



**THE SUPREME COURT OF APPEAL OF SOUTH AFRICA  
JUDGMENT**

**Reportable**

Case no: 1150/2021

In the matter between:

**THE COMMISSIONER FOR THE SOUTH  
AFRICAN REVENUE SERVICE**

**APPELLANT**

and

**LITHA MVELISO NYHONYHA**

**1<sup>ST</sup> RESPONDENT**

**MAGDELINE SEKGOPI NYHONYHA N O**

**2<sup>ND</sup> RESPONDENT**

**MAGANDHERAN PILLAY**

**3<sup>RD</sup> RESPONDENT**

**MAGANDHERAN PILLAY N O**

**4<sup>TH</sup> RESPONDENT**

**INDHERAN PILLAY N O**

**5<sup>TH</sup> RESPONDENT**

**CORAL LAGOON INVESTMENTS 194 (PTY) LTD**

**6<sup>TH</sup> RESPONDENT**

**ASH BROOK INVESTMENTS 15 (PTY) LTD**

**7<sup>TH</sup> RESPONDENT**

**K2019495062 (SOUTH AFRICA) (PTY) LTD**

**8<sup>TH</sup> RESPONDENT**

**REGIMENTS FUND MANAGERS (PTY) LTD**

**9<sup>TH</sup> RESPONDENT**

<b>MARCYTOUCH (PTY) LTD</b>	<b>10<sup>TH</sup> RESPONDENT</b>
<b>ERGOLD PROPERTIES NO 8 CC</b>	<b>11<sup>TH</sup> RESPONDENT</b>
<b>WILLEM JACOBUS VENTER N O</b>	<b>12<sup>TH</sup> RESPONDENT</b>
<b>KAGISO SURPRISE DINAKA N O</b>	<b>13<sup>TH</sup> RESPONDENT</b>
<b>ERIC ANTONY WOOD N O</b>	<b>14<sup>TH</sup> RESPONDENT</b>
<b>TRUSTEGIC (PTY) LTD N O</b>	<b>15<sup>TH</sup> RESPONDENT</b>
<b>NEDBANK LIMITED</b>	<b>16<sup>TH</sup> RESPONDENT</b>
<b>CAPITAL 48 (PTY) LTD</b>	<b>17<sup>TH</sup> RESPONDENT</b>
<b>PROGRACE INVESTMENTS CC</b>	<b>18<sup>TH</sup> RESPONDENT</b>
<b>TRANSNET SOC LTD</b>	<b>19<sup>TH</sup> RESPONDENT</b>
<b>VANTAGE MEZZANINE FUND II</b>	<b>20<sup>TH</sup> RESPONDENT</b>
<b>FINASCEND (PTY) LTD</b>	<b>21<sup>ST</sup> RESPONDENT</b>
<b>GDM SOLUTIONS (PTY) LTD</b>	<b>22<sup>ND</sup> RESPONDENT</b>
<b>SETH CONSULTING T/A THUNI SYSTEMS (PTY) LTD</b>	<b>23<sup>RD</sup> RESPONDENT</b>
<b>CYBER SLEUTH FORENSICS</b>	<b>24<sup>TH</sup> RESPONDENT</b>
<b>CMS RM PARTNERS INC</b>	<b>25<sup>TH</sup> RESPONDENT</b>
<b>REGIMENTS TELECOMMUNICATIONS (PTY) LTD</b>	<b>26<sup>TH</sup> RESPONDENT</b>

OMNIMETA	27 <sup>TH</sup> RESPONDENT
PETASCAN INVESTMENT HOLDINGS (PTY) LTD	28 <sup>TH</sup> RESPONDENT
DUALITY SYSTEMS (PTY) LTD	29 <sup>TH</sup> RESPONDENT
MAJESTIC SILVER TRADING 157 (PTY) LTD	30 <sup>TH</sup> RESPONDENT
REGIMENTS SHARED SERVICES 191 (PTY) LTD	31 <sup>ST</sup> RESPONDENT

**Neutral citation:** *The Commissioner for the South African Revenue Service v Nyhonyha and Others* (1150/2021) [2023] ZASCA 69 (18 May 2023)

**Coram:** PONNAN ADP, VAN DER MERWE, WEINER AND MOLEFE JJA AND UNTERHALTER AJA

**Heard:** 8 March 2023

**Delivered:** 18 May 2023

**Summary:** Company law – setting aside of winding-up under s 354 of Companies Act 61 of 1973 – test is whether facts demonstrate that continuation of winding-up unnecessary or undesirable – not exercise of true discretion – commercial insolvency – no basis for setting aside winding-up.

