IN THE HIGH COURT OF SOUTH AFRICA
WESTERN CAPE DIVISION, CAPE TOWN

REPORTABLE

CASE NO: 9357/2015

In the ex parte application of:

DAVID HARRIS

for his rehabilitation **APPLICANT**

And in the application for leave to intervene by

FAIRHAVEN COUNTRY ESTATE (PTY) LIMITED INTERVENING PARTY

JUDGMENT DELIVERED ON 26 JANUARY 2016

GAMBLE, J:

INTRODUCTION

[1] On 2 June 2010 the estate of the applicant ("Harris") was sequestrated by order of this court. The amended first and final liquidation and distribution account in respect of his estate was confirmed by the Master on 22 November 2012.

[2] On 10 April 2015 Harris gave notice in the Government Gazette of his intention to apply for his rehabilitation in this court on 2 June 2015. In this application Harris complied with the relevant statutory requirements of the Insolvency Act, 24 of 1936 ("the Act") insofar as notice and time limits are concerned. The application for rehabilitation was brought pursuant to the provisions of section 124 (2) of the Act[1], in light of the fact that at the time that the application was launched more than 12 months had elapsed after the date of the confirmation of the liquidation and distribution account. In her report the Master noted certain shortcomings in the application to which I shall refer later but otherwise indicated that she would abide the decision of the court.

[3] On Friday 29 May 2015 the intervening party ("Fairhaven") gave notice that it intended making making application the following Tuesday (2 June 2015) for leave to intervene in the rehabilitation application for purposes of procuring the dismissal of such application, alternatively for the postponement of the rehabilitation application pending the completion of an envisaged enquiry in terms of section 152 (2) of the Act, which enquiry was to take place within three months of the Master authorising same. It bears mention that the founding papers in the application to intervene are substantial and run to 182 pages.

---

[1] The section reads as follows:

"(2) An insolvent who is not entitled under subsection (1) to apply to the court for his rehabilitation and who has previously given to the Master and to the trustee of his estate in writing and by advertisement in the Gazette not less than six weeks' notice of his intention to apply to the court for his rehabilitation may so apply-

(a) after 12 months have elapsed from the confirmation by the Master, of the first trustee's account in his estate….."

[4] The application to intervene was opposed and on 2 June 2015 was postponed, together with the rehabilitation application, for hearing before this court on 17 August 2015 with a timetable fixed for the filing of further papers. When the matter commenced on that day Harris was represented by Advs. G.W Woodland SC and D.Melunsky, and Fairhaven by Advs.W.R.E Duminy SC and F.S.G Sievers. On the second and third days Mr Melunsky appeared alone. While counsel originally estimated that the matter would only last a day, it did not finish on the second day and was postponed to a date to later to be fixed in Chambers. On 1 September it was agreed that the matter would continue on 16 October 2015. On that day a substantive application by Fairhaven for a postponement to enable it to prepare a formal application for the court's recusal was refused and argument was then completed whereafter judgment was reserved. The reasons for the refusal of the postponement application will form part of this judgment.

THE APPLICATION FOR REHABILITATION

[5] The application for rehabilitation was made in the perfunctory fashion in which so many of these applications are brought in the motion court. In terms of section 126 of the Act, historical background is given regarding the alleged factual basis for the erstwhile insolvency of Harris, brief details are furnished of the application for sequestration itself, there is a summary of assets and liabilities at the time of sequestration, a report by the trustees of the insolvent estate is placed before the court and details are given of Harris' current income and expenditure. In this regard Harris says that he is currently employed as an estate agent with a monthly income of R30 000. His list of alleged monthly expenses appears to total R28 469, 78.

[6] The requirement in section 126 that an applicant for rehabilitation "*shall include a statement of assets and liabilities…[as]… at the date of the application"* is purportedly complied with as follows:

> *"16. Since my estate was sequestrated, I did not acquire any assets and did not incur any debt".*

As to the reasons why rehabilitation is sought, Harris says that he is 62 years old and urgently needs to get back into the property market and become commercially active in order to provide for himself and his wife as old age approaches. He concludes that –

> *"I cannot fully unlock my earning potential whilst being an unrehabilitated insolvent and desperately need to be rehabilitated so as to enable me to freely and fully participate in commercial activities."*

[7] I should observe at this stage that in terms of section 127A of the Act an insolvent is entitled to rehabilitation through effluxion of time after the lapse of a period of 10 years. In such circumstances no application to court is required. Section 124 of the Act, on the other hand, provides for an application for rehabilitation which may be brought within various stipulated timeframes. These vary between three and five years depending on the circumstances to hand. Of importance for an application under section 124 (2) is that a period of four years must have lapsed post sequestration, *"except upon the recommendation of the Master".* In the present case that four year period has lapsed and, under section 124 (2) (a), the requisite twelve month period after the confirmation by the Master of the first trustees' account in the

estate has also lapsed. In the circumstances it seems to me that Harris has brought himself with in the parameters of the Act, as far as the lapsing of time is concerned. Ordinarily, I would have thought that, subject to what I have to say hereunder in regard to the short-comings pointed out by the Master, on the founding papers as they stand, a court would have been entitled to exercise its discretion to rehabilitate Harris.

BASIS FOR THE APPLICATION TO INTERVENE

[8] An application for leave to intervene is not a prerequisite to a party being heard in opposition to an application for rehabilitation. In terms of section 127 of the Act, at the hearing of the application -

> "*the trustee or any creditor or other person interested in the estate of the applicant may appear in person or by counsel to oppose the grant of the application.*"

[9] Nevertheless Fairhaven considered it prudent to apply for leave to intervene on the grounds that it is a creditor in the insolvent estate whose debt has not been satisfied in full. Just how Fairhaven acquired its claim against Harris involves a fairly detailed account of the disintegration of a previously successful business relationship. If it be stated at this stage that Fairhaven was not a creditor in the insolvent estate, did not participate in the *concursus creditorum* and only purchased a claim from Nedbank Limited on the eve of the launching of the application to intervene (28 May 2015), it will be appreciated that Fairhaven's intervention appears *prima facie* to be out of the ordinary.

[10] Harris claims that Fairhaven is not acting *bona fide* and that its application to intervene and oppose his rehabilitation is an abuse of the process of the court. Fairhaven on the other hand alleges that Harris has conducted a successful estate agency business and has effectively secreted assets acquired through his employment as such in a family trust. It further disputes the integrity of the allegations made by Harris in the founding affidavit regarding his income and asset base and suggests that he is not entitled to be rehabilitated. At the very least, Fairhaven says that Harris and others should be interrogated in terms of section 152(2) of the Act before consideration can be given to his rehabilitation.[2] Allegations of this nature necessitate careful consideration of the extensive background detail relevant to this case.

THE PARTIES' COMMERCIAL RELATIONSHIP

[11] The commercial relationship between the parties to this dispute and the other *drammatis personae* is a fairly complex web of contractual arrangements. The nature thereof is not particularly material to the resolution of the dispute and I shall accordingly deal with it as briefly as possible. The commercial setting is the sale of units in various residential developments in the Somerset West area.

[12] On 26 July 2012 a marketing management agreement was concluded in respect of a development known as Somerset Lakes. The marketing of units in that

---

[2] Sec 152(2) provides that if at any time after sequestration and before rehabilitation the Master is of the view that, inter alia, the insolvent is able to provide information *"which the Master considers desirable to obtain, concerning the insolvent, or concerning his estate or the administration of the estate or concerning any claim or demand made against the estate"* , the insolvent can be given notice to appear before the Master , a magistrate or a specified officer in the public service on a fixed date for purposes of interrogation.

development was to be undertaken by a company which came to be named Summerclub Real Estate (Pty) Ltd. Summerclub was mandated by Omwieco (Pty) Ltd to undertake the marketing of Summer Lakes. The directors of Summerclub were Shaun Harris (the son of the insolvent who for convenience sake will be referred to as "Shaun") and Zane Mauritz de Decker, who deposed to the founding affidavit in the intervention application in his erstwhile capacity as the sole director of Fairhaven. Shaun, who also practices as an estate agent, runs his business affairs through a close corporation called Finman 119 CC, which trades as "Schonenberg Real Estate" and of which he is the sole member.

[13] The shares in Summerclub are owned in equal shares by Proventus Property (Pty) Ltd and the Avodah Trust. Avodah is a family trust which was established in September 2012 by Harris and his wife, as founders, for the benefit of the Harris family, all of whom (including the insolvent) are beneficiaries of the trust. Harris himself could not be appointed a trustee of Avodah due to his insolvency and so the trustees currently are his wife and daughter, Shaun and an attorney from the Strand, Mr Bosman, who was appointed as an independent trustee. The trust deed records, however, that upon rehabilitation Harris will be appointed as a trustee of Avodah.

[14] Proventus is a company effectively controlled by a property developer by name of Otto Wiehahn ("Wiehahn") who also has an indirect interest in Omwieco. In the application for postponement on 16 October 2105 it was drawn to the attention of the court that Wiehahn was then the sole director of Fairhaven, having replaced de Decker in the interim.

