings are clearly erroneous.

[56] The final word was spoken recently in the Supreme Court of Appeal in *Ramakatsa and others v African National Congress and another* [2021] JOL 49993 (SCA) in March 2021:

[10] Turning the focus to the relevant provisions of the Superior Courts Act (the SC Act), leave to appeal may only be granted where the judges concerned are of the opinion that the appeal would have a reasonable prospect of success or there

are compelling reasons which exist why the appeal should be heard such as the interests of justice. This Court in Caratco, concerning the provisions of section 17(1)(a)(ii) of the SC Act pointed out that if the Court is unpersuaded that there are prospects of success, it must still enquire into whether there is a compelling reason to entertain the appeal. Compelling reason would of course include an important question of law or a discreet issue of public importance that will have an effect on future disputes. However, this Court correctly added that "but here too the merits remain vitally important and are often decisive". I am mindful of the decisions at High Court level debating whether the use of the word "would" as oppose to "could" possibly means that the threshold for granting the appeal has been raised. *If a reasonable prospect of success is established, leave to appeal should be granted. Similarly, if there are some other compelling reasons why the appeal should be heard, leave to appeal should be granted. The test of reasonable prospects of success postulates a dispassionate decision based on the facts and the law that a court of appeal could reasonably arrive at a conclusion different to that of the trial court. In other words, the appellants in this matter need to convince this Court on proper grounds that they have prospects of success on appeal. Those prospects of success must not be remote, but there must exist a reasonable chance of succeeding. A sound rational basis for the conclusion that there are prospects of success must be shown to exist.* (Accentuation added)

CONCLUSION

[57] I might have been mistaken in my ruling that the issue of reviewability of the liquidator's decision is not one to be ruled upon here and now. If that is so, it would be in the interest of justice to allow the appeal.

[58] If I was not mistaken to not rule on the issue; then the time might have come for the reviewability of liquidators' decisions on the subject *in casu* to be vented and ruled upon in the Supreme Court of Appeal; that is if the Supreme Court of Appeal is willing to entertain the subject on the peculiar facts and timing in the case.

[59] The issue of reviewability will affect the order *a quo* that:

ORDER

1. The filing of the Notice in terms of Rule 6(5)(d)(iii) by the first to third and fifth respondents is provisionally set aside pending the finalisation of the process prescribed in Rule 53 dealing with reviews in the Uniform Rules of Court;

2. First to third and fifth respondents are ordered to make available to the applicants the record of the proceedings sought to be corrected and set aside and in terms of Rule 53(1)(b) and within fifteen (15) days of the date of this order;

3. The applicants may within ten (10) days after the record was made available to them deliver a notice and accompanying affidavit, amend, add to or vary the terms of their notice of motion and supplement the supporting affidavit in terms of Rule 53(4);

4. The first to third and fifth respondents may reply in terms of Rule 53(5);

5. The first to third and fifth respondents are afforded 10 (ten) days from the date of the filing of the papers and the conclusion of the Rule 53 process above in which to amend and file their Notice in terms of Rule 6(5)(d)(iii), if necessary;

6. The parties must each carry their own costs.

[60] ORDER

1. The applicants are granted leave to appeal to the Supreme Court of Appeal;
2. Costs to be costs in the appeal.

M OPPERMAN, J

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