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## ORDER

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**On appeal from:** Gauteng Division of the High Court, Johannesburg (Vally J, sitting as court of first instance):

- 1 The appeal is upheld.
- 2 Paragraphs 1 to 6 and 8 of the order of the court a quo dated 22 February 2021 are set aside and replaced with the following:  
'Prayer 2 of the notice of motion is dismissed with costs, including the costs of two counsel and the costs reserved on 11 November 2020'.

- 3 The first to 11<sup>th</sup> respondents are directed to jointly and severally pay the appellant's costs of the appeal, including the costs of two counsel.
- 4 The costs incurred by the 12<sup>th</sup> and 13<sup>th</sup> respondents in respect of the appeal, including the costs of their application for leave to adduce further evidence on appeal and the costs of two counsel, are costs in the liquidation of Regiments Capital (Pty) Ltd.

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## JUDGMENT

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**Van der Merwe JA (Ponnan ADP, Weiner and Molefe JJA and Unterhalter AJA concurring):**

[1] This is an appeal by the Commissioner for the South African Revenue Service (SARS) against an order setting aside the winding-up of Regiments Capital (Pty) Ltd (Regiments). The order was made by Vally J in the Gauteng Division of the High Court, Johannesburg, on the application of the first to 11<sup>th</sup> respondents (the respondents). They are parties that have an interest in Regiments and oppose the appeal. The 12<sup>th</sup> and 13<sup>th</sup> respondents (the liquidators) are the joint liquidators of Regiments. Their participation in the appeal is aimed at showing that the winding-up of Regiments should not have been set aside. None of the other respondents participate in the appeal. However, by agreement the National Director of Public Prosecutions (the NDPP) was joined as a party to the appeal. The NDPP's interest is limited to the eventuality of the appeal failing. The appeal is with the leave of this court.

[2] SARS and the liquidators separately launched voluminous applications for leave to adduce further evidence on appeal. The applications relate to evidence that existed at the time of the hearing in the court a quo, as well as to subsequent events. It is trite that leave to adduce further evidence on appeal should be granted only in exceptional circumstances. It was accepted that if the appeal were to succeed on the

evidence that was before the court a quo, it would be unnecessary to consider these applications. That is the question that I now turn to.

[3] The appeal raises two main issues. The first is whether the setting aside of a winding-up under s 354 of the Companies Act 61 of 1973 constitutes the exercise of a discretion in the strict sense (true discretion). The second issue is whether Regiments was commercially solvent at the time of the hearing in the court a quo. These issues must be determined against the following background.

### **Background**

[4] On 18 November 2019, the NDPP obtained a provisional restraint order (the restraint order) under the Prevention of Organised Crime Act 121 of 1998 which related, *inter alia*, to the assets of Regiments. This halted Regiments' participation in an 'unbundling' transaction in respect of shares in Capitec Bank Holdings Limited (Capitec) held by the sixth respondent. On 16 September 2020, Regiments was placed in final winding-up at the instance of an unpaid creditor.

[5] On 26 October 2020, the restraint order was discharged. This prompted the application of the respondents in the court a quo. The urgent application was brought in two parts. The first part was essentially for an order staying the winding-up of Regiments and authorising the execution of the unbundling transaction. The aim of the first part of the application was to realise funds for the benefit of Regiments. The second part of the application, as I have said, was for an order setting aside the winding-up of Regiments.