[15] During 2012, Fairhaven was used to purchase a distressed property development in Somerset West known as Fairhaven Country Estate from Nedbank. Fairhaven is effectively controlled by Wiehahn and his brother, Eric, (each of whom has a 25% stake in the company) and a certain Dennis Venter (50%), all of whom manage their respective interests through corporate entities controlled by them. As the erstwhile sole director of Fairhaven, de Decker took his instructions from Wiehahn and Venter. In 2012 Fairhaven granted Summerclub a sole mandate to market the undeveloped plots in Fairhaven Country Estate and Summerclub in turn granted Finman a sub-mandate to market the plots.

[16] For reasons which need not be expanded upon, the relationship between the Harris family and Wiehahn and Venter deteriorated with serious recriminations being made either way, to the extent that on 6 May 2014 Fairhaven purported to cancel the mandate to Summerclub. A dispute arose in this regard and eventually a settlement agreement was brokered and drafted by a Cape Town attorney, Mr Korber, who represents Fairhaven in these proceedings. The settlement agreement was signed by the trustees of Avodah, and the duly authorised representatives of Fairhaven, Summerclub, Proventus and Finman, as well as Harris' trustees. The purpose of the settlement was, inter alia, to effect a commercial divorce between Harris and the interests which controlled Fairhaven (and who,for the sake of convenience, I shall call the "the Fairhaven interests"). Shaun, on the other hand, was regarded by the Fairhaven interests as a hard-working and effective salesperson and his services were to be retained. In the preamble to that settlement agreement it is recorded that the insolvency of Harris was unknown to Fairhaven at the time that the Summerclub sub-mandate was granted to Shaun.

[17] The 50% shareholding of Avodah in Summerclub had throughout presented an obstacle to the Fairhaven interests in assuming effective control of Summerclub. Various stratagems were unsuccessfully employed to acquire that interest in the Trust, but, eventually, in early 2015 an opportunity arose for the Fairhaven interests to tighten the screws on the Harris family.

THE DOMAIN NAME LITIGATION

[18] Fairhaven owned a series of internet domain names relevant to its business and discovered in January 2015 that Shaun had allegedly taken steps to appropriate use of the domain name www.fairhavenestate.co.za to Finman. Fairhaven commenced urgent interdictory proceedings in this court to restrain Shaun from passing off that name (and any of its other domain names) either personally or through Finman. Fairhaven was ultimately successful in that litigation and on 8 July 2015 obtained the relief it sought (see Fairhaven Estate v Harris and another 2015(5) SA 540 (WCC).

[19] The papers filed in the intervention application show unequivocally that when the misappropriation of the domain name came to the attention of the Fairhaven interests Venter went to extraordinary ends to put pressure on Harris to force a settlement in the domain name litigation with Shaun. I shall deal with the full extent of this campaign of vilification and abuse against Harris shortly but point out that it culminated in settlement proposal put forward by Korber on 11 June 2015 on behalf of the Fairhaven interests pursuant to an invitation on 9 June 2015 from Harris' erstwhile attorneys, Louw Inc, who were also the attorneys for Shaun in the domain name litigation. Fairhaven's proposal not only made provision for settlement of the domain

name litigation but also provided for the transfer to the Fairhaven interests of Avodah's 50% interest in Summerclub. In the result, as I shall demonstrate later, the settlement which was intended to finally achieve a clean break between the warring factions did not materialise.

<u>VENTER'S PURSUIT OF HARRIS AND RELATED DEVELOPMENTS</u>

[20] It seems that during mid January 2015 Venter was away overseas. During his absence a certain Jan Hofmeyr of G-Studio Branding Agency (Pty) Ltd (the agent of Fairhaven responsible for managing its internet website) received an an email from Shaun requesting the transfer of the aforesaid Fairhaven domain name to him (Shaun). Hofmeyr took the matter up with de Decker who immediately alerted Venter. This development drew the ire of Venter who immediately contacted Harris. I shall quote extensively from a string of correspondence and events which ensued and, for the sake of completeness must include all of the invective, innuendo and sarcasm contained therein. All quotations will reflect the text in its original form replete with grammatical, spelling and punctuation errors.

[21] The first salvo was an sms message from Venter to Harris on Thursday 15 January 2015 at 19h54 to the following effect:

> *"If you want me to fuck you and your gay son up, continue with your shit!!! I am leaving Europe early, make sure that dimain is transferred".*

[22] Then, some time after 21h00 on Saturday 17 January 2015 Venter arrived at the entrance to the gated village in Somerset West where Shaun and his family resided and informed the security guard on duty that he was there to see Shaun. The guard phoned through to Shaun and informed him that there was someone at the gate who claimed to be from the Hell's Angels[3] and who said (in foul language) that he was there to beat Shaun up and break his neck. Shaun refused Venter entry and after the security guard had informed him of this he left uttering profanities. Shaun immediately sent several explanatory sms messages to Louw, reported the incident to the police and stepped up his personal security.

[23] On Monday 19 January 2015 Venter sent an email to Harris and copied it to Wiehahn and de Decker. The subject of the email is Mr. Bryan Shaw, one of Harris' trustees, and it reads as follows –

> *"Hi Dave*
>
> *Its your nightmare here. I have contacted Brian Shaw today and have a meeting with him on friday morning. He is a nice fellow, i really like him….He is understanding.*
>
> *I have a file of 105 pages that i am due to share with him (sharing is caring). If you want to have a discussion before i go and see him, please send me a time that you will be available tomorrow.*

---

[3] A notorious international motorcycle club regarded in many quarters as thuggish and aggressive (See Wikipedia Online Encyclopaedia *sv "Hell's angels")*

I hope we can sort this mess out and that we never have to deal with one another again.

Looking forward to hearing from you.

Sleep well."

[24] The following day, Tuesday 20 January 2015, Venter made good on his promise and sent Shaw a lengthy email detailing various aspects which he wished to raise with him at their upcoming meeting. The email commences with the following introduction –

"Hi Brian

I refer to my telephone discussion yesterday with you regarding the estate of David Harris. Can you please confirm when and where we can meet on friday? I am unfortunately not available after this date for three weeks. I have a file of 115 pages that I would like to take you through. In a nutshell we believe that millions of rands of income has been diverted by Dave to a trust and via an entity controlled by his son. I have various emails and agreements that will make it pertinently clear that the trust is Daves alter ego and that his creditors have been defrauded by the diversion of income and assets (in particular a 50% shareholding in a marketing company, for which there is a buyer) to this trust and his son.

I have attached a scanned copy of to relevant documents for your perusal. (Attachments) I will provide another approximate 80 when I see *you. These documents contain 'acknowledgments' by Dave that all the income is his personally and that the trust was simply interposed to divert the income and disguise the true nature thereof. Could you please also advise me if the sequestration file of Dave is a public document? Or will I have to bring a PAI application to obtain the contact names and numbers of the creditors who suffered in his estate?*

Lastly below I supply my comments on the paginated file that I will supply you on Friday."

The rest of the email contains comments on various annexures attached thereto. No purpose would be served by referring to each and every comment but I highlight the following three -

"…..*Daves son owns Finman and was another one of the Harris vehicles used to hide money from Daves creditors. Hence both entities were part of the same agreement. His son was and still is a puppet in Daves hands, with Dave heading up the den of thieves……..*

This is the deal done on Summerclub/now Somerset Lakes. In terms of this agreement David via his trust has 50% holding. Once again the shareholding would have been directly in Daves hands. The asset of the 50% shares should form part of his estate. I have a buyer for this 50%. The other 50% partner has

> *indicated that they want to buying it. Presently there is also an amount of R750 000 outstanding to Dave via this entity…..*
>
> *Dave does not even know the name of the trust if he refers to it as THE DAVE HARRIS TRUST. This is the closest he came to the truth. It is nothing other than David Harris. I believe this was likely to be the name, but he realised that it was to close to the truth and was advised to change it…"*

[25] The interdict application against Shaun was launched as a matter of extreme urgency on 19 January 2015 to be heard the following day, a provisional day during this court's summer recess. The matter was postponed and after the exchange of affidavits, was heard on the semi-urgent roll by Henney J on 23 April 2015. As I have said, final relief was granted in favour of Fairhaven on 8 July 2015. While the interdict application was running its course there were further on-going developments in the background.

[26] On 19 January 2015 an employee in one of Wiehahn's companies, a certain Zeanie Marais, forwarded documents to Shaun confirming a resolution passed at an alleged meeting of the directors of Summerclub at 10h00 that day. The resolution recorded the resignation of de Decker as a director and the appointment of Venter in his stead. Shaun responded to this by averring that he had no knowledge of any such meeting and emphasised that he required proper notice thereof.

[27] On 19 March 2015 Venter wrote to Shaw on behalf of a company described as Dream World Investments 401 (Pty) Ltd ('Dream World") with an offer to purchase all of the claims in Harris' estate –

> *"We hereby tender to purchase all and any of the proven claims in the David Harris estate for an amount equivalent to 5c(five cents) for every rand proven. Please contact all the creditors with proven claims in the estate and make the offer on our behalf. This offer is valid for a period of 14 days."*

[28] On 27 March 2015 Louw gave notice to the Master and Harris' three trustees (including Shaw) of his client's intention to apply for his rehabilitation. Thereafter, on 10 April 2015 the statutory notice in terms of section 124(2) was published in the Government Gazette.

