THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case no: 306/2019

In the matter between:

C MURRAY N.O.	**FIRST APPELLANT**
R F LUTCHMAN N.O.	**SECOND APPELLANT**
T OOSTHUIZEN N.O.	**THIRD APPELLANT**
C MURRAY	**FOURTH APPELLANT**
R F LUTCHMAN	**FIFTH APPELLANT**
T OOSTHUIZEN	**SIXTH APPELLANT**

and

AFRICAN GLOBAL HOLDINGS (PTY) LTD	**FIRST RESPONDENT**
THE COMPANIES AND INTELLECTUAL PROPERTY COMMISSION	**SECOND RESPONDENT**
THE MASTER OF THE HIGH COURT, JOHANNESBURG	**THIRD RESPONDENT**

Neutral citation: *Murray and Others NNO v African Global Holdings (Pty) Ltd and Others* (306/2019) [2019] ZASCA 152 (22 November 2019)

Coram: Wallis, Mokgohloa, Plasket and Nicholls JJA and Gorven AJA

Heard: 15 November 2019

Delivered: 22 November 2019

Summary: Voluntary winding-up of group of companies – s 351 of Companies Act 61 of 1973 – whether solvent companies needing to be wound up in terms of ss 79 and 80 of Companies Act 71 of 2008 – company not solvent if commercially insolvent – on facts companies commercially insolvent.

Liquidators – appointment by Master in Pretoria – companies registered offices within jurisdiction of Master in Johannesburg – Master in Pretoria exercising jurisdiction throughout Gauteng – s 2(1)*(a)*(ii) of the Administration of Estates Act 66 of 1965 – appointments valid.

Personal costs orders – when granted.

ORDER

On appeal from: Gauteng Division of the High Court, Johannesburg (Ameer AJ, sitting as court of first instance):

1 The appeal is upheld with costs, such costs to include those consequent upon the employment of two counsel.

2 The order of the high court is altered to read:

'The application is dismissed with costs, such costs to include those consequent upon the employment of two counsel.'

JUDGMENT

Wallis JA (Mokgohloa, Plasket and Nicholls JJA and Gorven AJA concurring)

[1] The events unfolding daily on our television screens at the hearings of the Zondo Commission[1] have given rise to the questions of company law arising in this appeal. They concern a group of companies (the Group) of which the first respondent, Global Africa Holdings (Pty) Ltd (Holdings), is the holding company. The group was formerly known as the Bosasa Group. Evidence of a sensational nature was given to the Commission concerning the relationship between senior political figures and the Group. This prompted its bankers, First National Bank Ltd (FNB) and ABSA Bank Ltd (ABSA), to indicate that continuing a business relationship with the Group involved them in unacceptable reputational risk. Accordingly both banks indicated that they would withdraw banking

[1] Technically the Judicial Commission of Enquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State established in terms of Proclamation 3 of 2018 of 23 January 2018, *Government Gazette* 41403, dated 25 January 2018.

facilities from African Global Operations (Pty) Ltd (Operations), itself a wholly-owned subsidiary of Holdings and the company that performed the Group's treasury functions in regard to receipt of payments and payment of debts incurred by the various operating companies in the Group. All of the latter were wholly-owned subsidiaries of Operations.

[2] The Group then attempted to find another bank that would provide it with banking facilities, but was unable to do so. This was catastrophic for its continued business operations. Its chairman, Mr Gumede, who deposed to the founding affidavit, explained that while the subsidiaries had a number of ongoing contracts with government departments and state owned enterprises from which it could expect a steady cash flow, in the absence of banking facilities the various companies 'would be unable to pay their employees (the Group's employees number in excess of 4 500) and suppliers or to receive payment of amounts due to them'. This led the Group to consult with a leading business rescue practitioner, but nothing came of that because the practitioner was unable to assure it that he would be able to secure the banking facilities needed to enable the Group to continue in existence.