[6] The application came before Vally J, together with an application by SARS for leave to intervene. The court granted the first part of the application. It issued a rule nisi returnable on 26 January 2021. The order authorised the implementation of the unbundling transaction under the supervision of an independent attorney. It also provided for the funds so generated for Regiments to be paid into an interest-bearing trust account under the control of that attorney. The attorney was directed to submit, prior to the return date, a report 'concerning all aspects of the implementation of the unbundling transaction in accordance with this order'. The court also granted leave

to SARS to intervene in the application. Costs of the first part of the application were reserved.

[7] In a woefully inadequate report dated 12 January 2021, the appointed attorney (Mr Brett Derwent Tate) stated that he had received the amount of R36 348 950 as the proceeds of the unbundling transaction in trust for Regiments. He added that he understood from the respondents' attorneys that Regiments held 252 370 Capitec shares. On the other hand, in a supplementary affidavit dated 18 January 2021, SARS gave a full exposition of the grounds for its opposition to the setting aside of the winding-up of Regiments.

[8] SARS stated that it was in the process of conducting an audit in respect of the liability of Regiments for income tax for the 2014 to 2019 income tax periods, as well as its liability for Value Added Tax (VAT) in respect of the 2013/03 to 2016/02 VAT periods. Its findings in respect of the 2014 to 2016 income tax periods and the VAT periods, were in the process of being finally approved. The audit indicated an income tax liability for the 2014 to 2016 income tax periods of R217 578 411,92 and liability for VAT in the amount of R61 765 421,56. This total amount of R279 343 833,48 did not include understatement penalties, statutory penalties or interest. In addition, the audit in respect of the 2017 to 2019 income tax periods had not been completed. All of this meant that assessments in the amount of R279 343 833 (cents omitted) would be issued soon and that this amount was a conservative estimation of Regiments' liability towards SARS.

[9] On the return date, only SARS opposed the setting aside of the winding-up of Regiments. It accepted that Regiments had cash on hand in the amount of R36 348 950 and that it held Capitec shares worth R350 million. It was also prepared to accept that the amount of R4,5 million was due to Regiments by Nedbank Limited and that therefore, its total liquid and realisable assets amounted to R390 848 950. However, SARS did not accept the assertions of the respondents that Regiments' 84,36 per cent interest in Kgoro Consortium (Pty) Ltd (Kgoro) had a value of R513 million or that its 100 per cent interest in Little River Trading 191 (Pty) Ltd (Little River) was worth R32 million.

[10] It was common cause or not disputed that Regiments owed unrelated creditors (referred to in the papers as Table A creditors) the amount of R278 011 795 and that R113 920 106 was due to related creditors (referred to as Table B creditors). Vally J recorded that the Table B creditors had given the undertaking that they would not seek payment of the debts owed to them until the Table A creditors were paid in full. The court a quo accepted the evidence contained in SARS' supplementary affidavit. It thus proceeded on the basis that Regiments owed SARS R279 343 833. Because the relevant assessments had not been issued, however, this debt was not yet due and payable. On this basis, Regiments' total liabilities (Table A creditors, Table B creditors and SARS) amounted to R671 275 734.

[11] Vally J accepted that the respective values of Regiments' interests in Kgoro and Little River were R513 million and R32 million. On the basis of this finding, Regiments' total assets (R545 million together with the liquid assets of R390 848 950) would amount to R935 848 950. That would exceed its total liabilities by R264 573 216. Vally J continued:

'More importantly the papers show on a balance of probabilities that Regiments is – in the words of Mr Pillay – “asset rich but cash poor”. It is, in other words, only commercially insolvent.'

[12] The court proceeded to say:

'It cannot be gainsaid that if all the creditors, including SARS – although it is only a contingent one at this stage – can be paid then there is no advantage to keeping the hand of the law on the estate of Regiments. However, sight cannot be lost of the fact that SARS would be a preferrent creditor if the winding-up order is not set aside. The object of an insolvency order is to ensure “a due distribution of assets among creditors in the order of their preference”. As such the creditors listed in Table A would have to await full payment to SARS before they received any payments from the estate if the winding-up order is not set aside. Losing this protection is SARS' greatest concern. But the protection can be catered for in the order that follows from this judgment. In such a case the removal of the hand of the law on the estate would, I hold, result in the integrity of the law being kept intact. The law is only concerned with doing justice by the parties and in serving the public interests. In *casu* this would be achieved if, once the winding-up order is set aside, there are sufficient assets to pay all the creditors, including a contingent one such as SARS. It also does not go unnoticed that the concern of SARS of losing the protection afforded it by insolvency law can

