



**IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG LOCAL DIVISION, JOHANNESBURG)**

CASE NUMBERS: 42741/19, 44827/19 and 32083/19

1. Reportable: No
2. Of interest to other judges: No

Date: 17 November 2020

In case numbers 42741/19 and 44827/19:

In re:

AFRICAN GLOBAL HOLDINGS (PTY) LTD

First Applicant

SUN WORX (PTY) LTD

Second Applicant

KGWERANO FINANCIAL SERVICES (PTY) LTD

Third Applicant

and

RALPH FARREL LUTCHMAN N.O.

First Respondent

CLOETE MURRAY N.O.

Second Respondent

TANIA OOSTHUIZEN N.O.

Third Respondent

MARIANNE OELOFSEN N.O.

Fourth Respondent

In their capacities as the joint provisional liquidators of **AFRICAN GLOBAL OPERATIONS (PTY) LTD** (in liquidation)

RALPH FARREL LUTCHMAN N.O.

Fifth Respondent

CLOETE MURRAY N.O.

Sixth Respondent

SELBY MUSAWENKOSI NTSIBANDE N.O.

Seventh Respondent

ANDRE BOTHA OCTOBER N.O.

Eighth Respondent

In their capacities as the joint provisional liquidators of **BOSASA PROPERTIES (PTY) LTD** (in liquidation)

RALPH FARREL LUTCHMAN N.O.

Ninth Respondent

CLOETE MURRAY N.O.

Tenth Respondent

NURJEHAN ABDOOL GAFAAR OMAR N.O.

Eleventh Respondent

In their capacities as the joint provisional liquidators of **GLOBAL TECHNOLOGY SYSTEMS (PTY) LTD** (in liquidation)

RALPH FARREL LUTCHMAN N.O.

Twelfth Respondent

CLOETE MURRAY N.O.

Thirteenth Respondent

ROYNATH PARBHOO N.O.

Fourteenth Respondent

LIZETTE OPPERMAN N.O.

Fifteenth Respondent

In their capacities as the joint provisional liquidators of **LEADING PROSPECT TRADING 111 (PTY) LTD** (in liquidation)

RALPH FARREL LUTCHMAN N.O.

Sixteenth Respondent

CLOETE MURRAY N.O.

Seventeenth Respondent

OFENTSE ANDREW NONG N.O.

Eighteenth Respondent

TSHEPO HARRY NONYANE N.O.

Nineteenth Respondent

In their capacities as the joint provisional liquidators of **BOSASA YOUTH DEVELOPMENT CENTRES (PTY) LTD** (in liquidation)

RALPH FARREL LUTCHMAN N.O. Twentieth Respondent

CLOETE MURRAY N.O. Twenty-First Respondent

TARYN VALERIE ODELL N.O. Twenty-Second Respondent

GORDON NOKHANDA N.O. Twenty-Third Respondent

In their capacities as the joint provisional liquidators of **BLACK ROX SECURITY INTELLIGENCE SERVICES (PTY) LTD** (in liquidation)

RALPH FARREL LUTCHMAN N.O. Twenty-Fourth Respondent

CLOETE MURRAY N.O. Twenty-Fifth Respondent

MILANI BECKER N.O. Twenty-Sixth Respondent

In their capacities as the joint provisional liquidators of **BOSASA SUPPLY CHAIN MANAGEMENT (PTY) LTD** (in liquidation)

RALPH FARREL LUTCHMAN N.O. Twenty-Seventh Respondent

CLOETE MURRAY N.O. Twenty-Eighth Respondent

MARC BRADLEY BEGINSEL N.O. Twenty-Ninth Respondent

In their capacities as the joint provisional liquidators of **BOSASA IT (PTY) LTD** (in liquidation)

RALPH FARREL LUTCHMAN N.O. Thirtieth Respondent

CLOETE MURRAY N.O. Thirty-First Respondent

MARIETTE BENADE N.O. Thirty-Second Respondent

In their capacities as the joint provisional liquidators of **RODCOR (PTY) LTD** (in liquidation)

RALPH FARREL LUTCHMAN N.O. Thirty-Third Respondent

CLOETE MURRAY N.O. Thirty-Fourth Respondent

JACOLIEN FRIEDA BARNARD N.O. Thirty-Fifth Respondent

In their capacities as the joint provisional liquidators of **WATSON CORPORATE ACADEMY (PTY) LTD** (in liquidation)

RALPH FARREL LUTCHMAN N.O.

Thirty-Sixth Respondent

CLOETE MURRAY N.O.

Thirty-Seventh Respondent

DEIDRE BASSON N.O.

Thirty-Eighth Respondent

In their capacities as the joint provisional liquidators of ON-IT-1 (PTY) LTD (in liquidation)

PARK VILLAGE AUCTIONEERS AND

PROPERTY SALES (PTY) LTD

Thirty-Ninth Respondent

(A further 177 respondents set out in an order dated 11 March 2020 have been joined as the Fortieth Respondent to the Two-Hundred-and-Sixteenth Respondent, but none opposed the two applications)

COMMISSIONER FOR THE SOUTH

AFRICAN REVENUE SERVICES

First Intervening Party

FIDELITY SECURITY SERVICES

(PTY) LTD

Second Intervening Party

In case number 32083/19:

FIDELITY SECURITY SERVICES

(PTY) LTD

Applicant

and

AFRICAN GLOBAL HOLDINGS (PTY) LTD

First Respondent

SUN WORX (PTY) LTD

Second Respondent

KGWERANO FINANCIAL SERVICES (PTY) LTD

Third Respondent

and

RALPH FARREL LUTCHMAN N.O.

Fourth Respondent

CLOETE MURRAY N.O. Fifth Respondent

TANIA OOSTHUIZEN N.O. Sixth Respondent

MARIANNE OELOFSEN N.O. Seventh Respondent

In their capacities as the joint provisional liquidators of **AFRICAN GLOBAL OPERATIONS (PTY) LTD** (in liquidation)

RALPH FARREL LUTCHMAN N.O. Eighth Respondent

CLOETE MURRAY N.O. Ninth Respondent

SELBY MUSAWENKOSI NTSIBANDE N.O. Tenth Respondent

ANDRE BOTHA OCTOBER N.O. Eleventh Respondent

In their capacities as the joint provisional liquidators of **BOSASA PROPERTIES (PTY) LTD** (in liquidation)

RALPH FARREL LUTCHMAN N.O. Twelfth Respondent

CLOETE MURRAY N.O. Thirteenth Respondent

NURJEHAN ABDOOL GAFAAR OMAR N.O. Fourteenth Respondent

In their capacities as the joint provisional liquidators of **GLOBAL TECHNOLOGY SYSTEMS (PTY) LTD** (in liquidation)

RALPH FARREL LUTCHMAN N.O. Fifteenth Respondent

CLOETE MURRAY N.O. Sixteenth Respondent

ROYNATH PARBHOO N.O. Seventeenth Respondent

LIZETTE OPPERMAN N.O. Eighteenth Respondent

In their capacities as the joint provisional liquidators of **LEADING PROSPECT TRADING 111 (PTY) LTD** (in liquidation)

RALPH FARREL LUTCHMAN N.O. Nineteenth Respondent

CLOETE MURRAY N.O. Twentieth Respondent

OFENTSE ANDREW NONG N.O. Twenty-First Respondent

TSHEPO HARRY NONYANE N.O.