[3] The Group then consulted an attorney, Mr Potgieter, who advised that the only possible course of action was to place Operations and its subsidiaries in voluntary winding-up. To that end he prepared what he regarded as the necessary documents. At a meeting on 12 February 2019 of all the directors of Holdings and Operations, resolutions were signed by the directors of Holdings in the case of Operations, and the directors of Operations in the case of the subsidiaries, placing Operations and the subsidiaries in a creditors voluntary winding-up. On 14 February the resolutions were filed with the Companies and Intellectual Property

Commission (CIPC).[2] On the same day the Deputy Master of the High Court in Pretoria[3] appointed Messrs Murray and Lutchman as the provisional liquidators of all eleven of the companies. Shortly before the commencement of these proceedings Ms Oosthuizen was added as a provisional liquidator of all of the companies. Messrs Murray and Lutchman and Ms Oosthuizen are, in their official capacities as provisional liquidators, the first, second and third appellants, and in their personal capacities, the fourth, fifth and sixth appellants. Although their appointments were provisional, I will refer to them as 'the liquidators'.

[4] The present proceedings appear to have been precipitated by the vigorous way in which Mr Murray went about his business as provisional liquidator. On 21 February 2019 he arrived at the Group's headquarters in Mogale City accompanied by security guards and over the next two days took control of the premises and the businesses and excluded the staff and directors. In the meantime, on 19 February, Holdings had consulted new attorneys with a view to obtaining advice on its position as a creditor of the companies in voluntary winding-up. On 26 February they were advised that the process of voluntary winding-up was defective and, when the liquidators would not accept this, commenced these proceedings on 4 March 2019 before the Gauteng Division of the High Court, Johannesburg as a matter of extreme urgency. They sought orders directed at having the resolutions for voluntary winding-up declared null and void and of no force and effect from inception. Consequent upon that they sought an order that the appointment of the liquidators was likewise null and void and of no force and effect and compelling the liquidators to

[2] CIPC is the second respondent in this appeal, and was the twenty-fourth respondent in the high court, but has played no part in the proceedings.
[3] The Master of the High Court, Johannesburg was cited as the twenty-third respondent in the high court and as the third respondent in this appeal, but has likewise played no part in the proceedings.

restore control of the companies to their directors. They asked that the liquidators be ordered to pay the costs of the application in their personal capacities, whether or not they opposed the application.

[5] Despite the protestations of the liquidators the case was argued before Ameer AJ on 13 March 2019, nine days after it was launched. The following day judgment was delivered granting Holdings the relief it had sought and ordering the liquidators to pay the costs of the proceedings in their personal capacity. The appeal is with the leave of the high court.

The issues

[6] The resolutions placing Operations and its subsidiaries under a creditors voluntary winding-up were expressed as being taken in terms of s 351 of the Companies Act 61 of 1973 (the 1973 Act). This section forms part of Chapter 14 of the 1973 Act dealing with the winding-up of companies. The continued operation of that chapter, notwithstanding the repeal of the 1973 Act by the Companies Act 71 of 2008 (the 2008 Act), is preserved under Item 9(1) of the Fifth Schedule to the 2008 Act. The reason is that, subject to one exception, the 2008 Act contains no provisions dealing with the winding-up of companies. Accordingly, in terms of s 343 of the 1973 Act, a company may still be wound up either by the Court or voluntarily, and in the latter event the winding-up will be either a creditors' or a members' voluntary winding-up.

[7] The exception to the continued application of the 1973 Act arises under ss 79 and 80 of the 2008 Act, which provide that in the case of a solvent company it can be wound-up either voluntarily or by way of a winding-up and liquidation by court order. To this end, Item 9(2) of the Fifth Schedule to the 2008 Act provides that the provisions of the 1973

Act providing for the compulsory and voluntary winding-up of companies do not apply to the winding-up of a solvent company.[4]

[8] Holdings' primary case was that Operations, and all the subsidiaries, were solvent companies and thus could not be voluntarily wound-up in terms of s 351 of the 1973 Act. Building on that foundation it contended that the resolutions were null and void from inception and that none of the companies had been validly wound up. It followed, so they contended, that the appointment of the liquidators was null and void from inception and should be set aside and the companies restored to their directors.

[9] In addition to its primary case, Holdings advanced an argument that the meetings at which the various resolutions leading to the voluntary winding-up of the companies were passed were not properly convened in terms of s 62 of the 2008 Act and that this provided a further reason for holding that the resolutions were null and void from inception. The high court upheld both the primary and this additional contention.

