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

Case no**:** 076/2013
Reportable

In the matter between:

**GAVIN CECIL GAINSFORD NO** **First Appellant**
**BENNIE KEEVY NO** **Second Appellant**
**NAKAMPE EDWIN RAMAPUPUTLA NO** **Third Appellant**

and

**TANZER TRANSPORT (PTY) LIMITED** **Respondent**

In the matter between:

**GAVIN CECIL GAINSFORD NO** **First Appellant**
**BENNIE KEEVY NO** **Second Appellant**
**NAKAMPE EDWIN RAMAPUPUTLA NO** **Third Appellant**

and

**TANZER TRANSPORT (PTY) LIMITED** **First Respondent**
**REGISTRAR OF COMPANIES** **Second Appellant**
**MASTER OF THE HIGH COURT, JOHANNESBURG** **Third Appellant**
**STATE LOGISTICS (PROPRIETARY) LIMITED** **Fourth Respondent**
**PICK N PAY RETAILERS (PTY) LIMITED** **Fifth Respondent**

**Neutral citation:** *Gavin Cecil Gainsford NO & others v Tanzer Transport (Pty) Ltd & others* (076/2013) [2014] ZASCA 32(28 March 2014)

**Coram:** Navsa, Mhlantla, Leach and Theron JJA and Swain AJA

**Heard:** 12 March 2014

**Delivered** 28 March 2014

**Summary:** Company — Winding-up — Liquidator — Proceedings by — Citation — Liquidators may sue in their capacity as liquidators or in name of company in liquidation proceedings under s 386(4)(*a*) of the Companies Act 61 of 1973

Unlawful alienations and preferences – Voidable dispositions in terms of s 341(2) of the Companies Act 51 of 1973

Application to set aside the winding-up motivated by need to avoid repaying amount received from the company.

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**ORDER**

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**On appeal from:** South Gauteng High Court, Johannesburg (Saldulker J sitting as court of first instance):

1 The appeal is upheld with costs including the costs of two counsel.

2 The the legal representatives of the respondent will only be entitled to recover fifty per cent of their costs from the respondent in respect of the heads of argument.

3 The order of the high court is set aside and replaced with the following:

'(a) In the application under case no 2252/10 the following order is made.

(i) The under-mentioned payments made by Costa Logistics SA (Pty) Ltd (in liquidation) to the respondent are declared to be void in terms of s 341(2) of the Companies Act 61 of 1973.

05/03/2009 – R1 651 681.14

05/03/20009 – R1 078 542.53

05/03/20009 – R4 899 817.15

01/04/20009 – R1 887 596.85

01/04/20009 – R4 718 524.19[1]

[1] There was a typographical error in the Notice of Motion and this amount was incorrectly reflected as R4 418 524.19.

(ii) The respondent is to pay the amounts in paragraph (i) above to the applicants.

(iii) The respondent is to pay the applicants' party and party costs.

(b) The application under case no 19020/11 is dismissed with costs.'

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**JUDGMENT**

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**Theron JA (Navsa, Mhlantla and Leach JJA and Swain AJA concurring):**

## Introduction

[1] The purpose of insolvency legislation is to bring about a *concursus creditorum* which, once in place, has the effect that:

'[T]he hand of the law is laid upon the estate, and at once the rights of the general body of creditors have to be taken into consideration. No transaction can thereafter be entered into with regard to estate matters by a single creditor to the prejudice of the general body. The claim of each creditor must be dealt with as it existed at the issue of the order.'[2]

Once the liquidation order is in place and the 'the hand of the law is laid upon the estate' nothing can thereafter be done by one creditor to alter the rights of other creditors.[3] The central issue in this appeal relates to payments made by a company after the commencement of its winding-up.