[29] On 17 April 2015 Korber wrote to Shaw on behalf of Dream World on the instruction of Venter. The following paragraphs are relevant –

> *"3. I think that the matter can easily be resolved and I accordingly propose the following solution, namely that:*
>
> > *3.1. I prepare a letter to the Master on behalf of the trustees of the Estate (to be signed by you) in terms of Section 152(2) of the Insolvency Act - naturally Dream World will indemnify the trustees for the costs of the enquiry;*

3.2 I write to the bank creditors of the Estate (i.e. ABSA, FNB, RMB and Nedbank) in regard to the cession to Dream World of the unpaid portions of their proved claims.

4. In regard to 3.2 above, I would appreciate it if you could furnish me with the confirmed L&D accounts. This would obviate the need to obtain them from the Master's file."

[30] Shaw responded to Korber's solicitation later in the day as follows –

"I have not had a case previously where an interested party has wanted to acquire the claims of creditors in order to pursue an insolvent due to a breakdown in business relationship. I had discussed this matter with various parties informally and tried to seek advice on how best to deal with the matter.

Be that as it may I was then advised that I could not make the offer directly to the creditors and it was at this stage that I submitted the details to your client of the various creditors.

Possibly your client or you should communicate with the various creditors in order to acquire the claims and thereafter once this has been secured attend to the application for a 152 enquiry.

A copy of the account together with the confirmation notice are attached as requested."

[31] Korber had, on his own initiative, already taken the suggested steps earlier that day, having written to the 4 creditor banks and offering to purchase the unpaid portions of their respective claims for 5c in the Rand upon cession thereof to Dream World.

[32] After judgement had been reserved in the interdict application Venter sent Harris the following sms message on Wednesday 29th of April 2015 –

> *"Hey Dave. That domain is costing you more by the day!!!! I don't want your money….I have enough of my own. If you want to pay our costs and transfer the domain before it costs you everything….Give me a call"*

[33] First National Bank and ABSA were not interested in the proposal put forward on behalf of Fairhaven but Nedbank was. In an email dated 5 May 2015 an employee in its Bad Debt Recovery Centre in Paarl, a certain Ms. Susan Erasmus, wrote to Korber as follows:

> "*After thorough investigation we ar e prepared to sell the unpaid portion of our claim (R1 042 854,92) for an amount of 40c in the Rand."*

[34] This development led to the following direct response from Venter a couple of hours later that afternoon:

> *"Hi Susan*
>
> *I am the guy chasing David Harris. I am chasing for reasons mainly other than commercial gain. Unfortunately there will not be a fortune (if*

anything) out of an investigation. They will definitely not be anything close to the 40 cents in the rand. Could we possibly meet and I can take you through what I know. At worst you can contribute to a 152 investigation (with us) and possibly get some dividend for Nedbank. I could come through on Thursday."

[35] Thereafter Venter discussed the matter with Erasmus' manager, Mr. Andre Potgieter, who was persuaded to conclude a deal. On 21 May 2015 Venter confirmed the position to Erasmus in the following terms:

'Hello Susan

Ek het vanoggend met Andre gesels. Ons gaan Nedbank se eis vir 30c .in die rand koop. Ons gaan 'n maatskapye gebruik Fairhaven Country Estate (www.fairhavenestate.co.za)? Patricia sal die detail van die maatskapy vir jou stuur. My venoot Otto sal die betaling reel en dokumente teken. Dit is net uiters belangrik dat ons die transaksie vining afhandel.'

[36] The apparent urgency referred to in the concluding sentence of this correspondence relates to the allegation by de Decker in the replying affidavit that notwithstanding publication in the Government Gazette on 10 April 2015 and the notice to the trustees on 1 April 2015, the Fairhaven interests had only become aware of the application for rehabilitation on 20 May 2015, the day upon which the application was issued out of this court. In any event, it acquired the claim a week later (28 May 2015) and the next day launched its application for leave to intervene.

As I have said, that application was voluminous and the rehabilitation application was postponed by agreement on 2 June 2105 for hearing on the semi-urgent roll.

[37] Behind the scenes, there were further developments which merit mention. On 9 June 2015 Korber wrote to the Master (without notice to Shaw or Harris' attorneys) requesting the establishment of an enquiry in terms of section 152(2) of the Act before the magistrate, Somerset West. That application was granted, without more, by the Master on 15 June 2015. Also on 9 June 2015, and quite fortuitously, Louw had made a without prejudice approach to Korber in an attempt to settle all outstanding issues between the parties. It is common cause that Louw was not aware of the application to the Master for the enquiry and was certainly not informed thereof by Korber when the parties spoke telephonically on 8 June 2015.

[38] In his email dated 9 June 2015 Louw wrote to his colleague as follows:

> "*I confirm that I am seeking a method to get rid of all the acrimonious litigation surrounding my client Mr David Harris, since his health is not good.*
>
> *My instructions are that the family is prepared to forego the 'website' application and to tender the costs thereof, in an attempt to get rid of all the animosity.*
>
> *Kindly take instruction on what basis your client's will be prepared to come to an agreement on all the issues between them."*

[39] Korber replied promptly to this request in a detailed letter dated 11 June 2015. Having first sketched some background detail, the following proposal was made on behalf of the Fairhaven interests –

“4. While my clients are not averse to the idea of a clean break with Mr Harris and his family, it would be iniquitous were he and his family to escape scot-free without paying any compensation to our client.

5. In the circumstances, our client has proposed the following solution to the current impasse, namely that it will withdraw its applications in case numbers 735/15 (the website application) and its application to intervene in and oppose your client’s rehabilitation application (in case number 9357/2015) and its complaint and request to the Master for an enquiry in terms of section 152 (2) of the Insolvency Act, against:

5.1 receipt of a notice of withdrawal of your client’s opposition to our client’s application in case number 735/15 and a consent to final relief being granted in terms of paragraphs 2.1 to 2.5 of our client’s notice of motion in that application;

5.2 receipt of a transfer form signed in blank by the Avodah Trust (“the Trust”), and dated as at date of signature thereof, in terms whereof the Trust transfers its 50% shareholding in Summerclub Real Estate (Pty) Ltd for no compensation to a recipient to be filled in by our client on the blank space on the *form concerned (your client will be required to the initial against such blank space);*

5.3 payment into our trust account (and accompanied by Proof of Payment in regard thereto) of the sum of R1.5 million, being in respect of:

a) our client's costs (on the attorney and own client scale) in respect of case number 735/15;

b) our client's costs (on the attorney and own client scale) in respect of case number 9357/2015;

c) the purchase price of our client's claim (against Insolvent Estate Harris including the cost of acquiring such claim from Nedbank) and the costs involved in preparing the application to the Master in terms of section 152 (2) of the Insolvency Act, after which payment our client will be regarded as having sold its said claim to the Avodah Trust or to any other party (acceptable to our client) as nominated by Mr Harris and his family.

6. Your client(s) would, notwithstanding the transfer of their interest in Summerclub Real Estate (Pty) Ltd, still be entitled to payment in due course of such commission as may be due to them as at date hereof."

[40] I should perhaps point out at this juncture that both letters from the respective attorneys are marked “without prejudice”. Korber’s letter was annexed to the answering affidavit of Harris in the intervention application on the basis that it did not constitute a *bona fide* attempt to settle Fairhaven’s intervention application, but was rather an attempt to resolve the intervention application and the domain name litigation by “extorting” R1.5 million and seeking to transfer the Avodah Trust’s 50% share in Summerclub for no consideration. In the replying affidavit Louw’s earlier letter was produced by Fairhaven to dispel any impression that the Korber letter was unsolicited. In the result, neither party sought to strike out either letter, and, furthermore, ample reference was made thereto in argument.

[41] The matter did not settle and a fortnight later, on Thursday 25 June 2015, Louw withdrew as Harris’ attorney of record and was substituted the following Monday (29 June) by Edward Nathan Sonnenberg Inc (“ENS”) of Cape Town. The attorney dealing with the matter was Ms Morgan.

[42] Over the intervening weekend Venter sent the following lengthy email to Harris under the title “**Slow train comming** (sic)”[4]

---

[4] No doubt a reference to the 1979 folk-rock album of that name released by American singer-songwriter Bob Dylan. The title song is said to be an allegorical reference to an impending apocalypse (see Wikipedia Online Encyclopedia s.v “Slow Train (Bob Dylan Song)”)

"Hi Dave

Hope all is well your side and that your health has improved. I have received your attorneys notice of withdrawal as attorney of record. He reminds me of the skipper on the Oceanos who made it to shore first when he saw that the tide had turned. Clever man, I will definitely be using him in future.