[10] Both contentions were advanced on the basis that the applicable legislation for the purpose of winding-up these companies was the 2008 Act, more particularly ss 79 and 80 thereof, and not the 1973 Act. This was apparent from the founding affidavit, which summarised the provisions of Item 9(1) of the Fifth Schedule to the 2008 Act, and referred to Part G of Chapter 2, as well as ss 79 and 80. Mr Gumede said that he had been advised, and it would be argued, that the consequence of these provisions was that s 351(1) of the 1973 Act was inapplicable to the winding-up of a solvent company and that it was not possible for the

[4] The relevant provisions are ss 343, 344, 346 and 348 to 353 of the 1973 Act.

shareholders of such a company to resolve to liquidate it in terms of that section. In order to advance that case it was accordingly essential for Holdings to show that the companies were solvent at the time of their voluntary winding-up. If they were not then the 2008 Act was inapplicable and its primary and secondary cases were both bad.

[11] Over and above these contentions on the merits Holdings attacked the *locus standi* of the liquidators at two levels. The first was that their appointment was invalid because it had been effected by the Deputy Master in Pretoria, while the registered offices of all the companies were within the area of jurisdiction of the Master in Johannesburg. This was said to be contrary to the relevant provisions of the Administration of Estates Act 66 of 1965 (the Estates Act). The second related solely to their coming before this court in their personal capacities to challenge the order for costs. It was submitted that the application for leave to appeal had been brought by them solely in their capacity as provisional liquidators and not in their personal capacity and granted as such. In the absence of the grant of leave to appeal in their personal capacity they were not properly before this court. The latter point was abandoned and there is no need to mention it further. It is appropriate and convenient to deal first with the remaining issue of *locus standi*.

Appointment as liquidators

[12] This argument was raised before the high court, but no decision was made on it because of the finding that the appointments had in any event to be set aside on the basis of Holdings' primary case. The point arises from s 2(1)*(a)*(ii) of the Estates Act, which provides that:

'Subject to subsection (2) and the laws governing the public service, the Minister—

(i) …

(ii) shall, in respect of the area of jurisdiction of each High Court, appoint a Master of the High Court'.

Section 3 then provides that each Master shall have an office at the seat of the High Court 'in respect of whose area of jurisdiction he or she has been appointed'. There is a Master of the High Court in both Pretoria, which is the main seat of the Gauteng Division, and Johannesburg, which is a local seat of that division.

[13] Holdings pointed out that under s 1 of the 2008 Act the Master is defined as the officer of the High Court referred to in s 2 of the Estates Act who has jurisdiction over a particular matter arising under the 2008 Act. Given the provisions of s 79(2) of the 2008 Act, the procedure for appointing a liquidator in the case of the winding-up of a solvent company are those prescribed in Chapter 14 of the 1973 Act. As a result this preliminary point is unaffected by whether the winding-up fell to be dealt with under the 2008 Act or the 1973 Act.

[14] Section 368 of the 1973 Act requires the Master to appoint a provisional liquidator as soon as a special resolution for the winding-up of the company has been registered with CIPC in terms of s 200 of the 1973 Act. The definition of 'Master' in s 1 of the 1973 Act provides, in regard to a company that is not being wound-up pursuant to a court order, that this is 'the Master having jurisdiction in the area in which the registered office of that company is situated'.[5] Although this definition was not referred to in the heads of argument, Holdings contended that because the companies had their registered offices within the area of jurisdiction of the Master in Johannesburg only that Master was entitled to appoint the provisional liquidators of the companies. This despite the

[5] Companies Act 61 of 1973, s 1 sv 'Master' para *(c)*.

fact that they had requisitioned the Master in Pretoria to have Mr Lutchman appointed as provisional liquidator of a number of the companies.

[15] The argument overlooked the fact that s 2 of the Estates Act was formulated in 1965 in accordance with the structure of the Supreme Court, as the High Court was then known. Under s 2 of the Supreme Court Act 59 of 1959, read with the First Schedule, there were originally five, and subsequently six,[6] provincial divisions of the Supreme Court of South Africa and originally two, and subsequently three,[7] local divisions of the Supreme Court. Under the Constitution these divisions of the Supreme Court became the High Courts. In 2012 the Constitution was amended to constitute a single High Court in South Africa. The Superior Courts Act 10 of 2013 abolished local divisions and constituted the High Court in its present nine divisions corresponding to the nine provinces, with main seats in all of them and local seats in some.