## Background

[2] This appeal concerns two applications. In the first application (the main application) the liquidators of Costa Logistics (Pty) Ltd (the company) sought an order in the high court declaring that certain payments made by the company to Tanzer Transport (Proprietary) Limited (Tanzer) were voidable dispositions as envisaged in s 341(2) of the Companies Act 61 of 1973 (the Act) and directing that Tanzer repay the money to the liquidators. In that application the liquidators

[2] *Walker v Syfret NO* 1911 AD 141 at 166. These comments, although made in respect of the legislation as it then was, apply equally to the Companies Act 61 of 1973.

[3] *Ward v Barrett NO and another NO* 1963 (2) SA 546 (A) at 552E-G.

also sought an order, in terms of s 386(5) read with s 386(4) of the Act, authorising them to institute the main application. In the second application (the setting aside application) Tanzer sought an order setting aside the winding-up of the company.

[3] The facts giving rise to this matter are largely common cause. State Logistics (Proprietary) Limited (State Logistics), is an Australian company, and its directors were various members of the Costa family. After growing into one of Australia's largest wholesalers and exporters of fresh produce, State Logistics expanded to South Africa where it incorporated the company in 2006. In June 2007, the company entered into an agreement with Pick n Pay Retailers (Pty) Limited (Pick n Pay), one of South Africa's largest retailers, to operate the latter's distribution centre in Longmeadow, Johannesburg. The essence of the distribution agreement was that goods ordered by Pick n Pay for its retail stores would be received, quality checked and stored at the distribution centre and then distributed by the company to Pick n Pay stores. After the company took over the operation of the Longmeadow distribution centre, Tanzer became a sub-contractor of the company, providing it with transportation services.

[4] It is evident that the company experienced logistical and financial difficulties in operating the distribution centre viably. One of the first indications of the problems it experienced was recorded in a letter from the auditors of the company, dated 25 July 2008, in which they expressed concerns about the 'company's ability to continue as a going concern'. In a letter dated 16 January 2009 Pick n Pay expressed its concern about the financial performance of the distribution centre and in particular the level of stock losses and claims for damaged and missing items from its stores and the distribution centre. On 13 February 2009 Pick n Pay cancelled its agreement with the company and

appointed another company to take over the management of the distribution centre with effect from 1 March 2009.

[5] The resolution to place the company in winding-up, passed on 13 February 2009, was registered by the Registrar of Companies on 3 March 2009. The winding-up was a creditor's voluntary winding-up in terms of ss 349 and 351 of the Act. The directors of the company completed a statement of affairs reflecting that as at 13 February 2009 the company was hopelessly insolvent and that its liabilities exceeded its assets. Section 352 of the Act provides that the voluntary winding-up of a company commences at the time of registration of the special resolution.

[6] The liquidators estimated that as at the commencement of the company's winding-up, the concurrent creditors were owed R70 000 000. The two main creditors who lodged claims against the company were Pick n Pay and State Logistics. Pick n Pay's claim was admitted to proof in the sum of R14 244 630.65, while State Logistics' claim, in respect of supplies and services rendered by it to the company, was R27 534 209.95.

[7] During March and April 2009 and after the commencement of the company's winding-up, the company paid an amount totalling R14 231 61.86 to Tanzer. It was these payments that the liquidators sought to have declared void. The high court (Saldulker J) determined the main application on the basis of a point *in limine* raised by Tanzer, namely a lack of locus standi on the part of the liquidators. It was contended that the liquidators could only bring the main application in the name of the company in liquidation and not as liquidators acting on behalf of the company. These contentions found favour with Saldulker J and she dismissed the main application on that basis and referred the setting aside application to trial. The first order in the main application is difficult to understand

in light of the second order. Naturally, if the winding-up were to be set aside, the issue that was the subject of the first order would be rendered moot. Nevertheless, it is against those orders that the liquidators appeal, with the leave of the high court. The dispute, both in the high court and on appeal, was essentially between the liquidators and Tanzer.

**The main application**

[8] Tanzer, in its opposition to the main application took a number of points *in limine*. Three of these were persisted with on appeal. The first two of the points *in limine* raised by Tanzer are interlinked as they relate to the question of locus standi referred to above and authority of the liquidators to institute the main application.