Twenty-Second Respondent

In their capacities as the joint provisional liquidators of **BOSASA YOUTH DEVELOPMENT CENTRES (PTY) LTD** (in liquidation)

RALPH FARREL LUTCHMAN N.O.

Twenty-Third Respondent

CLOETE MURRAY N.O.

Twenty-Fourth Respondent

TARYN VALERIE ODELL N.O.

Twenty-Fifth Respondent

GORDON NOKHANDA N.O.

Twenty-Sixth Respondent

In their capacities as the joint provisional liquidators of **BLACK ROX SECURITY INTELLIGENCE SERVICES (PTY) LTD** (in liquidation)

RALPH FARREL LUTCHMAN N.O.

Twenty-Seventh Respondent

CLOETE MURRAY N.O.

Twenty-Eighth Respondent

MILANI BECKER N.O.

Twenty-Ninth Respondent

In their capacities as the joint provisional liquidators of **BOSASA SUPPLY CHAIN MANAGEMENT (PTY) LTD** (in liquidation)

RALPH FARREL LUTCHMAN N.O.

Thirtieth Respondent

CLOETE MURRAY N.O.

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MARC BRADLEY BEGINSEL N.O.

Thirty-Second Respondent

In their capacities as the joint provisional liquidators of **BOSASA IT (PTY) LTD** (in liquidation)

RALPH FARREL LUTCHMAN N.O.

Thirty-Third Respondent

CLOETE MURRAY N.O.

Thirty-Fourth Respondent

MARIETTE BENADE N.O.

Thirty-Fifth Respondent

In their capacities as the joint provisional liquidators of **RODCOR (PTY) LTD** (in liquidation)

RALPH FARREL LUTCHMAN N.O.

Thirty-Sixth Respondent

CLOETE MURRAY N.O.

Thirty-Seventh Respondent

JACOLIEN FRIEDA BARNARD N.O.

Thirty-Eighth Respondent

In their capacities as the joint provisional liquidators of **WATSON CORPORATE ACADEMY (PTY) LTD** (in liquidation)

RALPH FARREL LUTCHMAN N.O.

Thirty-Ninth Respondent

CLOETE MURRAY N.O.

Fortieth Respondent

DEIDRE BASSON N.O.

Forty-First Respondent

In their capacities as the joint provisional liquidators of **ON-IT-1 (PTY) LTD** (in liquidation)

PARK VILLAGE AUCTIONEERS AND

PROPERTY SALES (PTY) LTD

Forty-Second Respondent

COMMISSIONER FOR THE SOUTH

AFRICAN REVENUE SERVICES

Forty-Third Respondent

JUDGMENT

De Villiers AJ:

Introduction

- [1] This is the judgment in three applications for leave to appeal against my decision dated 24 August 2020. I continue to use the same defined terms and abbreviations in this judgment as used in my original judgment.
- [2] The legal basis of my powers to grant leave to appeal is uncontentious, and is contained in section 17(1)(a) of the Superior Courts Act, 10 of 2013. I need to form a view that there is “a *measure of certainty that another court will differ from*” my judgment, or that there is a compelling reason to grant leave to appeal.¹ My main reason to grant leave to appeal is on the compelling reason

¹ See in this division the full court decision in *Fair Trade Tobacco Association v President of the Republic of South Africa and Others* [2020] ZAGPPHC 311 para 2-6, relying inter alia on *Smith v S* [2011] ZASCA 15 para 7.

requirement. Once such leave is to be granted, it becomes difficult to excise portions of the judgment in respect of which to grant leave to appeal.

[3] My original judgment dealt with three matters, the auction application, the business rescue application, and the Rule 42 application:

[3.1] The applicants in the business rescue application seek leave to appeal in the business rescue application only. They seek the setting aside of paragraphs 16-18 in the order in the main judgment. They have about six grounds of appeal, as I read their notice of application for leave to appeal. They do not seek leave to appeal in the auction application, or in the Rule 42 application. In essence they seek that my dismissal of the business rescue application be overturned. The other parties in the end did not oppose the application for leave to appeal;

[3.2] SARS seeks leave to appeal in the auction application and in the business rescue application. SARS seeks the setting aside of paragraphs 7-11 and 17 in the order in the main judgment. Its grounds of appeal overlap between the auction application and the business rescue application, and as such it has about four grounds of appeal in the business rescue application, and about twelve grounds of appeal in the auction application. It does not seek leave to appeal in the Rule 42 application. SARS seeks the overturning of my decision on the auction application, and a different costs order in the business rescue application.² The other parties in the end did not oppose the application for leave to appeal; and

[3.3] The provisional liquidators seek leave to appeal in all three of the auction application, the business rescue application and the rule 42 application. They have 42 grounds of appeal. One ground addresses only an appeal on costs in the rule 42 application, the remaining 41 grounds of appeal often overlap in the auction application and the

² The effect of their submission is that if a court does not award costs *de bonis propriis* against a liquidator, it should not be deprived of costs due to his/her conduct as the liquidator would simply recover those costs from the estate. I say no more about this below, as I believe that it would be a clear conflict of interest for a liquidator to act in this manner.

business rescue application. The provisional liquidators seek to set aside paragraphs 1, 3, 6, 7, 8, 9, 10, 11, 13, 15, 17 and 19 and 21 in the order in the main judgment. They seek the overturning of my decision on the auction application, and several costs orders. The other parties in the end did not oppose the application for leave to appeal;

- [4] Initially I was *prima facie* of the view that I should grant leave to appeal to the Supreme Court of Appeal (“*the SCA*”) on the merits in the auction application, and possibly on an aspect of the business rescue application, namely the use of that procedure as an alternate winding-up process. This would have meant that leave to appeal on the ultimate costs orders ought to have followed, as opposed in all interlocutory matters. I was sceptical about leave to appeal in the Rule 42 application.
- [5] When the matter was called on video conferencing, I advised the parties that my *prima facie* view was that once one party gets leave to appeal, the others must get leave to appeal too. My notes leading to this exchange contained an inexplicable error, it reflected my thinking on the main matters only, and failed to reflect the full extent of the leave sought in interlocutory and mere costs matters that I believed were not appealable.
- [6] The outcome of this discussion was that the application was not argued on the implicit understanding that I would grant leave to appeal to the SCA to all parties in all matters. I made an error in this exchange. I never intended that leave in all interlocutory matters should have been granted, but I did not say so, and cannot fix that error without infringing on the fairness of the hearing.
- [7] I only realised my error that I omitted to address interlocutory costs orders as I prepared this judgment. I tender my apologies to the SCA should a party seek to persist to argue interlocutory costs orders due to my error. The record is substantial. On CaseLines 7 490 pages have been loaded in the business rescue application, 3 193 in the auction application, and 1 161 in the Rule 42 application. Much if this I believe to be irrelevant. I am conscious of the fact that the SCA in some instances may find that “*the issues are of such a nature*

that the decision sought will have no practical effect or result",³ or say that an appeal against my reasoning is not properly before it⁴ when it deals with this appeal.