[16] Section 2(1)*(a)*(ii) of the Estates Act must initially be construed against the historical background prior to the changes effected in 2012 and 2013. It required the appointment of a Master 'in respect of the area of jurisdiction of each High Court'. Prior to 1994 there had been six provincial and three local divisions in South Africa and courts in each of the TVBC states. A Master's office had to be established in respect of the area of jurisdiction of each of these. In the case of three provincial divisions[8] and the TVBC states a single Master's office having

[6] The original five were the Cape of Good Hope Provincial Division, the Eastern Cape Division, the Natal Provincial Division, the Orange Free State Provincial Division and the Transvaal Provincial Division. The Northern Cape Division was established in 1968.
[7] The original two were the Durban and Coast Local Division and the Witwatersrand Local Division. The South-Eastern Cape Local Division was established later.
[8] The Cape of Good Hope Division, the Northern Cape Division and the Orange Free State Division.

jurisdiction throughout the area of jurisdiction of those courts was established.[9]

[17] That left three divisions where there was a provincial division[10] having jurisdiction over the entire area of the province in question and three local divisions[11] having jurisdiction over a defined portion of those provinces. As the local divisions were separately constituted as high courts, the effect of s 2(1)*(a)*(ii) of the Estates Act was that a Master had to be appointed for both the provincial and the local divisions. As a result there was the same overlap in the jurisdiction of the Masters as there was in regard to the jurisdiction of the provincial and local divisions to which they were attached. The Masters in Grahamstown (now Makhanda), Pretoria and Pietermaritzburg could exercise jurisdiction over the whole province, including the areas covered by the local divisions, but the Masters in Port Elizabeth, Johannesburg and Durban were confined to exercising jurisdiction within the areas in which the courts to which their offices were attached exercised jurisdiction.

[18] The passage of the Superior Courts Act 10 of 2013 did not alter this in any way. If anything, it strengthened the conclusion flowing from the above analysis. The reason is that it established a single High Court for South Africa consisting of nine divisions, corresponding to the nine provinces, and abolished local divisions. The courts that formerly existed there, and those in Mthatha, Bhisho and Thohoyandou, are now local seats of the provincial divisions. They are not separate courts and it is no

[9] Of course the position in fact had been that these Master's offices had existed for many years prior to the enactment of the 1965 Estates Act

[10] The Eastern Cape Division, the Gauteng Division and the KwaZulu-Natal Division with their seats in Grahamstown, Pretoria and Pietermaritzburg respectively.

[11] The South-Eastern Cape Local Division, the Witwatersrand Local Division and the Durban and Coast Local Division with their seats in Port Elizabeth, Johannesburg and Durban respectively.

longer appropriate to refer to them as such or to describe them as local divisions.[12] The Masters' offices situated at those local seats exercise their functions within a limited territorial jurisdiction, while the Masters' offices at the main seat of each division[13] exercise jurisdiction throughout the provinces for which those divisions are constituted.

[19] Section 2(1)*(a)*(ii) does not give the Minister the power to appoint a Master for a portion of the area of jurisdiction of a High Court. Nor is the Minister empowered to limit a Master's jurisdiction in any way or to prescribe which matters will be dealt with in which Master's office where there is concurrent jurisdiction. As a matter of fact there is no indication that the Minister has tried to do so. The assumption underlying Holdings' argument was that the areas of jurisdiction of the Master in Johannesburg and that of the Master in Pretoria do not overlap. That was incorrect because the area of jurisdiction of the Master in Pretoria includes the entire area of jurisdiction of the Master in Johannesburg, in the same way that the former Transvaal Provincial Division exercised concurrent jurisdiction over the entire area of jurisdiction of the former Witwatersrand Local Division. As then, so now, it is open to parties requiring the assistance of the Master to use the office of either where their areas of jurisdiction overlap. The objection to the appointment of the liquidators by the Deputy Master, Pretoria was therefore without merit.

Were the companies solvent?

[20] The evidence in this regard was sparse. Mr Gumede said:

'The Group and its individual members were (and are) all solvent with no significant debt (apart from a liability on the part of Operations to the South African Revenue

[12] *Nedbank Ltd v Norris* 2016 (3) SA 568 (ECP) para 14.
[13] Masters have now been appointed at Polokwane for the Limpopo Division and Nelspruit for the Mpumulanga Division.

Services, which is covered by reserves and the settlement of which is in the process of being negotiated) and held a number of current contracts for the provision of services and providing for a healthy cash flow.'

No financial statements or any financial information was put up to support this.