[9] The first point *in limine* was that it was a fatal flaw for the liquidators to bring the main application in their capacity as liquidators rather than in the name of the company in liquidation. For this Tanzer relied on s 386(4)(*a*) of the Act which provides that liquidators must bring or defend proceedings of a civil nature 'in the name and on behalf of the company'. Section 386(4)(*a*) of the Act provides that:

'The [liquidator's] powers referred to in subsection (3) are—

(*a*) to bring or defend in the name and on behalf of the company any action or other legal proceedings of a civil nature, and, subject to the provisions of any law relating to criminal procedure, any criminal proceedings: Provided that immediately upon the appointment of a liquidator and in the absence of the authority referred to in subsection (3), the Master may authorise, upon such terms as he thinks fit, any urgent legal proceedings for the recovery of outstanding accounts;'

[10] For their part, Mr Gavin Gainsford, one of the joint liquidators, who deposed to the founding affidavit in the main application averred that:

'I am cited herein in my capacity as the joint liquidator of Costa Logistics SA (Pty) Limited (in liquidation) ("the company").'

Similar averments were made by the second and third appellants, the other two liquidators of the company.

[11] This matter calls into question the proper citation of a party, particularly a liquidator, engaged in legal proceedings for the recovery of a debt owed to a company in liquidation. The high courts have adopted two divergent approaches: on the one hand it is required that an application be brought in the name of the company in liquidation; on the other hand, liquidators were permitted to sue qua liquidators. I shall presently deal with the divergent authorities.

[12] Tanzer relied on *Fey NO & another v Lala Govan Exporters (Pty) Ltd*, where Epstein AJ held that the reference in s 386 to the liquidator being empowered 'in the name and on behalf of the company' underpinned the requirement that any legal proceedings instituted or engaged in the exercise of that power must thus necessarily be brought in the name of the company, rather than that of the liquidator *nomine officio*.[4] The court reasoned that this requirement was emphasised by its distinction from other provisions of the Act that enable the liquidator to act in his or her own name.[5]

[13] Hugo J in *Shepstone & Wylie & others v Geyser NO*,[6] noted the following:

'Although s 386(4)*(a)* of Act 61 of 1973 empowers the liquidator "to bring . . . *in the name* and on behalf of the company any action" . . . in practice such actions are frequently brought in the name of the liquidator with the letters NO (*nomine officio*) appended. I have been unable to find any rule that distinguishes the two forms of citation and it seems until now to have been up to the whim of the liquidator concerned.'

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[4] *Fey NO & another v Lala Govan Exporters (Pty) Ltd* 2011 (6) SA 181 (W) para 20.
[5] Ibid, para 21. See also *Janse Van Rensburg NO v Ladislav* 2006 JDR 0815 (T).
[6] *Shepstone & Wylie & others v Geyser NO* 1998 (1) SA 354 (N) at 359F-G.

Similarly, in *Gainsford & others NNO v Hiab AB*,[7] there was a challenge to the liquidators having launched proceedings in their own names to have a voidable disposition set aside on the basis that they lacked the requisite *locus standi*. Mailula J dismissed this challenge, holding that 'where the liquidator requires authority to exercise any power, *he* may approach the Court under s 386(5) read with s 388(1) of the Act'.[8] (Emphasis added.)

[14] In my view the divergent views reflect a distinction without a difference. The structure of the Act is such that liquidators are empowered to perform specified acts including applying to court in a voluntary winding-up in terms of s 388(1) to determine any 'question arising in the winding-up or to exercise any of the powers which the Court might exercise if the company were being wound up by the Court'. Likewise, s 386(5) provides that:

'In a winding-up by the Court, the Court may, if it deems fit, grant leave to a liquidator to raise money on the security of the assets of the company concerned or to do any other thing which the Court may consider necessary for winding up the affairs of the company and distributing its assets.'