[8] I reserved judgment to state my reasons for granting leave to appeal, as I have a duty to give a reasoned judgment in granting leave to appeal (or in refusing leave to appeal).⁵ I do not believe that my duty to give a reasoned judgment, extends to dealing with all criticisms of my reasoning, or to merely repeat my earlier findings.

[9] I seek to address herein what I see as the material matters on appeal.

Relevant facts

[10] Where I state below that I did not address a matter in my original judgment, I merely state a fact. I do not find thereby that I erred by dealing with the matter differently. My original judgment reflects that I approached the matter on a basis that I did not seek to resolve factual disputes where it was not necessary to do so. I summarised in my original judgment the material facts that I believed I required for judgments on the merits in the three applications, without doing an injustice to any party.

[11] These were the types of matter that required a resolution, not a postponement. Some of the issues now raised in the applications for leave to appeal, are to the effect that I had to resolve certain factual disputes that I had left unresolved. I took a different view. Matters such as the present matters could end up in endless hearings on factual disputes if every fact is sought to be resolved. I do not believe that an outcome of a factual dispute (say in favour of the parties making the averments of fraud and tax avoidance), would have resulted in a different outcome in any of the three applications. The same holds true of disputes about tax liability of the six business rescue companies, or how successful the auction and private treaty sales were.

³ See section 16(2)(a)(i) of the Superior Courts Act 10 of 2013.

⁴ See *Neotel (Pty) Ltd v Telkom SA Soc Ltd and Others* [2017] ZASCA 47 para 15-24.

⁵ See *Phillipa Susan van Zyl NO v Getz* [2020] ZASCA 84 para 11-13, relying *inter alia* on *Strategic Liquor Services v Mvumbi NO and Others* 2010 (2) SA 92 (CC) para 15 and 17, and *Mphahlele v First National Bank of South Africa Ltd* 1999 (2) SA 667 (CC) para 12. See too *Liesching and Others v The State* [2018] ZACC 25 para 54-55, and *Maake v Director of Public Prosecutions* [2010] ZASCA 51 para 19-20.

[12] In papers running into the thousands of pages, the summarised facts off course were not the only factual averments in the papers. It seemed to me that most of the facts required for findings were and are uncontentious. I do not believe that I incorrectly applied *Plascon Evans*⁶ and *National Scrap Metal*⁷. A distinction must be drawn between bare averments of purported facts, and averments of fact that are supported by averments and proof of *facta probanda* and *facta probantia*. *Plascon Evans* is not a stratagem to avoid dealing with a matter, but a safety net where parties properly address facts, and a true, *bona fide*, factual dispute arises. Such a true, *bona fide*, factual dispute cannot be resolved on affidavit; hence the rule that the respondent's version prevails where a dealbreaker is required (or the matter must be referred to trial or to oral evidence).

[13] Practice has become more robust (to avoid the abuse of *Plascon Evans*), but off course not recklessly so. See *Wightman t/a J W Construction v Headfour (Pty) Ltd and Another*,⁸ especially:

“[13] A real, genuine and bona fide dispute of fact can exist only where the court is satisfied that the party who purports to raise the dispute has in his affidavit seriously and unambiguously addressed the fact said to be disputed. There is thus a serious duty imposed upon a legal adviser who settles an answering affidavit to ascertain and engage with facts which his client disputes and to reflect such disputes fully and accurately in the answering affidavit. If that does not happen it should come as no surprise that the court takes a robust view of the matter.”

[14] In the matter before me, I believed that no true, *bona fide*, factual dispute stood in the way of my findings, and no one sought a referral to trial or to oral evidence. Still, the first issue on appeal will be if my summary of the material facts in my original judgment, was correct. The criticisms of my original judgment are threefold, (a) alleged omitted facts, (b) alleged wrong facts, and (c) alleged wrong conclusions.

[15] As such, omitted facts are sought to be added to my summary of material facts. The applicants in the business rescue application seek to rely on factual findings pertaining to rental agreements over the Lindela Repatriation facility

⁶ *Plascon Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) (SA) 623 (A) at 634 E - 635 D.

⁷ *National Scrap Metal v Murray & Roberts* 2012 (5) SA 300 (SCA) para 21-23.

⁸ *Wightman t/a J W Construction v Headfour (Pty) Ltd and Another* 2008 (3) SA 371 (SCA) para 12-13.

and the Mogale Youth Centre, a business partnership between Sun Worx and Technology Systems, and the business of Rodcor. They seek to rely on the business case for each one of the individual, six business rescue companies. Such detail on the business cases would include detail of the income, assets, liabilities (especially to SARS) and personnel, for findings that (some or all the business rescue companies) still trade legitimately, and could return to an existence on a solvent basis (if not the same business as before). I believe I should not address these criticisms of my summary of material facts, as I cannot do so without adding substantially to my original judgment. I assume that SARS and the provisional liquidators would seek to add factual findings on the amount of tax payable by the individual, six business rescue companies. The applicants in the business rescue application also seek to advance their factual contentions about a better return to be achieved through business rescue proceedings of the individual, six business rescue companies.

- [16] SARS also seek to add to my summary of material facts. SARS in its application for leave to appeal alleges that:

“The court erred in failing to have regard to the fact that the applicants have over the years together with the companies in liquidation orchestrated a fraudulent scheme with one of the main purposes of evading tax and SARS had already been deprived of tax for a number of years and it continues to be so deprived in light of the setting aside of the sale of the immovable property.”

- [17] The provisional liquidators averred that:

“The court erred in making no finding based on the alleged fraudulent activity in Consilium Business Consultants (Pty) Ltd, Miotto Trading and Advisory Holdings (Pty) Ltd and Bosasa Supply Chain Management (Pty) Ltd.”

- [18] It is true that I did not seek to resolve averments of fraud and tax avoidance (and indeed what the tax liabilities of the six business rescue companies are) in the business rescue application. SARS is of the view that I should have done so. As appears from my original judgment I also did not consider the averments about fraud and tax avoidance in the auction application. SARS is of the view that I should have done so. In my view a court must decide the auction application on its merits. Even if the applicants in that matter were part of acts

of fraud and tax avoidance, they would still be entitled to demand that the provisional liquidators act lawfully. It is a matter of the Rule of Law, in my view.

- [19] I remain perplexed why SARS seeks to involve itself actively in the disputes before me in the auction application. In my view, SARS (an organ of state) should create distance between itself and unlawful conduct, and not condone it. This is in my view what it means to live in a country subject to the supremacy of the rule of law, where obligations in terms of the Constitution must be fulfilled, and where *“the state must respect, protect, promote and fulfil the rights in the Bill of Rights”*.⁹ Instead SARS argues, to my mind startlingly so, in its application for leave to appeal:

“The court therefore erred in failing to consider as part of the judgment the contentions of SARS that it, in its capacity as the largest (only) third-party creditor, could in any event as part of the winding up at the relevant subsequent meetings of creditors, condone and ratify any unauthorised sales by the provisional liquidators, in the event of the sales in question being held to be unauthorised.”