[21] In his answering affidavit, deposed to on 7 March 2019, three days after the application was launched, Mr Murray said that the claim of solvency was not borne out by the CM100 forms setting out the financial position of the companies, but did not attach these forms to his affidavit. His complaint was that given the time constraints imposed by Holdings, that required the answering affidavit to be delivered two days after service of the application papers, it was not possible to provide a detailed analysis of the financial position of the Group. Accordingly he said that the affidavit would need to be amplified. In particular he raised the fact that Mr Gumede merely asserted the solvency of the companies without providing a factual basis for his assertion.

[22] I will deal later with the judge's approach to the case, including the filing of the document to which I am about to refer. Mr Murray dealt with the companies' financial position in much greater detail in a report that he filed under cover of an affidavit sworn on 10 March 2019. He said in the affidavit under cover of which the report was filed that it had been prepared and filed at the request of the Master. Attached to the report were the audited annual financial statements of Operations for the year ended 28 February 2017. The following passage appeared in the Directors' Report signed by Mr Gumede and Mr Gavin Watson, then the moving spirit behind the Group, on 7 March 2018:

'The directors draw attention to the statement of equity in the annual financial statements which indicates that the company incurred a net loss of R40,864,615 during the year ended 28 February 2017, and as of that date, the company's total liabilities exceeded its total assets by R -173,026,543. These conditions indicate the existence of uncertainty which may cast doubt about the company's ability to continue as a going concern.'

Had the judge had any regard to that document it is difficult to see on what basis he could have accepted at face value Mr Gumede's statement that the companies were all solvent. As there is a dispute over its status in the record, it is fortunate that it is unnecessary to rely upon the report to resolve the issue of the solvency of the companies in the Group.

[23] There is no definition of a solvent company in the 2008 Act. Initially this occasioned some difficulty in various high courts, as litigants sought to avoid compulsory winding-up under the 1973 Act on the grounds that they were solvent and hence could only be wound-up in terms of the 2008 Act. The confusion was set to rest by the decision of this court in *Boschpoort*.[14] It decided that a solvent company for the purposes of the 2008 Act is a company that is commercially solvent.[15] It matters not that its assets may exceed its liabilities if it is commercially insolvent. Conversely it may be commercially solvent despite the fact that its liabilities exceed its assets.[16] If it is commercially insolvent it is liable to be wound-up in terms of the provisions of the 1973 Act and it may not be wound-up in terms of the 2008 Act.

[24] The terse statement by Mr Gumede quoted above in para 9 appears to have been formulated with a view to conveying that the Group's assets

[14] *Boschpoort Ondernemings (Pty) Ltd v ABSA Bank Ltd* [2013] ZASCA 173; 2014 (2) SA 518 (SCA).
[15] *Boschpoort* para 21.
[16] *Ex Parte De Villiers & another NNO: In Re Carbon Developments (Pty) Ltd (in Liquidation)* 1993 (1) SA 493 (A) at 502H-503H.

exceeded its liabilities and the Group companies were all going concerns. Its conclusion that all the companies were solvent was an assertion not supported by empirical data. In dealing with urgency Mr Gumede disclosed one major obstacle to its being correct. It was that the principal assets of Operations appeared to be loans of over R416 million owed to it by the various subsidiary companies. Mr Gumede said that if these loans could not be recovered the damage to Holdings would be considerable. In the absence of evidence that the subsidiaries would be able to repay these loans the financial situation of the Group appeared to be precarious.

[25] The assertion of solvency on its own was insufficient to warrant a conclusion that the companies were solvent, an essential finding if the attack on the resolutions underpinning their voluntary winding-up was to be sustained. As it happens the judge did not address the issue in any detail and merely said that there was no indication that the companies were at the time insolvent. Possibly he accepted Mr Gumede's statement in the replying affidavit that the solvency of the companies was irrelevant – a proposition that was manifestly incorrect and not pursued in this court. In my view, given that the assertion of solvency was disputed, the *Plascon-Evans* rule required that the application be dismissed on this ground alone.

[26] In any event, there was a considerable body of material in Mr Gumede's affidavit and in the surrounding circumstances to demonstrate that the companies were commercially insolvent. According to him the damage was done to the Group by the evidence at the Zondo Commission and the endeavours to repair it had failed. Despite his efforts, in November 2018 FNB gave notice of its intention to close the Group's accounts. In early February 2019 ABSA followed suit. When he deposed

to his affidavit the attempts to obtain alternative banking facilities elsewhere had failed. A leading business rescue practitioner had advised them that there was no point in pursuing business rescue, because the business rescue practitioner would not be able to secure banking facilities for the group.