As stated above, Mailula J was correct in reaching the conclusion referred to in *Gainsford*, to have regard to the provisions of s 386(5) which demonstrate that liquidators act in the stead of the company in liquidation. A distinction between the *locus standi* accorded to the company in liquidation and that of its liquidators acting in their representative capacity, is pedantic[9] or illusory.[10] To disqualify liquidators properly appointed from acting on behalf of a company in liquidation would truly be elevating form above substance.

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[7] *Gainsford & others NNO v Hiab AB* 2000 (3) SA 635 (W).
[8] *Gainsford & others NNO v Hiab AB* 2000 (3) SA 635 (W) at 641E.
[9] *Airborne Express CC v Van Den Heever NO* (WLD) Case No 05/18568 (7 June 2006).
[10] *Barnard & others NNO v Imperial Bank Ltd & another* 2012 (5) SA 542 (GSJ) paras 23-24. The judgment of Weiner J in *Barnard* came to this court on appeal and is reported as *Imperial Bank Ltd v Barnard & others NNO* 2013 (5) SA 612 (SCA). On appeal, Mpati P stated that as a result of the court's finding that the amendment sought did not seek to introduce a new plaintiff and that prescription was properly interrupted on service of the original summons, 'the present is not an appropriate case for a consideration of the question whether or not a liquidator has standing where a debt owed to a company in liquidation is sought to be recovered' (at 616A-B).

[15] Hefer JA when interpreting s 13 of the Act in *Shepstone & Wylie & others v Geyser NO*,[11] stated:

'The express reference in s 13 to a company which is being wound up and to its liquidator indicates that the Legislature envisaged cases where the plaintiff or applicant is a company in liquidation. It could not have been unaware of the fact that in such cases the company is always represented by the liquidator, whether the latter sues *nomine officii* or not. There can be no doubt that the reference in the opening words to a company must be interpreted to include a liquidator suing on behalf of a company in liquidation.'

This dictum in itself ought to be dispositive of this point raised by Tanzer. Moreover, in *Imperial Bank Ltd v Barnard & others NNO*,[12] the court was faced with an application for an amendment of the particulars of claim to reflect the name of the close corporation where the liquidators had been cited in their own names followed by the letters 'NNO'. While the court did not pronounce on the locus standi of the liquidators, it held that the citation of the liquidators clearly indicated that they were not acting in their personal capacities but on behalf of the close corporation. This is in accordance with the reasoning of Hefer JA in *Shepstone & Wylie & others v Geyser NO*.

[16] It is clear that the liquidators had at no time purported to act in their personal capacities but were always acting in their representative capacities as duly appointed joint liquidators of the company. The claim for the declaratory order and the order for payment had always been pursued by the liquidators on behalf of the company. The result of them litigating in such capacity is that the payment sought would not enure for their personal benefit but for the benefit of the creditors of the company. Predictably, counsel on behalf of Tanzer could point to no prejudice being suffered as a result of the liquidators suing as they did. The high court, in finding that the liquidators did not have *locus standi* to institute the main application, erred.

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[11] *Shepstone & Wylie & others v Geyser NO* 1998 (3) SA 1036 (SCA) at 1044B-C.
[12] *Imperial Bank Ltd v Barnard & others NNO*,[12] 2013 (5) 612 (SCA).

[17] I now turn to the other point in limine raised by Tanzer, namely, lack of authority in that there was no authorisation by the creditors to institute the main application. The resolution adopted at the second meeting of creditors held on 11 August 2009, authorised the liquidators 'to collect any outstanding debts due to the company'. The liquidators relied on this resolution for their authority to institute the main application. It was stated in the founding affidavit that they had 'been advised that [the] resolution . . . may not be framed widely enough to encompass the present proceedings'. It was for this reason that they sought authorisation from the court to institute the main application. Tanzer, opportunistically seized on this uncertainty on the part of the liquidators, in order to contest the liquidators' authority.

[18] It was contended that the liquidators lacked authority to institute the main application as the resolution upon which they relied for such authority was only applicable to amounts owing to the company by debtors who had not paid the company and did not apply to proceedings to recover voidable dispositions in terms of the Act.