Dave, I have been keeping you fully informed of my actions from day one i.e

1) *When you 'stole' the website, I told you that all I wanted was the website back or I would go to Brian Shaw (your curator) and fight 'dirty'. I gave you a full copy of the documents and my reasoning that I would use to institute a 152 investigation. I did this as I did not want your money and did not want to fight. I wanted our website back. Your actions or lack thereof left me with no alternatives;*

2) *You gave me the middle finger and simply chose to ignore it. Your comments to certain of your staff was that it would just 'create a bit of admin' for you.*

3) *My repeated comments to you that the website is starting to cost you a fortune, fell on deaf ears. Even the blind could see that you had come to a gun fight with a water pistol with so much water that it could possibly keep you 'in liquidation' for a*

long time. If you dont settle we will ensure that you dont rehabilitate;

4) *My last text to you on the 29 April in which I made it clear that you should pay our legal costs to date and return our website or else it would consume you, also fell on deaf ears. It was at this point that I started buying up the claims in your estate and realised that once I start spending serious money on claims any chances of a throwing you a life raft was over. At the moment the life raft that you holding onto is unfortunately tied to the Titanic with the captain having left by helicopter.*

5) *Your sneaky little move to try and rehabilitate before we could stop you was very feeble to say the least. Reading your application brought me to tears…. I thought I was reading the story of the Dalai Lama…. A good guy that had been handed a terrible hand. You should consider writing fairy tails and not commit your imagination to court papers;*

6) *I am in the final stages of negotiating the purchase of two more BIG claims in your estate that are going to cost you a fortune. I dont want to pay as much as I am about to but unfortunately they have come to realise that there might be some money in it for them. They are greedy…. Sorry I am trying my best not to blow more than another 5 million rand of yours on claims;*

Looking at the crystal ball:

1) *You will in all likelihood choose to ignore this email once again and hope that it goes away. It will not. This website will become your Bermuda Triangle. It will swallow everything you have and spit you out the other side… Please don't ignore it;*

2) *If you don't settle quickly, I am going to commit purchasing the next two large claims in your estate. I have got them down to 70 cents in the rand (you are welcome to use your stash and pay them a bit more and become my fellow creditor in your 152 enquiry…. You can ask yourself questions and answer them, which would be easier on you because you don't have to ask yourself the difficult ones, I will ask those. At this point there will be no settlement at all and I will come for every last cent that you have. You have also spread so much negativity and false information that I will be left with no option but running a series of advertorials to rectify the situation. I am already thinking of the headlines…'Dave Harris spends his hidden treasure on a website'….' Dave Harris web of deceit finally sinks him'… could be fun… or on Twitter 'Twit overpays for website'.*

My suggestion to you is as follows: (I am typing slowly)

1) *Let's settle this thing. I believe that your health has taken a turn for the worse that could possibly positively effect your judgement. Dont let this website become your epitaph www.fairHEAVENestates.now*

2) *Its costing you more and more daily….STOP IT*

3) *Even if you happen to get the website (which we don't think will happen), you will be the loser….BIG time. We will use our gain on your estate to change Fairhavens name at YOUR COST;*

4) *We have put an offer to you that you must seriously consider. I cannot believe that after all this water under the bridge, you think it is remotely possible to continue at Somerset Lakes with Otto? Is it the nice Dave that works there? The bad one stole the website? We only know one leopard with one set of spots…. Let me once again tell you what I will be doing…. Your shareholding in Somerset Lakes is an asset in your estate. I will be bidding up to the amount of the shortfall in the claims that I will own (I intend to own about R7,8 million in claims shortly. Presently I only own R 1 million for that*

shareholding i.e I will be paying your estate, who will pay me out on the claims I have (less their 10% commission) I am even sure if I settle your curator his 10% commission he will net my offer and my claim off. I am not sure if Otto has a pre-emptive right on the shares? Possibly I will become Ottos partner…. exciting times;

A FINAL FINAL FINAL FINAL attempt at settling. I dont want to talk to you but dont mind if it will help to resolve the situation. I suggest that you sit with Otto and agree on a deal so that this utter madness can stop. I will be committing another approximately R 6 million of your money on Tuesday. I dont believe that it is too late to stop the 'Slow train coming' It has unfortunately cost you a fortune to date. It has the potential to cost you everything. Its in your ability to stop it. If you dont accept this generous olive branch, we will see you in court and I suggest you see a psychologist….and o yes… if you want me to send you the list of questions we will be asking at the 152 I will gladly do so…. You can take crib notes.

Your call….

THIS EMAIL IS SENT TO YOU WITHOUT PREJUDICE AND I RESERVE ALL OUR RIGHTS IN THIS REGARD IN TOTO "

[43] Later on the same day Shaun received a text message from a certain Mark Bune, formerly a friend of Shaun's but by then an acquaintence of Venter, which read as follows-

"Hi matey, I know that we no longer associate on a social basis but I'm sure you know why! I do however care about you and Carin. If you are even aware of today's email from Dennis and the extent of the problem you should swallow your pride and consider it carefully. You and your dad have so picked the wrong guy to piss off. He is prepared blow millions just to get even with you. We really don't want to see you guys burn. Think about yourself and Carin mate."

[44] In terms of the timetable agreed upon when the matter was postponed on 2 June 2015, Harris was required to file his answering affidavit in the intervention application on 29 June 2015. When Morgan took over the representation of Harris she wrote to Korber on that day informing him of the position and indicating the inability of her client to immediately file his affidavit. Collegial indulgence was requested by Morgan but she was not afforded the courtesy of a reply to her letter which was hand delivered to Korber's office shortly after 14h00 on the 29th. Instead Fairhaven's attorney launched an urgent Chamber Book application the following day in which an

order was sought obliging Harris to file his affidavit within five days of receipt of the Chamber Book application (ie Tuesday 7 July 2015). The Chamber Book application was served on ENS at 15h30 on the 30th June and was lodged with the Registrar the following day. In the event the matter only came before the recess Duty Judge, Ndita J, more than a week later (Friday, 10 July 2015) when an order was made directing the filing of the affidavit a week hence. The Registrar's stamp indicates that the affidavit was in fact filed on 21 July 2015.

[45] In the meanwhile, Venter sent a text message to Harris on Wednesday, 1 July 2015 to the following effect-

> *"Please look after my new VW. Please don't scratch it."*

Harris says this was understood to be a reference to a Volkswagen motor car of Shaun's which was being driven by Harris' wife at the time and to which Venter laid claim.

<u>DEVELOPMENTS DURING ARGUMENT</u>

[46] Argument commenced before this court on Monday 17 August 2015, the compulsory practice note having indicated that the matter was not likely to last longer than a day. Counsel for Harris completed his address shortly after the morning tea break on the Monday. By the close of proceedings on the first day counsel for the intervening party was still busy with his address and the matter continued the following day. Senior counsel for Harris asked to be excused at that stage and junior counsel continued to represent Harris until the conclusion of the matter. By the close of proceedings on the second day counsel for the Fairhaven interests had still not

completed his address and the matter was postponed to a date to be fixed later in Chambers in consultation with the parties. Ultimately an order was made by agreement in Chambers on 1st September 2015 that argument should be completed on Friday, 16 October 2015.

[47] The application to the Master for the section 152 (2) enquiry was convened for hearing before the magistrate, Somerset West on 26 September 2015. During argument in August 2015, counsel for Fairhaven indicated that the enquiry would be held in abeyance until this court had finally determined the application to intervene.

[48] During the course of Wednesday, 14 October 2015 the court was approached in Chambers by counsel for Fairhaven who indicated that a postponement of the matter would be sought on Friday, 16 October 2015. Counsel for Harris indicated in Chambers that his client would oppose the application. Accordingly, a set of papers requesting a postponement of the matter was filed late in the day on the Thursday. In the affidavit deposed to in support of the application Korber indicated that the purpose of the postponement was to enable Fairhaven to draft papers in a formal application for the court's recusal: a postponement of 2-3 weeks was contemplated in that regard. Harris' papers opposing the application for postponement were filed at around 09h00 on the Friday. From those papers it appeared that the section 152 (2) enquiry had been postponed until 26 November 2015. As already indicated the application for postponement was refused after morning tea on Friday 16 October 2015 whereafter argument, including the reply on behalf of Harris, was completed late in the day. I shall deal with the application for postponement in more detail later when I furnish the reasons for its refusal.

THE RIGHT TO INTERVENE

[49] As already stated, the provisions of section 127(1) of the Act contain an in-built right entitling a creditor or *'any party interested in the estate'* to object to an application for rehabilitation. In the instant case, Fairhaven contends that it may avail itself of that staturory right by virtue of its status as a creditor in Harris' estate. The fact that Fairhaven only became a creditor in the estate after sequestrartion does not *per se* preclude it from intervening. Both of the leading authorities on insolvency, Meskin[5] and Mars[6], are of the view that, even in the case of a post-sequestration creditor properly so-called[7], the right to object is available. As is pointed out in Meskin such a creditor may, for instance, wish to execute against property acquired by the insolvent during administration adversely to the trustee and there is accordingly no logical basis to refuse that right of action. But in the present case Fairhaven has taken cession of an existing claim against the estate and *per se* has the requisite *locus standi* in terms of sec 127(1) of the Act to object to the proposed rehabilitation.