- [20] The provisional liquidators will advance a case that I erred in my findings about the success they achieved in the auction and private treaty sales.
- [21] Having dealt with the alleged omitted facts, I turn to the alleged errors of fact in the original judgment. SARS is of the view that I erred in concluding in motion proceedings that the provisional liquidators deliberately acted unlawfully. This finding, it states, *“could not have been made on the papers before court, at least not on affidavit as part of motion proceedings”*. The provisional liquidators also contend that I could not have found that they improperly, deliberately, disregarded the Bhoola order and the business rescue application. It is the same point, but it is not consistently applied in the criticisms of my original judgment, as SARS and the provisional liquidators argue that I erred in not finding (also in motion proceedings) that the business rescue application was an abuse.
- [22] I disagree with the principle argued; it is not motion proceedings that stand in the way of negative findings. In issue is if I had a proper factual basis for my

⁹ Summarised from the first few sections in the Constitution.

findings. In my view, the common cause facts could lead to no other inference. In addition thereto is this context:

- [22.1] The about eleven individuals involved as provisional liquidators presented no evidence of advice sought to the effect that the Bhoola order and/or the business rescue application could be ignored in proceeding with the sales, of any discussions held between them about these matters, or of decisions taken by them (and the reasons for such decisions) to proceed with the sales despite these matters;
- [22.2] These material facts are omitted in circumstances where the issue of unlawful conduct was raised repeatedly with them, and the objective facts point to deliberate, unlawful conduct. Instead of explaining, the provisional liquidators kept quiet on what happened;
- [22.3] Added thereto is, with respect, the fact that provisional liquidators present a developing case of alleged consent, alternatively alleged tacit consent, alternatively that it was impossible to obtain consent, further alternatively that the requirement for consent fell away.
- [23] Similarly, the provisional liquidators in their application for leave to appeal take issue with my interpretation of certain letters by their attorneys. In my view, the fact that I dealt with motion proceedings, does not mean that I am precluded from assessing conduct from, what is in fact, common cause facts.
- [24] I believe that my conclusions were justified. I believe that I correctly made such findings without having to refer the matter to trial or to the hearing evidence.
- [25] SARS alleges that I had to make a finding that all purchasers of assets from the provisional liquidators acted *bona fide* (i.e. that they purchased assets without knowing that the authority of the provisional liquidators to sell the assets, has been placed in issue). I respectfully disagree that it was a matter before me for decision, or that I could make such a decision without considering the facts in each case. In my view a court could not have made such a factual assumption.
- [26] I only refer to some of the challenges to my factual findings by the provisional liquidators.

- [27] The provisional liquidators deny that it was common cause that the business rescue application was prepared under pressure (and presumably that I should have rejected the timeline put up by the lawyers acting for the provisional liquidators). The answering affidavit by the provisional liquidators read:

“40 The application is manifestly a rushed bastardisation of [conflicting] company law principles and provisions. ...

40.1 ...

41 What manifestly transpired is that the applicants were in the process of preparing an application contemplated by section 354 of the 1973 Act and after they reflected on the SCA Judgment and realised that such an application will not achieve a stay of the auction, they at the last minute converted that application to a business rescue application.”

I deal below with the timeline, further reflecting the time pressure.

- [28] The provisional liquidators deny that the business rescue application was served on 3 December 2019:

[28.1] The application was issued on 3 December 2019, according to the Registrar’s stamp.

[28.2] The deponent on behalf of the provisional liquidators (Mr Murray) stated in the answering affidavit to the business rescue application-

[28.2.1] *“21 This application was subsequently issued on 3 December 2019. Served on my offices on that same day and e-mailed to me at around 18h00 that evening”;*

[28.2.2] *“167 On 3 December 2019. the applicants’ attorneys called upon us to cancel the auction as a consequence of this application being issued. A copy of their letter to this effect is attached hereto as annexure AA43.*

168 Our attorneys responded on 4 December 2019, contending that the mere issue of this application did not have the effect of suspending the liquidation proceedings ...”

[28.3] The service affidavit in the business rescue application reflects service by e-mail on 3 December 2019 to a range of persons being what is described as known creditors, directors of the applicants, employees of the affected companies, about 19 e-mails to provisional liquidators, CIPC, and the auctioneers. It further reflects

service by a candidate attorney on 3 December 2019 on Mr Lutchman and by the Sherriff on Mr Murray.

[29] The provisional liquidators deny that it was common cause between the parties that all six business rescue companies were in financial distress. If they are of the view that the six business rescue companies were not in financial distress, why would they oppose the business rescue application? At the heart of their case is that they say that the six business rescue companies cannot be resuscitated, they are too far gone on the road of no-recovery.

[30] The provisional liquidators aver that I erred in reflecting the extent of the urgent application papers was presented to Wright J as comprising 70 pages as opposed to 170 pages, as I should have reflected 1 200 pages due to the annexures thereto that included the business rescue application. The point has some merit, as the answering affidavit in the business rescue application on behalf of the provisional liquidators made both points-

[30.1] *"174 However, when the urgent application had subsequently come to hand. At around 16h00 on 4 December 2019. it emerged that it in actual fact comprised more than 170 pages and it sought to ..."; and*

[30.2] *"179 Essentially. through the manipulative non-disclosure of material detail, the applicants unconscionably orchestrated an obligation upon us to have consulted on, consider and respond to affidavits in excess of 1200 pages over-night and within approximately 18 hours."*

[31] The provisional liquidators averred that "(t)he court erred in finding that the allegations of fraud and corruption were made by the liquidators as against Mr Jared Watson". What they accused him expressly of, only in the answering affidavit in the business rescue application, included:

[31.1] *"20 If there was any doubt that Mr Jared - the present protagonists behind Holdings - were hellbent on derailing and frustrating the winding up of these subject companies, such doubt can be no longer";*

[31.2] *"39 Ultimately, this application is persisted with the clear ulterior motive to neutralise the appointment of truly independent liquidators to the subject companies under circumstances where the Bosasa protagonists had a clearly intended plan in mind when they placed the said companies in liquidation on day one";*

[31.3] *"53 As I will demonstrate hereunder, the contents of the affidavits in support of the Urgent Application is palpably false, to the knowledge of the Watsons*

and intentionally crafted so as to dishonestly mislead the court in the hope of ultimately persuading it to grant the relief sought in an absolute and blatant contrivance”;

- [31.4] *“56 Stripped of its verbosity and the unfortunate but obviously purposefully employed vague nomenclature, the contents of the answering affidavit in and of itself evince why the liquidation proceedings in relation to the subject companies must as of necessity proceed and why the position that the Watsons want to prevail must be avoided at all costs”;*
- [31.5] *“57 The liquidators resist the application on a number of imbricated grounds. By way of summary, the liquidators' defences to this application are as follows:*

57.1 ...