[19] In terms of ss 386(3)(*b*) and 386(4)(*a)* of the Act,[13] the liquidator of a company in a creditors' voluntary winding-up, has the power, inter alia, to bring legal proceedings, provided he or she has been granted authority by creditors. The resolution grants to the liquidators the authority to recover 'any outstanding debts'. The contention advanced by Tanzer that the resolution is not framed

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[13] Section 386(3) provides that: 'The liquidator of a company-
*(a)* ….
*(b)* in a creditors' voluntary winding-up, with the authority granted by a meeting of creditors; and
*(c)* ….
shall have the powers mentioned in subsection (4).'
Section 386(4)(*a*) provides that: 'The powers referred to in subsection (3) are-
*(a)* to bring or defend in the name and on behalf of the company any action or other legal proceedings of a civil nature, and, subject to the provisions of any law relating to criminal procedure, any criminal proceedings: Provided that immediately upon the appointment of a liquidator and in the absence of the authority referred to in subsection (3), the Master may authorise, upon such terms as he thinks fit, any urgent legal proceedings for the recovery of outstanding accounts;'

sufficiently wide to cover the main application as it does not make specific mention of voidable dispositions, cannot be sustained. The terminology of the resolution is certainly broad enough to encompass any debt due to the company, including a debt arising by virtue of a voidable disposition.

[20] The high court ought to have found that the liquidators were authorised by the second meeting of the creditors to institute legal proceedings and recover debts and that the authority so obtained extended to include declaratory relief in respect of voidable dispositions and that the seeking of authority by the liquidators out of caution was misguided.

[21] I now turn to deal with the last remaining point *in limine*, ie that the liquidators ought to have proceeded by way of trial action instead of motion proceedings, in that they should have foreseen that material disputes of fact, not capable of easy determination on the papers, would have arisen between the parties.[14] Tanzer submitted that the liquidators should have anticipated, inter alia, that a material dispute of fact would arise in relation to the question whether the company was in fact insolvent at the time of its winding-up. It was argued that the court should, for this reason alone, dismiss the application in its entirety.

[22] It was suggested by Tanzer that the company's winding-up was part of a fraudulent scheme on the part of certain directors of the company to enable State Logistics to drain the company of its remaining funds and evade liability for the company's debts. There is force in this contention and it is accepted by the liquidators. It was common cause that the company had made payment of R4 500 000 to State Logistics immediately prior to the commencement of the liquidation proceedings. The liquidators have already instituted an action against State Logistics in which they claim repayment of the R4 500 000 to the company.

[14] *Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd* 1949 (3) SA 1155 (T) at 1161.

[23] It is important to note that State Logistics appears to have undertaken to guarantee payment of certain of the company's debt. A reference to such undertaking is recorded by the company's auditors in the financial statements of the company for the period ended 29 June 2008. A factor that influenced the auditor's determination that the company was viable was that State Logistics would 'continue to procure funding for the ongoing operations for the company in terms of the binding undertaking given'. State Logistics has since reneged on such undertaking. This reneging by State Logistics does not advance Tanzer's case. It in fact points ineluctably to the inability of the company to have continued operating without financial support from State Logistics.

[24] Tanzer has further alleged that the company was commercially solvent by virtue of the fact that State Logistics had agreed to defer repayment of its loan for a period of twelve months and thus the company's debt owing to State Logistics, in the amount of just under R36 million, had not yet become due and payable as at the date of the statement of affairs. Reliance on the deferment of the loan must be viewed in the context of the financial predicament that the company faced. The deferring of the loan does not assist Tanzer. It remained a liability of the company on its winding-up. The reality was that the company was not in a position to pay its creditors.