[50] The real issue in this matter is whether Fairhaven has availed itself of that right for a *bona fide* purpose. It is argued on behalf of Harris that where a party such as Fairhaven exercises that right for an ulterior purpose, and this amounts to an abuse of the process of the court, a court may exercise its inherent jurisdiction to protect itself and other litigants (such as Harris) from the abuse of its process. Indeed,

---

[5] Meskin Insolvency Law and Its Operation in Winding-up (Magid *et al* eds) at 14-18 para14.3.5

[6] Mars The Law of Insolvency in South Africa (9th ed , Bertelsman *et al* eds) at 571 para 25.16

[7] A creditor who acquires a right of action against the insolvent after the final order of insolvency has been made – Ex parte Dinath 1954(3) SA 748 (T)

it is the duty of a court to step in and prevent such abuse.[8] Just what constitutes abuse will be determined by the particular facts and circumstances of each case, but generally speaking,

'an abuse of process takes place where the procedures permitted by the Rules of Court to facilitate the pursuit of the truth are used for a purpose extraneous to that object.'[9]

[51] In National Potato Co-Operative[10] the Supreme Court of Appeal was called upon to determine whether litigation pursuant to an alleged champertous agreement[11] amounted to an abuse of process. Southwood AJA described the factors to be considered as follows –

> *"In general, legal process is used properly when it is invoked for the vindication of rights or the enforcement of just claims and it is abused when it is diverted from its true course so as to serve extortion or oppression; or to exert pressure so as to achieve an improper end. The mere application of a particular court procedure for a purpose other than that for which it was primarily intended is typical, but not complete proof, of mala fides. In order to prove mala fides a further inference that an improper result was intended is required. Such an application of a court*

---

[8] Hudson v Hudson and another 1927 AD 259 at 268; Clairson's CC v MEC for Local Government. Environmental affairs and Development Planning and another 2012(3) SA 128 (WCC) at 134 D-E

[9] Beinash v Wixley 1997(3) SA 721 (SCA) at 734 F-G.

[10] PriceWaterhouseCoopers Inc and Others v National Potato Co-Operative Ltd 2004(6) SA 66 (SCA) para [50]

[11] "*An agreement in terms of which a person provides funds to enable a litigant to prosecute an action in return for a share of the proceeds"(ibid)*

procedure (for a purpose other than that for which it was primarily intended) is therefore a characteristic, rather than a definition, of *__mala fides.__* *Purpose or motive, even a mischievous or malicious motive, is not in general a criterion for unlawfulness or invalidity. An improper motive may, however, be a factor where the abuse of the court process is in issue. (__Brummer v Gorfil Brothers Investments (Pty) Ltd en andere[1999(3) SA 389 (SCA)]__ at 412I-J;414I-J and 416B). Accordingly, a plaintiff who has no __bona fide__ claim but intends to use litigation to cause the defendant financial (or other) prejudice will be abusing the process (see __Beinash and Another v Ernst & Young and Others__ 1999(2) SA 116 (CC)…. para [13]). Nevertheless it is important to bear in mind that courts of law are open to all and it is only in exceptional cases that a court would close its doors to anyone who wishes to prosecute an action… The importance of the right of access to courts enshrined by s 34 of the Constitution has already been referred to. However, where a litigant abuses the process this right will be restricted to protect and secure the right of access for those with __bona fide__ disputes…"*

[52] In his argument on behalf of Fairhaven, Mr Duminy SC resorted to a detailed analysis of the 2 judgments of the Supreme Court of Appeal in __Brummer__ (Nienaber JA for the majority and Streicher JA for the minority). He referred to the distinction drawn by Nienaber JA at 412A (in consideration of the approach adopted by Streicher JA which was said by Nienaber JA to involve an incorrect application of the English law) between an *"abuse of the process of the court"* and an *"abuse of the legal process*". Nienaber JA cautioned that in his view, an abuse of the legal process

(*'misbruik van die regsproses')* had to be distinguished from abuse of the court process itself (more properly, according to the learned judge to be called the "court procedure").

[53] Counsel observed that, with reference to the judgment of Lord Denning in Goldsmith v Sperrings Ltd [1977] 2 All ER 566 (CA) at 574, Nienaber JA distinguished the fundamental difference between the position in English law and that in our law. In our law , as I understand the approach posited, an improper motive will not necessarily be regarded by the court as consituting an unconscionable or unlawful objective[12] which merits censure, if the end result of the application of that process is not legally tenable or permissible. In relation to the English law approach, which Nienaber JA said was to be distinguished from our law, Lord Denning described the position as follows:

> "*In a civilised society, legal process is the machinery for keeping order and doing justice. It can be used properly or it can be abused. It is used properly when it is invoked for the vindication of men's rights or the enforcement of just claims. It is abused when it is diverted from its true course so as to serve extortion or oppression; or to exert pressure so as to achieve an improper end. When it is so abused, it is a tort, a wrong known to the law. The judges can and will intervene to stop it. They will stay the legal process, if they can, before any harm is done. If they cannot stop it in time, and harm is done, they will give damages against the wrongdoer….*

---

[12] "'n Afkeurenswaardige of onbehoorlike oogmerk"

At other times the abuse can only be shown by extrinsic evidence that the legal process is being used for an improper purpose. On the face of it, in any particular case, the legal process may appear to be entirely proper and correct. What may make it wrongful is the purpose for which it is used. If it is done in order to exert pressure so as to achieve an end which is improper in itself, then it is wrong known to the law. This appears distinctly from the case which founded this tort."

[54] The distinction to which Nienaber JA adverted is embraced in the cited passage from the judgment of Southwood AJA in National Potato Cooperative, *and* is consistent with the following approach of Corbett JA in Kalil [13] to which Nienaber also refers:

"The English authorities so relied upon seem to be distinguishable as they emphasise that it is a scandalous abuse of process of the court to seek to use a winding-up procedure to seek to enforce payment by the company of a disputed debt as a means to exercise pressure to seek to exact payment. To seek to enforce payment by way of such proceedings is legitimate in South Africa. Estate Logie v Priest 1926 AD 312 at 319,320; Laeveldse Kooperasie Beperk v Joubert 1980(3) SA 1117(T) at 1121H-1122F…. The fact that the application is intended to enforce payment is irrelevant to the appellant bringing his application as a member of the first respondent; and is, in any event, not a good ground in law, as such intention is legitimate in such proceedings."

[13] Kalil v Decotex(Pty) Ltd and Another 1988(1) SA 943 (A) at 955 G-J

Nienaber JA observed further in Brummer at 415 D-E that in Kalil Corbett JA stressed that the emphasis fell on the "*behoorlikheid"* (propriety) of the eventual objective rather than the fact that it was employed for a secondary or ulterior purpose.

[55] If one applies the mandated approach to the facts at hand the following issues emerge. In the sms of 15 January 2015 Venter was clearly incensed about the alleged unlawful use of the domain name. While no litigation had yet commenced, it is clear that Venter wanted to put a stop to Shaun's use of it. His remedy in the circumstances was to approach the court for appropriate interdictory relief against Shaun, an approach which was ultimately vindicated in the judgment of Henney J of 8 July 2015. To be sure, Venter could attempt to persuade Shaun in pre-litigation correspondence to see the light and and to abandon his attempt to misappropriate the domain name. He might even be permitted, within limits, to express himself in strong language as some businessmen seem wont to do. But what Venter could not do was to threaten and abuse Harris (with whom there was no *lis*, and against whom no order could be made*)* in an endeavour to indirectly put undue pressure on Shaun.

[56] Two days later, on the Saturday evening preceeding the Monday on which the domain name interdict application was launched, Venter sought to intimidate Shaun at his home with threats of violence and foul language. Those threats *per se* constituted a criminal offence (common assult[14]) and can accordingly never fall within the permissible grounds of impropriety.

[57] Shortly after the hearing before Henney J, Venter was at it again: threatening Harris to procure something which he could not deliver *viz* an undertaking

[14] South African Criminal Law and Procedure Vol II (Third Ed – Milton) at 407

that there would be no passing off of the domain name. Undoubtedly, Venter's objective was again to put pressure on Shaun through the harassment of his father. Not only were the demands demonstrative of an attitude of paternalism, as with the sms of 15 January, the threats were made in the absence of any *lis* between Harris and Venter and it cannot be suggested that they were either permissible or that they served a legitimate end.

[58] In the "Slow Train" email of 27 June 2015, following the withdrawal of Louw as Harris' attorney in the rehabilitation application, Venter relied on dripping sarcasm and puerile one-liners to harass his nemesis yet again. In para 3 of that email the purpose of the harassment was clearly stated by Venter as follows –

> "*If you don't settle [the domain name litigation] we will ensure that you don't rehabilitate."*

Earlier in that email Venter accused Harris of having "stolen" the domain name (something which was manifestly not true - if anything it was Shaun, through Finnman, who had used the name to compete unlawfully with Fairhaven) and bragged that he would make good on his promise to *"play dirty".* The latter was a reference to Venter's avowed intention to use the mechanism of the Insolvency Act to procure the establishment of an enquiry under sec 152(2) before a magistrate at which Harris would be questioned *ad nauseam* in an endeavour to put pressure on him to persuade Shaun to concede the domain name application.

THE OBJECT OF INSOLVENCY INTERROGATION

[59] It is necessary at this juncture to consider the purpose of an interrogation under the Act. As is pointed out in Mars[15], the Act makes provision for three distinct processes of interrogation. Firstly, there is the procedure contemplated in sec 42 in which the integrity and validity of creditors' claims against the insolvent estate is considered. Secondly, there is the enquiry contemplated under secs 64-66 at which the creditors are entitled to interrogate the insolvent's affairs in a public hearing. That interrogation is similar to the public enquiry contemplated under secs 415-416 of the old Companies Act of 1973. Thirdly, there are the provisions of sec 152 of the Act which provide for a private interrogation before the Master or a designated official. This is akin to the machinery available under secs 417-418 of the old Companies Act. Sec 152 incorporates various of the procedural aspects of sec 64, including the subpoenaeing of witnesses and documents, and the like.