57.3 this application is an abuse in the advance of an inherently dishonest modus operandi. the very basis for the Rescue Application is dishonest and ma/a tide and should be dismissed for those reasons alone;”
- [31.6] *“294 There is a litany of reasonably anticipated litigation which is likely to occupy a business rescue practitioner for some time to come. This is particularly so in light of the dubious conduct on the part of the Bosasa protagonists and the matters already dealt with herein above”;*
- [31.7] *“304 Moreover. company creditors may very well again be placed at risk of further substantial mismanagement of the companies' affairs by and at the instance of the Bosasa protagonists or parties aligned to it, which will certainly be avoided in the event that the companies are left to remain in liquidation”;*
- [31.8] *“305 What is of a further concern is the Watsons' association and intricate involvement in various other entities. The company creditors for obvious reasons do not have insight into the affairs of these other entities. ...”;*
- [31.9] *“313.2 The funds of the companies have been expended at the instance and according to the preference and commensurate discretion of the Watsons and other Bosasa protagonists. This ...”;*
- [31.10] *“320 Ultimately the very basis upon which this application has been brought remains dishonest, both factually and legally”;*
- [31.11] *“347.91.1 Each of the subject companies' directors were removed from office pursuant to the SCA handing down judgment in the Setting Aside Application. The only present Board of directors is that of Holdings, Holdings' board, at this point in time. is confined to Mr Jared and Ms Lindsay Watson and they are presently its principal protagonists”;*
- [31.12] *“347.92.5 If anything, Mr and Ms Watson cannot be trusted and their contention that they aim to be the proverbial "new broom" certainly does not instil confidence, but rather concern.”*

[32] The provisional liquidators averred that *“(t)he court erred in finding that the liquidators advanced a case to the effect that counsel for the applicants in the business rescue application was part of a conspiracy to abuse the court process”*:

[32.1] The answering affidavit in the business rescue application on behalf of the provisional liquidators states with regard to the role of the senior counsel and his attorney-

[32.1.1] *“175 The actual extent of the urgent application papers was certainly not correctly represented to Wright [J] in chambers.”*

[32.1.2] *179 Essentially. through the manipulative non-disclosure of material detail, the applicants unconscionably orchestrated an obligation upon us to have consulted on, consider and respond to affidavits in excess of 1200 pages over-night and within approximately 18 hours.”*

[32.2] The same averments about the senior counsel and his attorney appear in the answering affidavit in the auction application on behalf of the provisional liquidators;

[32.3] The answering affidavit in the business rescue application on behalf of the provisional liquidators further states with reference to the senior counsel and his attorney-

“177 The actual extent of what was truly contained and traversed in the urgent application and what were to be required for it to be heard was, in the circumstances. equally not accurately represented to Wright [J].

178 Senior Counsel for the applicants made it clear that he did not have precise insight into the founding papers to the urgent application but certain of the aforesaid representations were made to Wright [J] by him in the presence of his instructing attorney and certain other representations were made by his instructing attorney personally.

179 Essentially. through the manipulative non-disclosure of material detail, the applicants unconscionably orchestrated an obligation upon us to have consulted on, consider and respond to affidavits in excess of 1200 pages over-night and within approximately 18 hours”;

[32.4] The answering affidavit in the auction application on behalf of the provisional liquidators further states with reference to the senior counsel and his attorney-

[32.4.1] *“20 The business rescue application, comprising in excess of one thousand pages [supported by a founding affidavit that without its annexures span one hundred and sixty-two pages] was brought at the fifty ninth minute of the eleventh hour with the clear and sole purpose of derailing the auction.*

21 It was manifestly kept in the barrel and purposefully only issued on 3 December 2019 in an [unsuccessful] attempt to trigger the provisions of 131 (6) of the 2008 Act, to suspend the liquidation proceedings and derail the auction.”

[32.4.2] *“167 It suffices to state that the business rescue application:*

167.1 comprising in excess of a 1000 pages [supported by a founding affidavit that without its annexures span 162 pages], was demonstrably kept in the barrel and purposefully only issued on 3 December 2019 in an [unsuccessful] attempt to trigger the provisions of 131 (6) of the 2008 Act i.e. to suspend the liquidation proceedings and derail the auction;

167.2 is the quintessential example of a flagrant abuse of court process and in want of merit on every conceivable basis, which is now also particularly emphasised by the content of paragraphs 94 to 98 of the founding affidavit in this application.”

[32.5] The replying affidavit clearly addressed these matters and denied them. In addition, the averments about what was told to Wright J were *prima facie* made by someone who in the normal course would not have been present in the judge’s chambers (an issue raised in the replying affidavit). Strong exception was taken to the imputation of dishonest conduct about what transpired before Wright J. The withholding of the business rescue application with the assistance of a legal team was pertinently dealt with in the replying affidavit in the auction application where the deponent stated-

[32.5.1] *“74. In consequence of the upholding of the SCA appeal, which meant that the Group was officially in liquidation, the directors of Holdings decided, upon advice from a business rescue practitioner, to apply for business rescue. This discussion occurred on the following Monday 25 November 2019.*

75. Telephonic discussions and exchanges of documents followed from 25 November 2019 onwards with the Group’s

newly appointed legal team, and on Friday, 29 November 2019 Roth Watson, the son of the late Gavin Watson, and I flew to Cape Town to consult with counsel. During the weekend of 30 November 2019 to 1 December 2019, a first draft of the business rescue application was prepared, which was finalised on Monday 2 December 2019 and issued on Tuesday 3 December 2019 in the High Court of South Africa, Gauteng Local Division, Johannesburg, under case number 427 41/2019”.

[32.5.2] *“132.1. The deponent’s unfounded speculation that this business rescue application was “kept in the barrel and purposefully only issued on 3 December 2019” is devoid of all truth. In reality the application was extensive, which the deponent appears to accept, and was only initiated on 25 November 2019 subsequent to the SCA handing down judgment in favour of the provisional liquidators on 22 November 2019, and drafting of the affidavits by our legal team only commenced on 30 November 2019.”*

[32.6] Knowing the facts stated in the replying affidavit, and later confirmed by their lawyers about their role in heads of argument submitted by them, and knowing of an application to strike out offensive matter, these statements were repeated in the heads of argument on behalf of the provisional liquidators. These statements include averments about how Wright J was misled, including stating that *“through the manipulative non-disclosure of material detail, the applicants unconscionably orchestrated ...”* There were was no factual basis for the repeated attack on the lawyers’ integrity, in my view.

[33] I briefly address next some other matters of overall importance.

Other matters

[34] SARS is of the view that my questions about the application of *stare decisis* *“is such a fundamental departure from what has always been the trite position in our law, that this finding alone warrants leave to appeal being granted and that it be granted to the Supreme Court of Appeal”*.