be attended to by itself taking proactive action through the rights accorded to it by ss 94(1) and 163 of the Tax Administration Act (TAA). It is still in the process of issuing its assessments for the tax liability on Regiments. It should be placed on terms to issue this assessment speedily, and then be given a short period of time to take the rights accorded to it by ss 94(1) and 163 of the TAA. In addition, if Regiments is interdicted from dissipating any of its interests in Kgoro and Little River until the debt of SARS has been liquidated then SARS' concern would be addressed. This, of course, means that Regiments cannot utilise the assets in Kgoro and Little River to liquidate the debts listed in Table A. As for the creditors listed in Table B they should not be allowed to make any claim until SARS and those creditors listed in Table A are paid in full.'

[13] Vally J issued the following order:

1. The winding-up of Regiments Capital (Pty) Ltd (Regiments) is hereby set aside.
2. The 21<sup>st</sup> respondent (SARS) must within 15 calendar days of this order issue its assessments of the tax liabilities of Regiments.
3. Regiments must only commence paying the entities referred to in Table A in [8] of this judgment after the expiry of the 30 days from the date of this order.
4. Regiments must not pay any of the entities referred to in Table B in [8] of this judgment until all creditors listed in Table A and SARS, should it become one, have been paid in full.
5. The value of Regiments' interests in Kgoro Consortium (Pty) Ltd and Little River Trading 191 (Pty) Ltd must not be dissipated in any way whatsoever until Regiments has settled any claim SARS makes in terms of para 2 of this order or until this court amends this paragraph of the order.
6. Any applicant or respondent seeking an amendment of para 5 of this order may do so within thirty days of this order.
7. Regiments is to pay:
  - 7.1 the taxed costs of the first and second respondents (including the costs of this application) in the administration of Regiments;  
and
  - 7.2 the costs of Vantage in the application under Case Number 2019/8365.
8. Save for the contents of para 7 of this order each party is to pay its own costs.'

[14] To complete the picture, I have to mention that after the issuance of the order of Vally J, the full court upheld the NDPPs appeal against the discharge of the restraint order. The order of the full court included the following provision:



'The restraint proceedings instituted against the fourth defendant, Regiments Capital, are suspended, and the application for a restraint order against the fourth defendant is postponed sine die, with costs to be in the cause.'

This formed the background to the contentions of the NDPP aimed at preventing a lacuna should the appeal be dismissed.

### **Analysis**

[15] By virtue of Item 9 of Schedule 5 to the Companies Act 71 of 2008, s 354 of the repealed Companies Act 61 of 1973 remains in force until a date to be determined. Section 354 provides:

'354. Court may stay or set aside winding-up.

(1) The Court may at any time after the commencement of a winding-up, on the application of any liquidator, creditor or member, and on proof to the satisfaction of the Court that all proceedings in relation to the winding-up ought to be stayed or set aside, make an order staying or setting aside the proceedings or for the continuance of any voluntary winding-up on such terms and conditions as the Court may deem fit.

(2) The Court may, as to all matters relating to a winding-up, have regard to the wishes of the creditors or members as proved to it by any sufficient evidence.'

### **True discretion?**

[16] The respondents submitted that the decision of the court a quo under s 354 constituted the exercise of a true discretion. Their argument was that none of the limited grounds for interference on appeal with the exercise of a true discretion were shown. Accordingly, so they contended, the appeal had to fail.

[17] It is trite that the scope for interference on appeal with the exercise of a true discretion is limited. The question is not whether the appeal court would have reached the same conclusion, but whether the discretion was exercised properly. For present purposes it suffices to say that interference would be called for if the exercise of the discretion was based on a misdirection of fact or a wrong principle of law. See *Ex parte Neethling and Others* 1951 (4) SA 331 AD at 335E and *Trencon Construction (Pty) Ltd v Industrial Development Corporation of South Africa Ltd and Another* 2015 (5) SA 245 (CC) (*Trencon*) para 88.