[60] The ambit of an enquiry under sec 152 is limited to the gathering of relevant facts and no decision is taken by the presiding officer which is capable of review. As was said in Podlas[16] -

> *"The presiding officer makes no findings that can detrimentally affect a person's rights. Nor does he determine any rights. He simply records the evidence and regulates the proceedings."*

---

[15] Op cit 418 *et seq*

[16] Podlas v Cohen and Bryden NNO and Others 1994(4) SA 662 (T) at 675I

[61] Such an enquiry is traditionally veiled in secrecy and, for instance, the insolvent is not entitled as of right to prior access to the documentation placed before the Master when the application for the enquiry is requested. Nor is the insolvent entitled to be present throughout the enquiry. Harris would be permitted to be legally represented at his interrogation, but thereafter would be in the dark as to what transpired since no record need be kept of the proceedings and the contents of what is uncovered are regarded as confidential. In Strauss [17] Mynhardt J observed that there was a similarity between secret enquiries held under secs 417 and 152, and that the substantial body of law that has developed in respect of the former is applicable to the latter. As to the object of the latter the Learned Judge said the following at 663 A-C:

> *"Section 152 is an important and valuable mechanism for the Master and the trustee of the insolvent estate to obtain information which might enable them to secure assets belonging to the insolvent and to obtain clarity on claims or demands that have been made against the estate of an insolvent. It is therefore also important to safeguard the interests of persons who furnish information to the trustee or to the Master in a confidential manner. Should the Master too readily make such information available to persons such as the applicants who have been summoned to be interrogated, a valuable source of information for the Master, or the trustee, might be destroyed. It is therefore also important for the Master, as a matter of policy, to keep information confidential*

[17] Strauss and Others v The Master and Others 2001(1) SA 649 (T) at 662 -3

which has been furnished to him in a confidential manner."(Emphasis added)

[62] There is however an important distinction between secs 417 and 152. The former is controlled through the intercession of the High Court and the Master, and in the event that the interrogation is to take place under the aegis of the Court, a court appointed commissioner is customarily appointed as presiding officer (often a legal practitioner or retired judge with experience in corporate insolvency). Under sec 152, however, it is solely the Master that may convene the enquiry before either a Magistrate or other civil servant. The parties entitled to question a witness at a sec 152 enquiry are only the Master (or the civil servant) and the insolvent's trustee. Given the purpose of a sec 152 enquiry, it would usually be the trustee who would be the driving force behind the enquiry since that would be the party interested in establishing, for example, the existence of hidden assets which might be recovered for the benefit of creditors. Further, there is no provision in sec 152 for a creditor to interrogate the insolvent or other party subpoenaed to the enquiry, and it is difficult to understand how the Fairhaven interests would give effect to Venter's avowed recreation of the Star Chamber.

[63] Be that all as it may, at the time that this part of the campaign of harassment of Harris was conceived, it was considered by the Fairhaven interests (in whatever corporate guise they decided to cloak themselves) that they did not have any legal basis to ask the Master for such an enquiry since they were not a creditor in Harris' estate. The approach of their attorney (then purporting to act on behalf of the somewhat paradoxically named "Dream World") to Shaw setting out the client's intention to acquire such a claim was met with significant caution by an experienced

liquidator. The move was something which genuinely surprised Shaw since he confessed that he had never before come across a situation where an interrogation under sec 152 had been employed to resolve the disintegration of a business relationship. Nevertheless, as we have seen, the attorney then went about contacting the known major creditors whose claims had not been settled in full (all banks) to procure what was seen by Venter as the most effective method to ruin Harris financially and attain complete control of Summerclub.

[64] The position seems to have been that the procurement of a claim against Harris' estate would ensure the Fairhaven interests the right to oppose the rehabilitation application but, in so doing, would provide them with a 'stalking horse'[18] with which to approach the Master for the establishment of a sec 152 enquiry. Ultimately such an enquiry would not afford those interests an opportunity to interrogate Harris with a view to exposing his alleged secretion of personal assets in Avodah: that function is entrusted to the trustee who, it is clear, has expressed no further interest in the matter. On that basis alone it seems to me that the scheme was still-born and can never have been said to be persuing a legitimate aim.

---

[18] In Phillips v Botha 1999(2) SA 555(SCA) at 565E-F Hoexter JA cited with approval the following passage from the judgment of the Australian High Court in Varawa v Howard Smith Co Ltd (1911) 13 CLR 35 at 91 : "..(T)he term 'abuse of process' connotes that the process is employed for some purpose other than the attainment of the claim in the action. If the proceedings are merely **a stalking – horse** to coerce the defendant in some way entirely outside the ambit of the legal claim upon which the court is asked to adjudicate they are regarded as an abuse for this purpose…' (Emphasis added)

<u>THE REAL INTENTION OF THE FAIRHAVEN INTERESTS</u>

[65] In the "Slow Train" email to Harris of 27 June 2015 Venter made no attempt to disguise his intention at that time. Having explained why he had made contact with Shaw in January 2015 Venter went on to say the following:

> "*I gave you a full copy of the documents [handed to Shaw] and my reasoning (sic) that I would use to institute a 152 investigation. I did this as I did not want your money and did not want to fight. I wanted our website back. Your actions or lack thereof left me with no alternatives…"*

And later in the same mail the prospect of financially ruining Harris is highlighted:

> "*I am in the final stages of negotiating the purchase of two more BIG claims in your estate that are going to cost you a fortune….*
>
> *"….At this point there will be no settlement at all and I will come for every last cent that you have."*

[66] It must be borne in mind that at this stage the domain name litigation had been argued and judgment was awaited, Fairhaven having elected to exercise its legal remedies by way of an urgent application to this court. To the extent that Venter was intent upon bypassing the legal route which his company had adopted, with the issuing of threats and promises of further harassment ultimately designed to reduce Harris to penury, he brought the matter squarely within the the ambit of the proscribed conduct referred to by Lord Denning in <u>Goldsmith.</u> On behalf of the Fairhaven interests, Venter turned his back on the "*the machinery for keeping order and doing*

justice" and abused it by diverting "*it from its true course so as to serve extortion or oppression; or to exert pressure so as to achieve an improper end."* And he did so in the absence of a legitimate end which may otherwise have saved his admitted abuse.

[67] The duty of the court in such circumstances was described thus by de Villiers JA in Hudson at 268:

> "*When therefore the Court finds an attempt made to use for ulterior purposes machinery devised for the better administration of justice, it is the duty of the court to prevent such abuse."*

And in Beinash Mahomed CJ said the following in a matter in which the primary objectives of Rules 35 (discovery) and 38 (subpoena *duces tecum*) were being considered in relation to allegations that they had been abused:

> *"The object of Rule 35 is to enable a litigant to discover documents in the possession of or control of another party to the proceedings, whereas the primary object of Rule 38 is to secure the production of documents from persons who are not necessarily parties in the main proceedings… The distinction is perfectly sound, but the machinery contained in both of these rules must be utilised in a bona fide manner and not for the purposes of pursuing ends extraneous to the real objectives sought to be obtained through these rules. The existence of bona fides is the basic precondition upon which both of these rules are premised."*

[68] The absence of *bona fides* on the part of the Fairhaven interests and the persuit of extraneous ends by its controlling shareholder are adequately demonstrated in the numerous passages to which I have referred but for the sake of completeness I would highlight the following 2 instances. Firstly, the unconscionable threats by Venter of physical violence to Shaun and the intended reduction of Harris to penury over a protracted period of time can never be considered to have been *bona fide.* Secondly, and as demonstrated above, the acquisition of the claim from Nedbank was not for a legitimate purpose as contemplated by sec 152. Venter himself said so in the "Slow Train" email of 27 June 2015, but even then he did not reveal to Harris what his real quest was. This was left up to the Fairhaven interests' attorney to negotiate under the protection of without prejudice correspondence.

[69] Indeed, the very fact that Fairhaven's attorney ignored the caution of Shaw and began fossicking around to acquire a claim on behalf of Fairhaven in and of itself demonstrates that at the outset Fairhaven had neither an actual nor legitimate interest in Harris' estate. It had to spend a substantial amount of money and time to acquire the *locus standi* which it considered necessary to persue what it regarded as a legitimate end – the holding of an enquiry to ostensibly address the interests of creditors - but which in truth was an exercise "*extraneous to the real objectives sought to be obtained".*

[70] In my considered view, the settlement proposal put forward in June 2015 by Fairhaven's attorney to Louw finally raises the true motive for the campaign of harassment of Harris. Not only did Venter wish to regain use of the Fairhaven

domain name, he wanted to procure Avodah's share in Summerclub for no consideration and oblige Harris to pay R1,5m towards the Fairhaven interests' legal expenses and the acquisition of Nedbank's claim. That proposal demonstrated unequivocally that the "*real objective"* of Venter's campaign of abuse and pressure was a commercial interest: the acquisition of an asset which could not otherwise be procured by the Fairhaven interests via the litigation route. While it is perhaps arguable that an application for the winding up of Summerclub under sec 81(1)(d) or (e) of the Companies Act, 71 of 2008 might have facilitated the desired result, neither the urgent application for an interdict for the passing off of the domain name, nor an interrogation before the magistrate Somerset West in terms of sec 152 could ensure that the Fairhaven interests would acquire total control of the equity in Summerclub.