[35] I believe that I did not err in the application of *stare decisis*.¹⁰ Some changes to the application of *stare decisis* is, with respect, clearly overdue. Our law of

¹⁰ *Stare decisis et non quieta movere* (stand by what has been decided and do not disturb the settled).

precedent *inter alia* depends on the borders of colonies, Boer Republics, provincial boundaries after 1910, and often on fragmented Bantustan borders. Our current areas of jurisdiction do not follow those old borders and sometimes contain some of them in some areas. That is the first reason a change is necessary.

- [36] The current system further ignores that we have a single judiciary under the Constitution. As such I am bound by a single judge in Johannesburg and in Pretoria, and not by three judges say sitting in Cape Town. This is untenable where we have a single judiciary. It is hardly a revolutionary idea. *Whose decisis must we stare?*¹¹ The article refers to the effect of (a) item 16(6)(a) of the Sixth Schedule to the Constitution, (b) the effect of the change from “*High Courts*” to “*High Court*” in section 166(c) of the Constitution, brought about by section 2 (a) of the Constitution Seventeenth Amendment Act of 2012, and (c) section 6 of the Superior Courts Act 10 of 2013 that refers to a High Court with divisions.
- [37] These matters are of practical importance. Judges are subjected to a deluge of electronically reported cases. Those judgments are prepared by judges who work under pressure and with limited resources. It becomes increasingly likely that a problematic judgment in a provincial division will be found, stored on the “*web*”, never intended to have precedent value, never relied upon by anyone giving advice, often unearthed by a judge and not addressed in argument. A preferred decision in another division of the single judiciary often will be available.
- [38] It is a hard place to find oneself in, between a judgment that seems to be against legal principle, but which *stare decisis* dictates should be followed. A judge is always mindful of the statement in 1968 in *The South African Legal System and its Background*¹² that *stare decisis inter alia*:

“... keeps the weaker judge along right and rational paths, drastically limiting the play allowed to partiality, caprice or prejudice, thereby not only securing

¹¹ M Wallis, *Whose decisis must we stare?*¹¹ (2018) 135 The South African Law Journal page 1-17

¹² HR Hahlo and E Kahn, *The South African Legal System and its Background*, Juta, 1968 at page 214-215.

justice in the instance but also retaining public confidence in the judicial machine through like being dealt with alike ...”

- [39] Accordingly, addressing that hard position is not easy. The tension is between giving effect to the principled approach that underlie the Common Law and the Bill of Rights, versus the certainty that *stare decisis* brings. The difficulty in one sense must not be overstated. Following a larger court’s reasons for its findings is not that different to apply legislation binding on a court. But no judge of normal sensibilities wants to find that another judge was clearly wrong, or overlooked legal principle. A judge is also always mindful how negative creative reasoning (sometimes the only too available to distinguish binding authority) appears to the readers of the distinguishing judgment. It seems to me that any limited return to the Common Law (where *stare decisis* did not apply)¹³ is unlikely. Any revision of the rules as raised in *Whose decisis must we stare?* would be for a higher court to deal with, should it wish to do so. Much of the academic work has been done.¹⁴ I did not raise these matters in my original judgment as our highest courts have confirmed the approach in our law in several judgments: Strict application of *stare decisis*, with limited exceptions.¹⁵ I seek to apply that law, as I must.
- [40] What I raised in my original judgment is that I do believe that a revision of current rules due to current court areas of jurisdiction and a single judiciary under the Constitution, is likely. I believe it to be an uncontentious matter.
- [41] The next matter of overall importance is that it is implicit that my interpretation of the Bhoola order and certain legislative provisions, is challenged.

¹³ Despite its description in Latin, *stare decisis* did not form part of Roman Law. The Roman Dutch Common Law, in the end, also still allowed for a High Court judge to depart from precedent “*for convincing reason after careful consideration*”. See *The South African Legal System and its Background* page 221, quoting Van der Linde.

¹⁴ See JG Kotze, *Judicial Precedent*, (1917) South African Law Journal 280; JC de Wet, *Gemene Reg of Wetgewing*, 1948 THRHR 1; E Kahn, *The Rules of Precedent Applied in South African Courts*, (1967) South African Law Journal from 43, 175, and 308; HR Hahlo and E Kahn, *The South African Legal System and its Background*, Juta, 1968 from 214; S Woolman and D Brand, *Is there a Constitution in this Courtroom? Constitutional jurisdiction after Afrox and Walters*, (2003) 18 SAPR 37.

¹⁵ *Afrox Healthcare Bpk v Strydom* 2002 (6) SA 21 (SCA) para 26-30; *Van der Walt v Metcash Trading Ltd* 2002 4 SA 317 (CC) para 39, *Daniels v Campbell NO and Others* 2004 5 SA 331 (CC) para 94, *True Motives 84 (Pty) Ltd v Mahdi and Another* 2009 4 SA 153 (SCA) para 100, *Camps Bay Ratepayers and Residents Association and Another v Harrison and Another* 2011 (4) SA 42 (CC) para 28.

- [42] I did address the law on interpreting of legal instruments in my original judgment. In my view true adherence to *Endumeni*,¹⁶ reconciled with *Cool Ideas*¹⁷ brought me to the findings I made. Looking into the mirror, in my view (a) an objective standard is in fact applied in interpreting of legal instruments, and (b) in fact there are times when text matters more than context. The quality of the drafting in issue and the context within which it came about, are two of the factors that point to where the balance between text and context falls. Our law is not that text means that whatever a judge believes the text should have meant under some vague reference to context. I do believe that our courts should always be mindful of the risk of crossing the line between interpretation (adjudication) and legislative functions, the risk of crossing the line between correcting a court order and interpreting the order, the risk of crossing the line between making an agreement for the parties and interpreting it.
- [43] There is another matter of overall importance. SARS and the provisional liquidators take issue with my approach to decide the matter based on all the evidence before me. They both say I failed to apply *Valentino Globe*¹⁸ by not only looking at the founding affidavits. I disagree. *Valentino Globe* in my view is a tool to prevent a matter without substance entering the process. Once the papers are supplemented and all the evidence is before the court, it serves no purpose dismiss the matter for a defect in the founding papers, already fixed. Even a matter defectively put together, can be rescued with further evidence with the leave of the court. Had a case been made out about a defect in the papers, in the normal course leave to supplement the founding papers would have been granted, especially where papers had been prepared on short notice. This is not a case where the respondents did not know what case they had to meet or the applicants should have been non-suited. This is not a case where one of the material facts I relied upon, has been alleged to have been impermissibly considered by me. What was the alternative? In this case I read thousands of pages. Who would benefit from a dismissal, for supplemented papers to be re-issued, and for another judge to hear the matter after again

¹⁶ *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA);

¹⁷ *Cool Ideas 1186 CC v Hubbard and Another* 2014 (4) SA 474 (CC);

¹⁸ *Valentino Globe BV v Phillips and Another* 1998 (3) SA 775 (SCA).

after reading thousands of pages? I believe that my approach to meet the real issues head-on, and facilitate the resolution of the real issues in matters, is the preferred one.