[18] A true discretion is one which provides a court with a range of permissible options. Well-known examples are costs orders and awards of damages. See *Media Workers Association of South Africa and Others v Press Corporation of South Africa Ltd* 1992 (4) SA 791 (A) (*Perskor*) at 800E and *Trencon* paras 84-85. This was articulated as follows in *Florence v Government of the Republic of South Africa* 2014 (6) SA 456 (CC) para 113:

'Where a court is granted wide decision-making powers with a number of options or variables, an appellate court may not interfere unless it is clear that the choice the court has preferred is at odds with the law. If the impugned decision lies within a range of permissible decisions, an appeal court may not interfere only because it favours a different option within the range.'

[19] It is clear that the expression 'wide decision-making powers' in this passage refers to the multitude of permissible options that characterise a true discretion. This must not be confused with a wide or loose discretion which means 'no more than that the Court is entitled to have regard to a number of disparate and incommensurable features in coming to a decision'. See *Knox D'Arcy Ltd and Others v Jamieson and Others* 1996 (4) SA 348 AD at 361I, quoted with approval in *Trencon* para 86.

[20] A power to determine whether the (proven) facts demonstrate a legal requirement or conclusion, is not a true discretion. EM Grosskopf JA lucidly explained this in *Perskor* at 800F:

'I do not think the power to determine that certain facts constitute an unfair labour practice is discretionary in that sense. Such a determination is a judgment made by a Court in the light of all relevant considerations. It does not involve a choice between permissible alternatives. In respect of such a judgment a Court of appeal may, in principle, well come to a different conclusion from that reached by the Court *a quo* on the merits of the matter.'

See also *Oakdene Square Properties (Pty) Ltd and Others v Farm Bothasfontein (Kyalami) (Pty) Ltd and Others* 2013 (4) SA 539 SCA paras 20-21.

[21] In *Ward and Another v Smit and Others: In re Gurr v Zambia Airways Corporation Ltd* 1998 (3) SA 175 (SCA) at 180H, this court said that the language of s 354 'is wide enough to afford the Court a discretion to set aside a winding-up order

both on the basis that it ought not to have been granted at all and on the basis that it falls to be set aside by reason of subsequent events'. The court proceeded (at 180I-181D) to state stringent requirements for an order on the former basis. Although the court referred to a discretion and discretionary power in this regard, it did not consider whether it was a true discretion or not.

[22] I agree with the authors of *Henochsberg on the Companies Act 61 of 1973* 5 ed at 748 that where, as is the case here, the setting aside of a winding-up is sought on the basis of subsequent events, the test is whether the facts show that the continuance of the winding-up would be unnecessary or undesirable. In *Ex parte Strip Mining (Pty) Ltd: In re Natal Coal Exploration Co Ltd (In liquidation) (Kangra Group (Pty) Ltd and Another intervening)* 1999 (1) SA 1086 (SCA) at 1091I, this court stated that the expression 'proof to the satisfaction of the Court' refers to 'the normal standard of proof of the facts which are to lead the Court to hold that the winding-up "ought" to be set aside'. Thus, the test for setting aside a winding-up under s 354 on the basis of subsequent events, is whether the applicant has proved facts that show that it is unnecessary or undesirable for the winding-up to continue. This does not involve a choice between permissible alternatives. The test is either satisfied or it is not.

[23] It follows that the decision of the court a quo did not constitute the exercise of a true discretion. It also follows that the statement in *Klass v Contract Interiors CC (In liquidation) and Others* 2010 (5) SA 40 (W) para 65 that 'the court's discretion is practically unlimited', is wrong. The tabulation of applicable principles in the same paragraph of *Klass*, should also be read subject to this judgment.

### **Misdirection**

[24] Nevertheless it has to be said that the court a quo misdirected itself on the facts and the law. Its decision was based on incorrect facts and wrong principles of law. I deal firstly with the factual errors.