[25] In the view I take of the matter there was no dispute of fact regarding the solvency of the company. Even prior to its liquidation there were indications that the company was in financial trouble. First, according to the draft financial statement of the company for the period ended 29 June 2008, it appears that the company had accumulated losses of R40 675 168 and that the company's total liabilities exceeded its assets by R40 675 068. Second, the letter from the company's auditors dated 25 July 2008, expressed concerns about the company's ability to continue as a going concern. Third, in an undated affidavit of Simon

John Costa, a director of State Logistics, he stated that the company was factually and commercially insolvent at the time of its liquidation and that it was doubtful whether any dividend would be payable to concurrent creditors. Fourth, the KPMG report prepared for the liquidators and tabled at the second meeting of creditors held on 11 August 2009, reflected that as at 6 July 2009 the company had total assets of R21 107 666 against liabilities of R71 513 041, ie an estimated shortfall of R50 405 375.

[26] Tanzer alleged that the true value of the company's assets as at the date of its statement of affairs was R48 167 314.16, while the liquidators placed this value at R21 107 666. The difference becomes irrelevant when regard is had to the factors listed in paragraph 25 above. Furthermore, at the date of the company's liquidation the amount in its bank account totalled R338 781.67. The company's movable assets subsequently only realised an amount of R338 029.78. On 12 October 2011, Mr Gainsford deposed to an affidavit in which he stated that 'as things stand creditors who have proved concurrent claims will not receive any dividends whatsoever as there is a deficiency of R239 231.27 in the estate'. The evidence demonstrated that at the time the company was liquidated, it was factually insolvent and manifestly unable to pay its debts.

[27] I now turn to deal with the merits of the main application. On behalf of Tanzer it was contended that the payments sought to be set aside by the liquidators were made bona fide in the ordinary course of business of the company. It was submitted that this fact was a complete answer to the application to have the payments set aside. I disagree. Section 341(2) of the Act is clear in its terms. In terms of this section:

'Every disposition of its property (including rights of action) by any company being wound-up and unable to pay its debts made after the commencement of the winding-up, shall be void unless the Court otherwise orders.'

The court will only order otherwise in terms of this section in limited circumstances. To have the defence proferred by Tanzer upheld in general terms would have the effect of avoiding the objects of the Act in that it would undoubtedly prefer one creditor above another.

[28] It is no defence to assert as Tanzer does that the dispositions were made by the company's staff in ignorance of the fact that the company had been placed under winding-up. Staff at a lower level carry out instructions and in any event that does not deal with the question of whether the dispositions were made at a time after the commencement of the winding-up. As has already been mentioned, the instances in which a court will validate a disposition are limited.[15] Even where a disposition was alleged to constitute 'a mere administrative rectification', the fact that the effect thereof was to remove a claim from the concursus and settle it in full in favour of the creditor concerned, to the prejudice of the general body of creditors, is impermissible.[16] This is in accordance with the principle that 'the free assets of the insolvent at the commencement of the liquidation shall be distributed rateably amongst the insolvent's creditors as at that date'.[17]

[29] There is in my view no acceptable basis provided by Tanzer for justifying a departure from the well-established rule of law which prohibits any disposition by the company after the commencement of its winding-up. Ordinarily a court will consider whether fairness and justice require the rule to be disregarded.[18] No such considerations were disclosed in the papers. On the contrary, the evidence demonstrates that the exercise of a discretion in favour of validity would result in extreme and irreparable prejudice to the creditors of the company.

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[15] *Lane NO v Oliver Transport* 1997 (1) SA 383 (C) at 386C-387B.
[16] *Schmidt & another NNO v Absa Bank Ltd* 2002 (6) SA 706 (W) para 17. See also *Walker v Syfret* NO 1911 AD 141.
[17] Per Buckley LJ in *Re Gray's Inn Construction Co Ltd* [1980] 1 All ER 814 (CA) at 819 quoted with approval by Willis J in *Schmidt*, supra, para 18.
[18] *Chesterfin (Pty) Ltd v Contract Forwarding (Pty) Ltd & others* 2002 (1) SA 155 (T) at 169D-F.

[30] The liquidators were thus entitled to the relief they sought. It is not necessary to grant an order in terms of para 1 of the notice of motion, authorising the liquidators to institute the main application, as they had the necessary authority in terms of the resolution passed at the second meeting of creditors.