[27] Mr Gumede and his co-directors recognised that this was fatal to the continued business operations of the Group. Once the banking facilities were withdrawn, something that was imminent, they could neither pay their bills nor receive payment of amounts due to them. The faint suggestions by counsel that some other way could have been found were unsupported by any evidence. Apart from anything else it faced the difficulty that payments by government departments and government entities have to be effected through the conventional payment system in terms of s 7 of the Public Finance Management Act 1 of 1999 and the regulations made thereunder.

[28] Commercial insolvency is dealt with in the following passage from LAWSA:[17]

'A company is unable to pay its debts when it is unable to meet current demands on it, or its day-to-day liabilities in the ordinary course of business, in other words, when it is "commercially insolvent". The test is therefore not whether the company's liabilities exceed its assets, for a company can be at the same time commercially insolvent and factually solvent, even wealthy. The primary question is whether the company has liquid assets or readily realisable assets available to meet its liabilities as they fall due, and to be met in the ordinary course of business and thereafter whether the company will be in a position to carry on normal trading, in other words whether the company can meet the demands on it and remain buoyant.'

[17] *LAWSA* Vol 4(3), (2 ed, 2014), para 74.

[29] ‘Liquid assets’ in this context mean assets that are available to the company for the purpose of meeting its obligations. These will include not only cash on hand, but receipts that it can expect to receive in the ordinary course; overdraft or other banking facilities that can be used to make payment of debts when they fall due; or assets, such as shares, bonds or book debts, that can be realised quickly so as to generate cash with which to pay debts. When, for whatever reason, a company is unable to access any liquid assets it is illiquid and unable to pay its debts as they fall due.

[30] Counsel’s argument on behalf of Holdings was that the moment of inability of the Group to pay its debts had not yet arrived when the resolutions placing the companies in voluntary winding-up were passed. The bank accounts had not yet been closed and at that point in time they could pay their debts, although an inability to pay was imminent once the Group’s access to banking facilities was terminated. Although Mr Gumede did not say when the banking facilities would be terminated he did say that when that occurred the Group would be unable to pay its employees and suppliers, which suggested that it might be as early as the end of that month. It was conceded in the heads of argument that the Group would be unable to continue to do business and it would have to be liquidated.

[31] 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'.[18] Put slightly differently, it is whether the company 'has liquid assets or readily realisable assets available to meet its liabilities as they fall due to be met in the ordinary course of business and thereafter to be in a position to carry on normal trading – in other words, can the company meet current demands on it and remain buoyant?'[19] 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[20] and prospective, and continue trading.

[32] In the case of the Group the answer to this was clearly that it would not. Mr Gumede recognised this because he said that the endeavours explored by the directors were aimed at continuing to provide services to clients for a period and manage the termination of staff contracts in the best interest of employees. Mr Gumede said substantial sums of VAT, provisional tax of more than R15 million and pension fund contributions due primarily by Operations fell due for payment on 28 February 2019 and had not been paid. It followed that there were already debts that had fallen due and not been paid in the ordinary course. These amounts were attracting interest and penalties.

[33] One further factor pointed to the financial problems confronting the Group. It was that the voluntary winding-up was a creditors voluntary winding-up in terms of s 351(1) of the 1973 Act, not a members voluntary winding-up in terms of s 350(1). Had the latter route been

[18] *Rosenbach and Co (Pty) Ltd v Singh's Bazaars (Pty) Ltd* 1962 (4) SA 593 (D) at 597B-C.
[19] *ABSA Bank Ltd v Rhebokskloof (Pty) Ltd* 1993 (4) SA 436 (C) at 440F-H.
[20] Contingent liabilities include such claims as an unliquidated claim for damages. *Koekemoer v Taylor and Steyn NNO and Another* 1981 (1) SA 267 (W) at 271 B-D.

followed security would have to have been furnished to the satisfaction of the Master for the payment of the debts of the company within a period not exceeding twelve months. Alternatively, the directors would have had to deliver to the Master a sworn statement or a certificate from their auditors that the companies had no debts. The latter was not possible because the companies had debts. The absence of security, which meant that in liquidation the liquidators of the companies would take their directions from their creditors, was a further factor pointing to the fact that the companies were commercially insolvent. Under the more stringent provisions of s 80(3) of the 2008 Act such security would have had to be provided in order for a voluntary winding-up to proceed, whether that was a creditors or a members voluntary winding-up. An application to court under s 81 would have been necessary.