[71] In his mail to Shaw of 20 January 2015, Venter casually mentioned half way through the 2nd page thereof that he had a buyer for the Trust's half share in Fairhaven. This email was copied by Shaw to Harris who says that this remark did not escape his attention. Yet in the correspondence which followed Venter made no mention of his designs in regard to that shareholding. It only cropped up fairly late in the piece in a letter which his attorney did not expect would find its way into any court papers given its classification as "without settlement" correspondence. Harris' new attorneys were quick to point out that the letter did not truly enjoy litigation privilege as it was not a *bona fide* attempt to settle[19] and included it as part of the answering papers. The Fairhaven interests, protest notwithstanding, did not seek to strike out the letter but sought only to give it context by pointing out that it followed upon Louw's solicitation and annexed a copy of his letter to the replying affidavit. In my view, it

---

[19] Zeffert and Paizes, The South African Law of Evidence, 2nd ed at 703

matters little that the settlement proposal followed upon Louw's entreaties: the importance thereof is that it formally exposed the true motive for the campaign against Harris.

[72] Finally, there is the fact that, notwithstanding Fairhaven's success in the domain name application, Venter was intent on proceeding with the sec 152 enquiry regardless. In light of the repeated demands from 15 January to 27 June 2015 that if he wished to be left in peace Harris should return the domain name which he had allegedly misappropriated, one would have thought that when the application succeeded with a favourable costs order before Henney J early in July 2015, Venter had achieved exactly what he had set out to do all along and that he would abandon his pursuit of Harris. But when regard is had to the settlement proposal put forward to Louw on 11 June 2015, the very essence of the scheme is ultimately revealed (as it was, almost in passing) to Shaw on 20 January 2015. Against payment by Harris of a substantial amount of money, and against transfer by Avodah of its shares in Summerclub, the enquiry would go away. The proposal by the Fairhaven interests to settle the dispute between the parties on those terms held no pecuniary benefit for Harris. Rather he was being offered freedom from further harassment, the cancellation of the insolvency inquiry and, ultimately, his status as a rehabilitated insolvent, against payment of a fairly hefty premium.

[73] In the circumstances I am not persuaded that the Fairhaven interests have established any legitimate cause which would bring the vendetta against Harris within the ambit of propriety considered by Nienaber JA in Brummer. The point of distinction between the majority and minority judgments in that case so fervently argued by Mr Duminy SC finds no basis in the evidence put up on behalf of

Fairhaven. The following extracts from the 161 page replying affidavit of de Decker are worth mentioning in that regard –

"16. The ***only reason*** *why the parting of the ways between Fairhaven (and in particular Venter) and the insolvent and his son on the other (sic), developed into a 'very personal fight' is because of the actions of the insolvent and his son in attempting to steal the active domain name of the Fairhaven estate (being 'fairhavenestate.co.za').* ***This and this alone*** *resulted in the prevailing comity between Fairhaven (Venter) and the insolvent (and his son) being brought to an abrupt end on 15 January 2015 and leading to the domain name litigation."…. (*Emphasis added)

29. In truth, the explanation is a simple one. Venter - who is a very wealthy man and has an interest in Fairhaven - vowed to retaliate for the groundless attempt to steal the Fairhaven domain name on 15 January 2015 …..

34. What is clear - and indeed common cause - is that the approach to Shaw came in the wake of the attempt by Shaun to steal the Fairhaven domain name…

73.1 The investigations into the conduct of the insolvent… were spearheaded by Venter, as from 15 January 2015, in reaction to the attempt by Shaun to steal the Fairhaven business…..

155.1 …. Venter only cried foul once Shaun elected to violate the agreement……

173.7 If Shaun had not attempted to steal the domain name and jeopardise Fairhaven's business, Venter would not have taken up the cudgels against the insolvent or his son, as from 15 January 2015, or at all…."

[74] In these passages (and various others in the papers) no claim is made to some loftier purpose or legitimate end which justified the vendetta of coercion against Harris or which would render the campaign of abuse tolerable in the pursuit of another purpose. Nor is any apology offered in the court papers for the offensive nature of the demands made by Venter or the language and innuendo employed therein. Rather, de Necker seems to brazenly defend his business partner's antics by resorting to the "blame game" and heaping the responsibility for the state of affairs on Shaun.

[75] That Fairhaven's intervention in the rehabilitation application is manifestly an abuse of process is further demonstrated by the fact that, according to the founding affidavit, its business is that of a property developer. Fairhaven does not involve itself in the purchase or factoring of debts, or debt-collecting. Other than as a vehicle for Venter (and possibly Wiehahn) it has no interest in the intervention application.

[76] For these reasons I am of the view that Fairhaven's application to intervene in the rehabilitation application is without merit, is not *bona fide* and is an abuse of the process of this court which, in terms of the authorities to which I have referred, must be stopped dead in its tracks. The application falls to be refused with costs.

REFUSAL OF THE APPLICATION FOR POSTPONEMENT.

[77] As I have already said, late on Thursday 15 October 2015 Fairhaven launched an application for postponement of the matter the following day, a date which the parties had agreed upon more than six weeks earlier for the finalization of argument. In the affidavit filed in support of the application Korber said that he had belatedly received instructions from his client to bring a formal application for the court's recusal in the matter. He said that he had procured a transcript of the proceedings held on 11 and 12 August 2015 on 25 August and had forwarded a copy on to Wiehahn.

[78] Korber says that he only read the transcript for the first time on Tuesday 13 October 2015 and when doing so formed the view that "*the presiding judge had formed a view adverse to the intervening party"* as a consequence whereof he was concerned that his client might not receive a proper hearing or obtain a fair result. After taking the initiative and discussing the issue with counsel and Wiehahn, Korber says he was formally instructed by Wiehahn, during the course of Wednesday 14 October 2015, to bring an application for recusal. Annexed to the application for postponement is a précis of certain of the passages in the transcript to be relied upon for the recusal application. These indicate that the cause for complaint arose within the first hour or two of proceedings on the first day of the hearing and relate to the Presiding Judge's interchanges with Adv Duminy SC regarding the attitude and conduct of Venter.

[79] In an affidavit opposing the application for postponement Harris points out that Korber was present in court throughout the two days of the hearing in August as Fairhaven's instructing attorney. He complains that the application for recusal should have been brought at a much earlier stage given the fact that Fairhaven's attorney was, at all times, aware of the conduct of the presiding officer complained of. He suggested too that the Presiding Judge's remarks were within acceptable bounds in a matter of this sort. The application for postponement was accordingly opposed on the basis that Fairhaven had delayed unreasonably in bringing the application, that it was part and parcel of Venter and Wiehahn's "*on-going campaign*" against him and that a further postponement of the case would only serve their interests. Harris pointed out that, to the knowledge of the Fairhaven interests, his health had deteriorated during the course of the litigation, and he asked the court to dispose of the matter sooner rather than later.

[80] The principles governing an application for postponement are trite[20]. The respondent in such an application has a procedural right for the matter to proceed on the day upon which it has been set down. In the present instance, as I have pointed out, the date was agreed upon many weeks before. In order to succeed in such an application an applicant must show "a good and strong reason" for the relief sought, it must give a full and satisfactory explanation and, importantly, it must make

[20] See for example National Police Service Union and others v Minister of Safety and Security and others 2000(4) SA 1110 (CC); Mc Carthy Retail Ltd v Shortdistance Carriers CC 2001 (3) SA 482 (SCA)

that application as soon as becomes aware of the necessity to do so, it must be *bona fide* and not use it as a tactical monoevre [21]

[81] I do not intend entering upon the merits of the application for recusal at all as this was not fully argued. But if there is any merit in that complaint, the Fairhaven interests would have been aware of the alleged basis therefore from the first day of the hearing given that their attorney was present in court throughout argument of the matter. In that context the decision to bring the application for postponement at the last minute is not adequately explained in the affidavit. The fact that the Fairhaven interests left matters late is consonant with their overall conduct of harassment and disregard for professional courtesy throughout this saga.

[82] In this regard one notes, for example, that the urgent application in the domain name application was served with very short notice to Shaun and was effectively brought *ex parte.*The application for leave to intervene itself was similarly served on Harris's attorneys very shortly before the unopposed hearing in the motion court was due to take place. And then when Louw withdrew as attorney of record and ENS sought an indulgence to file their client's affidavit late, the intemperate response from the Fairhaven interests was an urgent chamber book application brought during court recess on minimal notice to compel the filing of the affidavit.

[83] I was not persuaded that the Fairhaven interests had shown good cause for interference with Harris' procedural right to proceed to finality , nor that they had explained the inordinate delay of almost 2 months in bringing the application for recusal. Their conduct smacked of mala fides and the application was accordingly

---

[21] <u>Myburgh Transport v Botha T/A SA Truck Bodies</u> 1991(3) SA 310(NmSC) at 315D-E

refused. I should add that Mr Duminy SC was fully prepared to continue with argument and no prejudice was occasioned to Fairhaven by virtue of the fact that the application for postponement was summarily dismissed. In light of their conduct in delaying the bringing of the application, and the inconvenience which it occasioned in protracting the finalization of the matter on that day, a punitive costs order was warranted.