[25] The respondents did not deal with the value of Regiments' shares in Kgoro and Little River in their affidavits. Their submissions that these shares were worth

R513 million and R32 million respectively, were solely based on the reports that I shall identify shortly. Kgoro holds all the shares in Cedar Park Properties 39 (Pty) Ltd (Cedar Park). Cedar Park and Little River own immovable properties. These properties were subject to the restraint order. The *curator bonis* (the curator), who had been appointed in terms of the restraint order, obtained valuation reports in respect of the properties of Cedar Park and Little River. These reports were not confirmed under oath. They did not qualify the valuer as an expert with regard to the valuation of these commercial properties. In each case, they simply stated an open market value and forced sale value without any reasoning. It is trite that the admissibility of an opinion as evidence in a court of law depends on whether it is expressed by an expert in the field. The acceptability or weight of an expert's opinion in turn depends on whether it is based on established facts and cogent reasoning. The valuation reports might have served the purpose for which they had been obtained by the curator, but in the court a quo they were inadmissible and in any event carried no evidential weight.

[26] The figures of R513 million and R32 million emanated from a report of the curator to the court in the restraint matter dated 4 June 2020. An annexure to the report indicated that the net asset value of Cedar Park was approximately R513 million and that of Little River approximately R32 million. The calculation of these amounts departed from the open market values stated in the aforesaid valuation reports. Without any explanation or motivation, however, the report itself reflected these amounts as the respective values of the assets of Kgoro and Little River. The report did not refer to or place any value on the shares in Kgoro, Cedar Park or Little River.

[27] The valuation of shares in a private company on the open market is a matter of some complexity and would mostly be determined on the basis of expert evidence. This curator's report did not constitute evidence of the value of Regiments' shares in Kgoro (84,36 per cent) or Little River. In the result, the court a quo materially erred on the facts by placing a total value of R545 million on these shares. It therefore also erred in determining the matter on the factual basis that Regiments was factually solvent. As the respondents did not prove that these shares had a

market value, Regiments' liabilities (R671 275 734) far exceeded the value of its assets (R390 848 950).

[28] The court a quo did not mention or apply the test that I have set out. It did not consider whether the facts demonstrated that the continuation of the winding-up of Regiments was unnecessary or undesirable. Instead, it effectively ordered an alternative, court-designed winding-up. Moreover, it did so on the back of a finding that Regiments was unable to pay its debts, which was the touchstone for its liquidation in the first place. In the process it also arrogated to itself the power to regulate statutory functions and powers determined by Chapter 8 of the Tax Administration Act 28 of 2011, by directing SARS to issue tax assessments within a fixed period of time. Vally J took a course wholly impermissible in law.

### **Commercial solvency?**

[29] I now turn to the contention that Regiments was commercially solvent when the matter came before the court a quo. As I have demonstrated, Regiments was factually insolvent. It was undisputed that it did not trade and that there was no prospect that it might do so in future. Should the appeal be dismissed, Regiments would be wound up under the dispensation created by the order of the court a quo. In these circumstances, I fail to see how a finding that Regiments was commercially solvent at the time, could have justified the order of the court a quo. I nevertheless proceed to consider this issue.

[30] In *Namex (Edms) Bpk v Kommissaris van Binnelandse Inkomste* 1994 (2) SA 265 (AD) at 289E-G, this court held that liability for tax comes into existence at the latest at the end of a tax year, even though an assessment has not been issued. The issue of an assessment is a prerequisite for the enforcement of the tax liability, but not for its existence. Thus, an unassessed tax liability is not a contingent debt, that is, a debt which may or may not arise on the fulfilment of a condition. The respondents did not challenge this decision or its applicability. Their argument was solely that because Regiments had sufficient liquid assets to pay the Table A creditors and the debt owed to SARS was not yet payable, Regiments had to be regarded as commercially solvent.

[31] The judgment of this court in *Murray and Others NNO v African Global Holdings (Pty) Ltd and Others* 2020 (2) SA 93 (SCA) para 31 is destructive of this argument:

'The argument about timing misconceived the nature of commercial insolvency. It is not something to be measured at a single point in time by asking whether all debts that are due up to that day have been or are going to be paid. The test is whether the company "is able to meet its current liabilities, including contingent and prospective liabilities as they come due" . . . .Determining commercial insolvency requires an examination of the financial position of the company at present and in the immediate future to determine whether it will be able in the ordinary course to pay its debts, existing as well as contingent and prospective, and continue trading.'