[34] I conclude that Operations and the other companies in the Group were commercially insolvent at the time that the resolutions for their voluntary winding-up were taken. That conclusion removes the underpinnings of Holdings case. It should not have been granted any relief by the high court and the application should have been dismissed. Before setting out the order to be made it is, however, desirable that I say something about the proceedings in the high court and the costs order the judge made against the liquidators in their personal capacities.

The proceedings in the high court

[35] The application was brought as one of extreme urgency. It was launched on 4 March; the papers were served on 5 March; the answering affidavit had to be filed by 7 March and the case was argued on 13 March, with a 24 page judgment being delivered the following day. The liquidators rightly complained that this extraordinarily hasty litigation

timetable, contrary to the Practice Manual of the court, gave them inadequate time to prepare a substantive answer on the merits. Nonetheless they challenged the factual foundation of the claim in regard to the solvency of the companies and raised a number of preliminary points of principle. Notwithstanding the shortness of the time given to them a more detailed response on the question of solvency was set out in the report annexed to Mr Murray's affidavit of 10 March. That report was prepared and furnished to the court at the request of the Master.

[36] The judgment makes no mention of this report, yet it contained highly material information in regard to the central issue of the solvency of the companies. The objection by counsel on behalf of Holdings, repeated in heads of argument in this court, that in order for it to be part of the record there needed to be an application under Uniform Rule 6(5)(*e*) was patently incorrect. This was a document prepared and lodged with the court, via the liquidator, at the instance of the official charged by statute with oversight of the liquidation of companies and, what is more, the official who had appointed the liquidators to perform their task. I would add that because of Holdings' erroneous view of which Master was supervising the liquidations, the Master who made the appointments was not cited or served. How else was that Master to ensure in the discharge of their duties that the court was fully apprised of the facts?

[37] The court should have had regard to the report's contents. It would then have read Operations annual financial statements as at 28 February 2017 and seen the note quoted in para 22 above. It would also have seen that on 22 February 2019 two major contracts generating revenue in excess of R40 million per month had been terminated because the companies concerned had been placed in voluntary winding-up. There

was much else besides. In the face of this evidence the judge could not have concluded that there was no evidence of commercial insolvency.

[38] The judge dealt with the case as one of extreme urgency. It was not. There was no doubt that resolutions for the winding-up of the companies had been taken and lodged with the CIPC and provisional liquidators had been appointed. But that had occurred on 12 February and the appointments, at least of Mr Lutchman, had been in terms of requisitions signed by Mr Gumede and submitted to the Master. On 19 February the board of Holdings met with their current attorneys for advice in regard to their rights and obligations as creditors in the various liquidations. For reasons that were not explained those attorneys asked for copies of the resolutions, but these were only furnished on 25 February, whereafter the advice was given that led to these proceedings. Another week passed during which the application papers were prepared and lodged with the registrar – a total period of three weeks. Yet the newly appointed liquidators were given two days to deliver an answering affidavit and when they protested their protests were overruled. Even then they did the work that led to the report being filed on 11 March, but this report was ignored.

[39] The urgency was created by Holdings in the course of its endeavours to overturn the consequences of its own actions. They demanded that Mr Murray cease to exercise his statutory powers and relinquish control of Operations and the other companies to their directors on one day's notice. The fact that he could not comply with this demand until the voluntary winding-up of the companies was set aside together with his appointments was ignored. The basis of urgency was that the directors of the companies should be placed in control thereof as soon as

possible to mitigate any potential damage. There was no evidence that the exercise by the liquidators of the restricted powers conferred on provisional liquidators could harm the companies. Nor was it explained how the directors were going to conduct the operations of the companies without banking facilities. There was no suggestion that Mr Murray – who was the principal target of the complaints by Mr Gumede – had in any way acted improperly or would not act so as to protect the interests of the companies, their creditors and shareholders. No complaint was levelled at Mr Lutchman, the liquidator they had nominated.