THE MERITS OF THE APPLICATION FOR REHABILITATION

[84] In his applicantion for rehabilitation Harris must satisfy the court that he is a fit and proper person to be permitted to trade with the public on the same basis as any other honest business person.[22] The test was formulated thus by Wessels J nearly a century ago [23], but despite the myriad changes in commercial practice and business ethics in that time, it remains very much applicable today –

> *"I have to enquire whether the applicant is such a person as ought to be rehabilitated - is he a person who ought to be allowed to trade with the public on the same basis as any other honest man? That depends entirely on how he conducted his trade before he became insolvent. If he conducted himself in a negligent manner, or so as to deceive others, he is not a person who ought to be rehabilitated until it is clear that he intends to adopt better methods. His rehabilitation ought to be withheld from him, or at any rate it ought to be postponed for such a time that he will receive a severe lesson as to the necessity of trading honestly."*

[22] Ex parte le Roux 1996(2) SA 419 (C) ; Ex parte Greub v The Master 1999(1) SA 746 (C)
[23] Ex parte Heydenreich 1917 TPD 657 at 658

[85] In light of my refusal of the application to intervene I am not required to deal with the various grounds relied upon by the Fairhaven interests in the affidavit of de Decker which were said to be a bar to rehabilitation. The allegations made by Harris in the affidavits filed in support of the rehabilitation application therefor stand uncontradicted. In any event, the founding affidavit, the answer and the reply thereto in the intervention application raised material disputes of fact. Those disputes fell to be resolved in terms of Plascon-Evans[24]. Harris did not ask for a referral to oral evidence but rather relied on dismissal of the intervention. Fairhaven did not pursue that option either, believing that any such disputes could be addressed at the sec 152 enquiry. I have already demonstrated why this would not have been possible given the limited rights afforded to Harris at such an enquiry, the absence of any record keeping and the fact that there is no process by which to incorporate such testimony in these proceedings.

[86] Nevertheless, in light of the issues raised in the intervention application, and since I had not come to a firm view on the matter, when the date for continuation of argument was fixed in September 2015 I requested the Master and the trustees to file supplementary reports. I was concerned that there may be issues which arose from the papers filed in the intervention application as to the appropriateness of the proposed rehabilitation which those parties would wish to address given their fiduciary duties to the court and which needed to be considered by the court.

[87] In a comprehensive affidavit filed on behalf of the trustees, Shaw did not appear to express any concerns. Having read the full set of papers filed in this

---

[24] Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd 1984(3) SA 623 (A)

application, he pointed out repeatedly that he no longer had access to his file in this matter since it had been destroyed many years ago. He was therefore unable to say whether there was any truth in the allegations by de Decker that Harris had indeed failed to comply with his obligations under insolvency to file the necessary documentation once he had been reminded by Shaw to do so. Shaw does say that, from his recollection, Harris had cooperated and assisted in the winding up of the estate '*where he could'*. Certainly, there is no recollection on the part of Shaw that Harris had not done what was required of him and he remains resolute in his view (as he did in 2012) that there is no basis to refuse the application for rehabilitation.

[88] The supplementary report by the Master is regrettably of little value to the court. Firstly, there is no indication that the Master has considered the full set of papers, including those filed in the application to intervene and that she hs applied her mind thereto. In addition, I have to say that the supplementary report is poorly drafted as the following example demonstrates:

> "*6. Therefore the letter dated 21 July 2015 is not a proof that, the Master has received the trustees report and does not have Master date stamp. Since now the Master has received copy of the trustee's supplementary report attached to the letter dated to September 2015 from Ens attorneys the master will consider the supplementary reports for the rehabilitation of Mr Davies Harris."*

[89] The Master goes on to note that an enquiry in terms of section 152(2) has been convened and offers the court a brief synopsis of the import of that subsection. While abiding the decision of the court the Master says that *"based on the*

above section (ie 152(2))", the application for rehabilitation should be held in abeyance pending finalisation of the enquiry. The Master does not draw to the court's attention any additional factors in the rehabilitation application which she believes would militate against a rehabilitation order. All that she seems to say is that the enquiry ought to go ahead because it has been convened, although she does not say what benefit would accrue from the holding thereof.

[90] In her initial report the Master confirmed that all of the requisite statutory requirements had been complied with by Harris, save for the filing of the trustees' reports. In his supplementary affidavit dated 31 July 2015 Harris explains that there were two trustees' reports filed with the Master on 29 May and 9 June 2015, and in the garbled explanation referred to in para 88 above the Master seems to acknowledge that this is correct.

[91] The supreme irony in this matter is that having done business extensively with Harris for any number of years after his sequestration, the Fairhaven interests had no apparent basis to doubt Harris' integrity as a businessman until January 2015. And, when they did so, as I have found, such professed doubts were predicated on ulterior motive. Certainly, the Fairhaven interests had no qualms about paying a large sum of money to the Trust in May 2014 at a time when they claim they were fully aware (for the first time, they allege) of Harris' status as an unrehabiltated insolvent. It is significant too, I believe, that Shaw was a party to that agreement and that there was nothing untoward in the transaction which appears to have raised any concerns on his part. Indeed, when he filed his report in relation to this application a year later, the May 2014 agreement would presumably have come to mind and there

appears to have been nothing at that stage either that troubled him in relation to the lawfulness of the agreement

[92] As far as the Ayodah Trust is concerned, I would only add that the use of a trust by an insolvent to hold a family home, for example, has been considered by this court to be a matter of financial prudence and estate planning[25]. Furthermore, there is no evidence before this court to suggest that the Avodah Trust was set up deceitfully, or that Harris played any roll in relation to the administration thereof. After all, an independent trustee (a senior attorney who has practised in this Division for many years) was appointed and it is hard to believe that the trust would have been permitted by him to be abused by Harris as his *alter ego.*

[93] If the reasons for Harris' insolvency are considered, one sees a property developer who flew high and ultimately too close to the sun – a person who overcommitted himself in terms of a large property transaction (which leading financial institutions were prepared to finance), took his profits before they had actually accrued, and consequently became entangled in a spiral of debt. Finally, there is no evidence before the court which suggests that Harris was deceitful or duplicitous in his subsequent employment as an estate agent. On that score, the undisputed evidence is that Harris discussed his prospective employment with Shaw at the time and the latter says that he urged Harris to find a job and restore his self-esteem and financial independence.

[94] I am accordingly satisfied that Harris has made out a proper case for his rehabilitation and that an order to that effect should be granted.

---

[25] Van Zyl NO and another v Kaye NO and another 2014(4) SA 452 (WCC) at 458 para [17]

COSTS

[95] I have already granted a punitive costs order in the application for postponement on 16 October 2015. For the sake of completeness and for the assistance of the Taxing Master, I shall include that order herein. In regard to the application to intervene Mr Woodland SC preferred to ask only for costs on the party and party scale to be awarded in favour of Harris in the event that the intervention was unsuccessful. Those costs, which include the costs of the affidavits filed in opposition to the intervention application, will be awarded.

[96] As I have already observed, the founding papers in the intervention were lengthy. The replying papers filed by the Fairhaven interests were excessive and unnnecessrily burdened with repetitive and argumentative matter. Given that they run to some 160 pages, I indicated to Fairhaven's counsel at the outset that I was minded to apply the advice of Schutz JA in Phambili Fisheries[26] to "*declare war on unnecessarily prolix replying affidavits and upon those who inflate them".* In the result, however, it was considered more convenient and in the interests of justice to permit Harris to file a fourth set, there being no application by Harris to strike out the reply. As a mark of my displeasure at the length and content of the replying affidavit I shall order that Fairhaven bear the costs of the fourth set.

---

[26] Minister of Environmental Affairs and Tourism v Phambili Fisheries (Pty) Ltd; Minister of Environmental Affairs and Tourism v Bato Star Fishing (Pty) Ltd 2003(6) SA 407 (SCA) at 439H

[97] The costs order which I shall make is intended to burden Harris with the cost of bringing the rehabilitation application on an unopposed basis and, to the extent that Harris elected to file a supplementary affidavit in that application detailing events which occurred after the filing of the application, I believe that it is only fair that he should carry those costs. If there are any other costs incurred in the rehabilitation application which are not covered by this order and which arise as a consequence of Fairhaven's attempted intervention, they shall be for Fairhaven's account

ORDER OF COURT

A. The estate of David Harris ("Harris") is hereby rehabilitated.

B The application by Fairhaven to intervene in the rehabilitation application is dismissed with costs on the party and party scale.

C The costs in the application for rehabilitation, including the supplementary affidavit filed on 3 August 2015, are to be borne by Harris.

D Any other costs in the application for rehabilitation occasioned as a result of the application to intervene are to be borne by Fairhaven Country Estate (Pty) Ltd ("Fairhaven") on the party and party scale.

E The costs incurred by Harris in filing the supplementary affidavit in the intervention application on 14 August 2015 are to be borne by Fairhaven on the party and party scale.

F Fairhaven is to bear the costs of the application for the postponement of the matter on 16 October 2015 on the attorney and client scale. For the convenience of the Taxing Master it is recorded that that application lasted for approxiamately one and three quarter hours of the total court time taken up on that day.

GAMBLE, J

‘