**The setting aside application**

[31] The founding affidavit of the setting aside application was deposed to by Mr Johann Tanzer, a director of the respondent. In his affidavit he asserted that there were two bases upon which the winding-up fell to be set aside. The first was that the company was solvent at the time of its liquidation. This has already been dealt with. The second was that the winding-up of the company was tainted by fraud in that it was part of a fraudulent scheme to prefer State Logistics over all other creditors of the company and that fraud unravels all. The liquidators have accepted that the directors, in paying State Logistics R4 500 000, acted improperly. As has already been mentioned, they have instituted an action to recover that amount.

[32] It is common cause that the company has no staff, has ceased operations and is in fact even less than a shell. Regard being had to the conclusions reached by me in respect of the solvency of the company and the considerable claims by the creditors referred to in para 6 above, one can rightly ask what would the purpose be of setting aside the liquidation, other than preserving the undue preference that Tanzer enjoyed? The interest of the creditors of the company dictate that the company should remain in liquidation and that the unlawful payments to Tanzer should be repaid into the estate to be distributed by the liquidators amongst the proven creditors of the company in accordance with the law of insolvency. The order sought by the liquidators in this regard is in my view justified.

[33] Finally, the heads of argument filed by Tanzer were in flagrant disregard of the rules of this court. Rule 10(3)(*g*) of the Rules of Court provides that 'heads of argument of any appellant or respondent shall not exceed 40 pages, unless a judge, on request, otherwise orders'. In *Caterham Car Sales & Coachworks Ltd v Birkin Cars (Pty) Ltd* & *another*,[19] Harms JA explained that heads of argument should contain the most important part of the argument and not a recital of the facts and that quotations from authorities do not amount to argument.[20] He went on to warn that practitioners who fail to give proper attention to the requirements of the practice note might result in the disallowance of part of their fees.[21] The heads prepared on behalf of Tanzer abound with an unnecessary and lengthy analysis of numerous cases, which was singularly unhelpful. This court cannot allow such flagrant breaches of the Rules and its displeasure is reflected in the order set out hereinafter.

**Order**

[34] 1 The appeal is upheld with costs including the costs of two counsel.
2 The legal representatives of the respondent will only be entitled to recover fifty per cent of their costs from the respondent in respect of the heads of argument.

3 The order of the high court is set aside and replaced with the following:
'(a) In the application under case no 2252/10 the following order is made.
(i) The under-mentioned payments made by Costa Logistics SA (Pty) Ltd (in liquidation) to the respondent are declared to be void in terms of s 341(2) of the Companies Act 61 of 1973:

05/03/2009 – R1 651 681.14
05/03/20009 – R1 078 542.53
05/03/20009 – R4 899 817.15

[19] *Caterham Car Sales & Coachworks Ltd v Birkin Cars (Pty) Ltd* & *another* 1998 (3) SA 938 (SCA).
[20] Para 37.
[21] Para 38. See also *Van der Westhuizen NO v United Democratic Front* 1989 (2) SA 242 (A) at 252B-G.

01/04/20009 – R1 887 596.85

01/04/20009 – R4 718 524.19[22]

(ii) The respondent is to pay the amounts in paragraph (i) above to the applicants;

(iii) The respondent is to pay the applicants' party and party costs.

(b) The application under case no 19020/11 is dismissed with costs.'

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L V THERON

JUDGE OF APPEAL

[22] There was a typographical error in the Notice of Motion and this amount was incorrectly reflected as R4 418 524.19

APPEARANCES

| | |
|---|---|
| For Appellant: | I Miltz SC with J J Bitter<br>Instructed by:<br>Edward Nathan Sonnenbergs Attorneys, Johannesburg<br>Symington De Kok Attorneys, Bloemfontein |
| For Respondent: | R G Cohen<br>Instructed by:<br>Mervyn Dendy Attorney, Johannesburg<br>Lovius Block Attorneys, Bloemfontein |