[32] Thus, the debt owed to SARS had to be factored into the equation. On the evidence, tax assessments in the minimum amount of R279 343 833 would be issued in the immediate future. In the event, Regiments would be unable to settle the claims of all its current creditors, that is the Table A creditors and SARS. Therefore Regiments was commercially insolvent.

### **Conclusion**

[33] In conclusion, on the evidence before the court a quo, Regiments was both factually and commercially insolvent. On these facts there was no basis for finding that the continuation of its winding-up was unnecessary or undesirable. It follows that the appeal must succeed and that it is unnecessary to consider the applications for leave to adduce further evidence on appeal.

[34] Costs of the application in the court a quo, including the costs reserved in respect of the first part of the application and of the appeal, should be paid by the respondents jointly and severally. That should include the costs of two counsel. As it was unnecessary to consider the merits of the applications to adduce further evidence on appeal, it would be fair and just that each party bears its own costs in respect of these applications. The court a quo directed that the costs of the liquidators be costs in the liquidation and that was not challenged on appeal. In my view, the same should apply to the costs incurred by the liquidators in respect of the appeal, including the costs of their application for leave to adduce further evidence

on appeal and of two counsel. There should be no order as to the costs of the NDPP.

[35] One matter remains. This court called on Mr Vincent Maleka SC and Smit Sewgoolam Inc to make submissions as to whether their conduct in representing the first to ninth respondents in this matter, warranted a referral to the Legal Practice Council. We considered the affidavits filed in this regard, as well as the oral submissions of counsel on behalf of Mr Maleka and Smit Sewgoolam Inc. It suffices to say that the information at our disposal does not warrant a referral of the conduct of Mr Maleka or Smit Sewgoolam Inc.

[36] The following order is issued:

- 1 The appeal is upheld.
- 2 Paragraphs 1 to 6 and 8 of the order of the court a quo dated 22 February 2021 are set aside and replaced with the following:  
'Prayer 2 of the notice of motion is dismissed with costs, including the costs of two counsel and the costs reserved on 11 November 2020'.
- 3 The first to 11<sup>th</sup> respondents are directed to jointly and severally pay the appellant's costs of the appeal, including the costs of two counsel.
- 4 The costs incurred by the 12<sup>th</sup> and 13<sup>th</sup> respondents in respect of the appeal, including the costs of their application for leave to adduce further evidence on appeal and the costs of two counsel, are costs in the liquidation of Regiments Capital (Pty) Ltd.

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C H G VAN DER MERWE  
JUDGE OF APPEAL

## Appearances

For appellant:	A J Lamplough SC and N Komar
Instructed by:	Savage, Jooste & Adams Inc, Pretoria AP Pretorius, Bloemfontein
For 1 <sup>st</sup> – 9 <sup>th</sup> respondents:	D J Smit SC and T Scott
Instructed by:	Smit Sewgoolam Inc, Johannesburg Peyper Attorneys, Bloemfontein
For 10 <sup>th</sup> respondent:	A R Coetzee
Instructed by:	Moroka Attorneys, Bloemfontein
For 11 <sup>th</sup> respondent:	A E Bham SC and M Salukazana
Instructed by:	A B Scarrott Attorneys, Sandton Moroka Attorneys, Bloemfontein
For 12 <sup>th</sup> – 13 <sup>th</sup> respondent:	D M Leathern SC and J Verwey
Instructed by:	Tintingers Inc, Pretoria Cooper & Associates, Bloemfontein
For the National Director of Public Prosecutions	N Ferreira
Instructed by:	The State Attorney, Bloemfontein
For Mr Maleka SC and Smit Sewgoolam Inc	T Ngcukaitobi SC with L Sisilana
Instructed by:	Smit Sewgoolam Inc, Johannesburg Peyper Attorneys, Bloemfontein