[40] The liquidators justifiably complained that the matter did not warrant such urgent attention of the court and could easily wait another week, if not longer, in terms of the Practice Directive before being heard. Instead the judge held that it was urgent. When the liquidators complained that they had not had sufficient time to provide a defence on the merits, but could argue the preliminary objections and would then need time to file further papers, he put them to an election to proceed on the papers as they stood or to seek an adjournment in the face of strenuous objection from Holdings. He then treated their decision to argue the preliminary issues and challenge the urgency of the matter as 'inappropriate' and assumed that by not requesting more time they 'did not really require more time'.

[41] That brings me to the grounds for rejecting the liquidators' contentions in regard to urgency. The relevant passage in the judgment reads as follows:

'… if the resolutions are a nullity or unlawful, the control of a business of such magnitude in the hands of liquidators who are at large to do with it as they please, of itself is illustrative of the ongoing irreparable harm which is not only suffered on a

daily basis but on an hourly basis. Critical decisions that are not necessarily in the company's best interests can be decided upon. Of course, the liquidators, in the course of administering the estate by selling off its assets, would earn a fee on the tariff which is representative of a percentage of the sale value and may well be very eager to execute their mandate, particularly in an estate as large as this one.'

[42] That passage consists of completely unfounded insinuations that the liquidators would not discharge their duties properly under the supervision of the Master and in accordance with the directions of creditors. It ignored the fact that as provisional liquidators their powers were limited and did not extend to doing the things he attributed to them. In this regard it is worth mentioning that the creditors who nominated Mr Murray as liquidator were SARS, which was investigating the tax affairs of Operations and the Group, and Firstrand Bank, together with its Wesbank Division, which had claims of some R12 million. The irreparable harm being suffered 'on an hourly basis' was purely speculative, as was the suggestion that critical decisions might be made against the companies' best interests in the period of a week or two needed to enable the liquidators to provide a full answer.

[43] Finally there was the unfounded insinuation that the reason for the liquidators' opposition was their own financial interests. The judge returned to this when he dealt with costs. He said that the liquidators should have abided the Court's decision, ignoring the fact that from the outset Holdings sought an order against them personally that they pay the costs of the application, including the costs of two counsel. He went on to say that the interests of creditors did not need protection because the companies were solvent. This in the face of the fact that their solvency was disputed on the papers; had not been the subject of any analysis

despite Mr Gumede's extremely tenuous evidence; and when, for the reasons already given, they were commercially insolvent.

[44] The judge said that SARS, as the largest creditor and the one that requisitioned for Mr Murray's appointment, would be prejudiced because the amounts due to it would otherwise have been promptly paid. He had no evidence that this was SARS' view. How SARS was to be paid if the banking facilities had been withdrawn in the interim – a fact of which he had not been apprised, because Mr Gumede dealt only with the position at the date of liquidation – was ignored or overlooked. Had he considered, as he should, Mr Murray's report he would have discovered that the FNB facilities had been terminated and the ABSA facilities would be terminated on 18 March 2019 so that restoring the companies to the directors would not result in their being able to trade.

[45] Finally the judge returned to his canard that the liquidators were motivated by financial self-interest. He refused to consider Mr Murray's report in the face of submissions that it contained evidence of serious improprieties. He did so on the grounds that it was not under oath, although it had been filed under cover of an affidavit. His conclusion was that their opposition involved a conflict of interest and was a business decision. On that basis he ordered them to pay Holdings' costs personally including the costs of two counsel.

[46] There was no justification whatsoever for that order. It is trite that where a court is dealing with someone such as a liquidator coming to court, it is only if there is impropriety on their part that an order to pay costs personally will be made against them. The grounds relied on by the judge were based on speculation and insinuations that verged on the

defamatory. I have dealt with it in some detail to make it plain that orders such as this should not be sought and should not be granted on this basis.

The order

[47] The following order is made:

1 The appeal is upheld with costs, such costs to include those consequent upon the employment of two counsel.

2 The order of the high court is altered to read:

‘The application is dismissed with costs, such costs to include those consequent upon the employment of two counsel.’

M J D WALLIS
JUDGE OF APPEAL

Appearances

For appellants: K W Lüderitz SC (with him P Lourens)
Instructed by: MacRobert Attorneys, Pretoria;
Lovius Block Inc, Bloemfontein

For first respondent: M R Hellens SC (with him J G Richards)
Instructed by: Rushmere Noach Inc, Port Elizabeth;
McIntyre Van der Post, Bloemfontein.