- [44] Similarly, the provisional liquidators allege that Mr J Watson lacked personal knowledge of some matters, and that I erred in not dismissing the application simply because he deposed to the main affidavits (supplemented by confirmatory affidavits and mostly by documents that were common cause). Any such argument also would have required an interrogation of material facts relied upon by me, which were not supported by documentary proof and/or confirmatory affidavits. No such work has been done in the very long application for leave to appeal of some 50 pages, headings included.
- [45] Both SARS and the provisional liquidators argue that even after the joinder of SARS, I should have dismissed the business rescue application because it was not originally joined therein. I disagree, not only has it been joined, but my original judgment addressed the unique statutory requirements.
- [46] I do not believe that *stare decisis*, interpretation, my approach to hear the matter on its merits, alleged hearsay evidence, or alleged non-joinder would have warranted leave to appeal.
- [47] I now turn to the three applications.

The Rule 42 application

- [48] This was the application that Fidelity brought to fix an error in the order obtained by the provisional liquidators before Bhoola AJ. I granted the relief to vary the order, relief that the provisional liquidators (and SARS) supported. In my view, rectifying the order was a simple application of contextual facts. The material facts were common cause. My original judgment contains my reasoning.
- [49] The provisional liquidators contend that I erred finding that there was no reason for the liquidators to bring an application to join as co-applicant in the Rule 42 application once Fidelity had brought it, and that I erred in “*striking the application by the provisional liquidators to join in support of the Rule 42 application from the roll and to disregard their heads of argument filed in*

pursuance of supporting that application". I should have awarded them the costs in respect thereof, they submit. They do not disagree with my order on the merits in the Rule 42 application, but in essence they sought leave to appeal to obtain a costs order for an application delivered the day before the hearing, and for heads of argument also delivered the day before the hearing (and thus with no opportunity for a response to both).

[50] The provisional liquidators contend that I omitted to consider the stance taken by their opponents, namely that Fidelity lacked *locus standi*. I indeed did not address it. Rule 42(1) states that "*any party affected*" may bring the application. It is true that I said nothing about the meaning of the Rule in my original judgment.

[51] In my view, the grounds of appeal do not meet the test(s) for the granting leave to appeal. I exercised a discretion in the admission of documents served at the last minute. There is in my view no "*measure of certainty that another court will differ from*" my judgment. Still, I grant leave to appeal as at the heart of the 50-page application for leave to appeal is a complaint that I was too harsh on the provisional liquidators in my original judgment. If all the other matters are to be revisited on appeal, then in this instance this complaint too should be open to revisited should the court of appeal so wish to do. I do not want to grant leave to appeal that would unduly restrict the court of appeal in overturning my judgment.

The auction application

[52] As set out in my original judgment, my finding that the provisional liquidators lacked the power to sell the assets at the public auction rested on two grounds, the effect of the Bhoola order, or on section 131 of the 2008 Act (which depends on when an application for business rescue is made). There are decisions contrary to mine as to when an application for business rescue is made.

[53] To succeed on appeal, the provisional liquidators and SARS will have to show that I erred on both findings. They will have to show that that I erred in:

- [53.1] Interpreting the Bhoola order. SARS does not take issue with my interpretation;
- [53.2] Finding that there was no consent to the sales by the provisional liquidators. SARS does not take issue with my finding, but the provisional liquidators do;
- [53.3] Finding that it was possible to obtain consent to the sales by the provisional liquidators. The provisional liquidators and SARS take issue with my finding, in the case of the provisional liquidators their submission necessarily must be in the alternative.
- [54] Once the provisional liquidators and SARS overcome my findings on the Bhoola order, they still will need to convince the court of appeal that I was wrong on when an application for business rescue is made. I am not convinced of the required prospect of success on these grounds. Due to the conflicting judgments on when an application for business rescue is made, in my view, there is enough reason to grant leave to appeal. Any decision of mootness stands to be made by the SCA.¹⁹
- [55] My findings formed the basis for prohibiting sales of the assets of the six business rescue companies (prayer 7), declaring sales unauthorised (prayer 8), and prohibiting the transfer of immovable property (prayer 9).
- [56] There are further grounds for seeking leave to appeal, I assume in the alternative (i.e. even if my findings on the Bhoola order and when the business rescue application was made, were to be upheld). I address the further grounds next.
- [57] The relief sought before me by the applicants in the auction application was that I had to declare the sales null and void. In rejecting the claim that I must declare the sales by the provisional liquidators “*null and void*”, I held that I could not do so as some, or many, of the sales of movables may have been unauthorised, but still valid. In the essence, I applied the Constitutional right to equality (section 9) in terms of section 39(2) of the Constitution in the

¹⁹ See *Mahlangu v Mahlangu* [2017] ZASCA 81 para 13-16, and *President of the Republic of South Africa v Democratic Alliance and Others* 2020 (1) SA 428 (CC) para 16-40.

interpretive exercise to use the powers given to me in section 339 of the Companies Act, 1973 to achieve equality. In my view, my duties to apply both could not have been clearer.²⁰ In my view the rights of innocent purchasers before me was a novel issue and I was free to interpret the law as I did. All the parties before me accept my interpretation. They and I may be held to be wrong.

[58] Instead, the provisional liquidators and SARS aver that I did not go far enough. I should have made findings, they aver, (a) that all sales by the provisional liquidators were to *bona fide* purchasers, and (b) the fact that the purchasers of immovable property learn that the sales were unauthorised before transfer, is irrelevant²¹ and they may demand transfer. There are further difficulties with this relief sought on appeal:

[58.1] SARS and the provisional liquidators did not seek such relief before me in counter-applications. They sought the dismissal of the auction application;

[58.2] SARS takes issue not with all the three sales of immovable properties, but with the one to Fidelity only;

[58.3] I did not find, as suggested by SARS, that the intention of the provisional liquidators²² had an impact on my findings of *bona fide* purchasers. A *bona fide* purchaser (in this case) is clearly someone who does not know that the authority of the provisional liquidators to sell the asset has been placed in issue.

[59] SARS points out that the order that I granted in paragraph 8 regarding written consent by resolution of the board of directors of Holdings goes beyond the Bhoola order. It was deliberate step, to stop any further disputes about tacit

²⁰ See *Independent Institute of Education (Pty) Limited v KwazuluNatal Law Society and Others* [2019] ZACC 47 para 2.

²¹ The suggestion by SARS may even be that my findings are irrational: “*The court erred in finding that the second intervening party in the auction application and the applicant in the application under case number 32083/19 (“the rule 42 application”), Fidelity Security Services (Pty) Ltd (“Fidelity”), was suddenly no longer a bona fide purchaser and in doing so the court erred in setting aside the sale of the immovable property to Fidelity Security Services.*”

²² “*The court should have found that Fidelity was and remained a bona fide purchaser of the immovable property in question and that nothing, least not the intentions of the provisional liquidators, could have changed that fact.*”

consent. SARS criticises paragraph 9 of my order that impacts on sales after the auction. It, with respect, misses the point that some assets were sold after the auction by private treaty when it argues that

“The court could in view of its findings at best have prohibited in paragraph 9 of the orders that any transfer of immovable assets sold at the auction, in the instances where transfer have not yet taken place, are prohibited.”

The business rescue application

[60] All the parties seek a re-evaluation of my original judgment in the business rescue application. SARS is of the view that I should have dismissed the business rescue application for other reasons than the ones that I used:

[60.1] That I erred in finding that it was not necessary to have joined SARS (by operation of law and by implication that I was wrong to have found that in any event any joinder defect was cured after the first hearing). The provisional liquidators agree with SARS;

[60.2] That I erred in not first looking at the alleged fatally defective case made out in the founding papers, before I considered all the papers filed of record as a whole;

[60.3] That I erred in not finding that the business rescue application was an abuse, and launched for ulterior purposes.

[61] I am not going to revisit these matters, save to state briefly that:

[61.1] I do not believe that the first two points have merit. As I discussed the approach to the hearing of the matter with the parties, it was agreed that points *in limine* would not be argued separately. I did not impose any process; I facilitated a discussion and the parties agreed on the way argument would take place. It would have served no one's interest to hear points *in limine*, consider to postpone the hearing to allow for supplementary founding papers to be delivered, and if required, to postpone the hearing for further affidavits, with only costs to be wasted. No one would have non-suited the applicants in papers prepared under time pressure. I believe justice was served by the approach taken by me. No one abandoned any points, but when I

heard the matter over two days, the focus was on the merits of the matter, as set out in all the affidavits. No one was prejudiced thereby;

[61.2] I expressed a different view in the original judgment about the third point. In fact, SARS and the provisional liquidators do not oppose that leave to appeal be granted to the applicants in the business rescue application.

[62] The third point, is argued to the contrary by the applicants in the business rescue application. I have already in the summary of the facts reflected that the applicants in the business rescue application are of the view that I should have referred to more material facts in the original judgment and should have granted the business rescue application(s). As stated, I cannot address them fully without significant addition to my original judgment. In summary, the applicants in the business rescue application have the following grounds of appeal:

[62.1] That I erred in not finding that the six business rescue companies could be rescued and be restructured to conduct business on a solvent basis in that inter alia-

[62.1.1] Properties, Leading Prospect, and Youth Development Centres own immovable property and would receive rental income;

[62.1.2] Technology Systems and Sun Worx, in partnership, are predominantly engaged in the private sector,

and that certain or all six business rescue companies could be rescued to resume trading; and

[62.2] That I erred in not attaching sufficient weight to the second goal of business rescue being a better return than would result from the immediate liquidation, and erred by incorrectly applying the legal principles relating to that second goal, in that-

[62.2.1] The Rodcor plant on its own represents a substantial benefit of business rescue as opposed to immediate

liquidation in that, if sold as a copper plant, and not the sum of its parts, a potential gain of R238 Million stands to be made;

[62.2.2] I erred in not appreciating that SARS has a limited claim that could be settled from available cash within the six business rescue companies;

[62.2.3] I erred in not giving due consideration to the interests of the ultimate shareholders and/or the creditors other than SARS;

[62.2.4] I erred in not appreciating that a business rescue practitioner, taking the opportunity to work with the directors in identifying appropriate clients over time, should produce a better return than a forced sale;

[62.2.5] That I erred in not finding that the business rescue application would also cater for the investigatory and recovery functions under winding-up due to the legislated functions of the business rescue practitioner, especially due to sections 140(3)(a) and 141(2) of the 2008 Act;

[62.2.6] That I erred in not appointing an independent business rescue practitioner once I found that the provisional liquidators sold assets without having had the authority to do so.

[63] Two parties aver that the application is so without merit, that it is an abuse. The other party avers that I erred in dismissing the applications. It seems to me that the strongest case on appeal would be where to draw the line between normal liquidation proceedings, and business rescue proceedings as a liquidation tool. I believe this to be matter of importance, but I make no comment on the second leg of the matter.

Conclusion

[64] I make the following orders:

1. The late delivery of its notice of application for leave to appeal by SARS, is condoned

Case Number 42741/19

2. The application for leave to appeal by the 1st, 2nd and 3rd applicants against my decision reflected in paragraphs 16, 17 and 18 in the order in the original judgment dated 24 August 2020 succeeds, such leave is to the Supreme Court of Appeal and the costs of the application for leave to appeal shall be the costs in such appeal;
3. The application for leave to appeal by the first intervening party, against my decision reflected in paragraph 17 in the order in the original judgment dated 24 August 2020 succeeds, such leave is to the Supreme Court of Appeal and the costs of the application for leave to appeal shall be the costs in such appeal;
4. The application for leave to appeal by the 1st to 3rd, the 5th to 34th, and the 36th to 38th respondents against my decision reflected in paragraphs 1, 13, 15, and 17 in the order in the original judgment dated 24 August 2020 succeeds, such leave is to the Supreme Court of Appeal and the costs of the application for leave to appeal shall be the costs in such appeal;

Case Number 44827/19

5. The application for leave to appeal by the 43rd respondent against my decision reflected in paragraph 7 and 11 in the order in the original judgment dated 24 August 2020 succeeds, such leave is to the Supreme Court of Appeal and the costs of the application for leave to appeal shall be the costs in such appeal;
6. The application for leave to appeal by the 1st to 3rd, the 5th to 34th, and the 36th to 38th respondents against my decision reflected in paragraphs 1, 3, 6, 7, 8, 9, 10 and 11 in the order in the original judgment dated 24 August 2020 succeeds, such leave is to the Supreme Court of Appeal and the

costs of the application for leave to appeal shall be the costs in such appeal;

Case Number 32083/19

7. The application for leave to appeal the 4th to 6th, the 8th to 37th, and the 39th to 41st respondents against my decision reflected in paragraph 19 and 21 in the order in the original judgment dated 24 August 2020 succeeds, such leave is to the Supreme Court of Appeal, and the costs of the application for leave to appeal shall be the costs in such appeal.

DP de Villiers AJ

Delivered: This judgement was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the Parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 17 November 2020.

Heard on: 30 September 2020

Delivered on: 17 November 2020 electronically, by e-mail and by uploading on CaseLines

The representation is reflected as in the original applications:

On behalf of the applicants in case numbers 44827/19 and 42741/19 and on behalf of the first to third respondents in case number 32083/19

Adv F Joubert SC

Adv J de Vries

Instructed by Goodes & Seedat Attorneys

On behalf of the first to thirty-ninth respondents (excluding the fourth and the thirty-fifth respondents) in case numbers 44827/19 and 42741/19 and on behalf of the eighth to forty-first respondents (excluding the seventh and the thirty-eighth respondents) in case number 32083/19

Adv KW Lüderitz SC

Adv P Lourens

Instructed by MacRobert Attorneys

On behalf of the first intervening party in case numbers 44827/19 and 42741/19 and
on behalf of the forty-third respondents in case number 32083/19

Adv HGA Snyman SC

Adv K Kollapen

Instructed by VZLR Inc