



Reportable:	YES / NO
Circulate to Judges:	YES / NO
Circulate to Magistrates:	YES / NO
Circulate to Regional Magistrates:	YES / NO

**IN THE HIGH COURT OF SOUTH AFRICA
NORTHERN CAPE DIVISION, KIMBERLEY**

Case No: **1871/2021**
Heard: **22/04/2022**
Date delivered: **22/07/2022**

In the matter between:

LIEZEL VENTER N.O.

NEERMALA (SUSAN) RAMCHANDRA N.O.

In their capacity as Liquidators of
JMA Petroleum CC t/a Gas City [In Liquidation]
(Registration Number: 1997/005 029/23)

First Applicant

Second Applicant

and

ALBA SKRYNWERKERSGEBOUW (PTY) LTD

Respondent

JUDGMENT

Mamosebo J

- [1] The first applicant, Liezel Venter N.O., and the second applicant, Neermala (Susan) Ramchandra N.O., are insolvency practitioners appointed by the Master of the Western Cape High Court on 20 July 2021 as liquidators of JMA Petroleum CC t/a Gas City placed under liquidation by Special Resolution registered on 10 June 2021.

[2] On 22 April 2022, the applicants launched an application against the respondent, Alba Skrynwerkersgeboue (Pty) Ltd, under Parts A and B. In Part A they are seeking the following relief:

2.1 That leave be granted to the applicants in terms of s 18(3) of the Insolvency Act,¹ r/w s 386 (4) of the Companies Act² to launch this application;

¹ 24 of 1936, which stipulates: A provisional trustee shall have the powers and the duties of a trustee, as provided in this Act, except that without the authority of the court or for the purpose of obtaining such authority he shall not bring or defend any legal proceedings and that without the authority of the court or Master he shall not sell any property belonging to the estate in question. Such sale shall furthermore be after such notices and subject to such conditions as the Master may direct.

² 61 of 1973, which stipulates: The powers referred to in subsection (3) are-

- (a) to bring or defend in the name and on behalf of the company any action or other legal proceedings of a civil nature, and, subject to the provisions of any law relating to criminal procedure, any criminal proceedings: Provided that immediately upon the appointment of a liquidator and in the absence of the authority referred to in subsection (3), the Master may authorise, upon such terms as he thinks fit, any urgent legal proceedings for the recovery of outstanding accounts;
- (b) to agree to any reasonable offer of composition made to the company by any debtor and to accept payment of any part of a debt due to the company in settlement thereof or to grant an extension of time for the payment of any such debt;
- (c) to compromise or admit any claim or demand against the company, including an unliquidated claim;
- (d) except where the company being wound up is unable to pay its debts, to make any arrangement with creditors, including creditors in respect of unliquidated claims;
- (e) to submit to the determination of arbitrators any dispute concerning the company or any claim or demand by or upon the company;
- (f) to carry on or discontinue any part of the business of the company in so far as may be necessary for the beneficial winding-up thereof: Provided that, if he considers it necessary, the liquidator may carry on or discontinue any part of

- 2.2 That the applicants are authorised in terms of s 69 of the Insolvency Act to enter properties 39 – 41 Toekoms Street, Uppington, and search and take into possession any and all movable assets, books and documents belonging to JMA Petroleum CC t/a Gas City (in liquidation) and remove same from the premises;
- 2.3 That the said warrant be executed either by a member/s of the South African Police Service or by the Sheriff of the Court; and
- 2.4 Costs of the application to be paid by the respondent on an attorney and own client scale.

[3] In terms of Part B of the Notice of Motion, the applicants are seeking the following relief:

the business of the company concerned before he has obtained the leave of the Court or the authority referred to in subsection (3), but shall not in that event be entitled, as between himself and the creditors or contributories of the company, to include the cost of any goods purchased by him in the costs of the winding-up of the company unless such goods were necessary for the immediate purpose of carrying on the business of the company and there are funds available for payment of the cost of such goods after providing for the costs of winding-up;

- (g) to exercise *mutatis mutandis* the same powers as are by sections 35 and 37 of the Insolvency Act, 1936, (Act 24 No. 24 of 1936), conferred upon a trustee under that Act, on the like terms and conditions as are therein mentioned: Provided that the powers conferred by section 35 aforesaid, shall not be exercised unless the company is unable to pay its debts;
- (h) to sell any movable and immovable property of the company by public auction, public tender or private contract and to give delivery thereof;
- (i) to perform any act or exercise any power for which he is not expressly required by this Act to obtain the leave of the Court.

- 3.1 A declaratory order that the respondent is in contravention of s 142(1), (2) and 145 of the Insolvency Act³;
- 3.2 That the National Prosecuting Authority is directed to investigate the actions and contravention of the respondent of sections 142 and 145 of the Insolvency Act and to determine whether to proceed with prosecution; and
- 3.3 costs of the application by the respondent on an attorney and own client scale.

³ Section 142 **Removing or concealing property to defeat an attachment or failure to disclose property**

- (1) Any person shall be guilty of an offence and liable to imprisonment for a period not exceeding three years if, either before or after the sequestration of an estate, he removes, conceals, disposes of, deals with or receives any asset belonging to that estate with intent to defeat an attachment by virtue of a sequestration order, or with intent to prejudice the creditors in that estate: Provided that in any proceedings for an offence under this sub-section, any such removal, concealment, disposal of, dealing with or receipt of assets which had the effect of defeating or was calculated to defeat such attachment or which prejudiced or was calculated to prejudice the creditors of that estate, shall, unless the contrary is proved, be deemed to have been committed with intent to defeat the attachment or (as the case may be) to prejudice those creditors.
- (2) Any person who has in his possession or custody or under his control any property belonging to an insolvent estate and who knows of the sequestration of the estate and that the property belongs to it, shall be guilty of an offence and liable to a fine not exceeding R1 000 or to imprisonment without the option of a fine for a period not exceeding one year if he fails to inform the trustee of the estate as soon as possible of the existence and whereabouts of the property and (subject to the provisions of section 83) to deliver it to, or place it at the disposal of, the trustee.

145 Obstructing trustee. – Any person who obstructs or hinders a *curator bonis* appointed under this Act or a trustee or a representative of either in the performance of his functions as such shall be guilty of an offence and liable to a fine not exceeding R500, or to imprisonment without the option of a fine for a period not exceeding six months.

- [4] The respondent resists the application and raised the following points *in limine*:
- 4.1 That the Magistrates Court has exclusive jurisdiction to hear applications in terms of s 69(3) of the Insolvency Act;
 - 4.2 That the applicants failed to comply with s 19(1) of the Insolvency Act;
 - 4.3 That the liquidator cannot rely on the provisions of s 69 of the Insolvency Act but rather on s 386 of the Companies Act;
 - 4.4 That the applicants lack jurisdiction to seek a declaratory order.
- [5] The background is necessary for context. On 10 June 2021 the Companies and Intellectual Property Commission (CIPC) addressed a certificate, annexure "FA2", to the Master of the High Court, confirming receipt of the CM26 Special Resolution for Voluntary Liquidation in terms of s 352(2) of the Companies Act. Resultantly on 10 June 2021 JMA Petroleum CC company number 1997/005029/23's, status was changed to Voluntary Liquidation.
- [6] On 20 July 2021 the Master of the Western Cape High Court appointed Liezel Venter N.O., practicing under the name and style of Maurice Schwartz Venter & Associates (Pty) Ltd, and Neermala (Susan) Ramchandra, practicing under the name and style of Stowell Estate Administration Trust, as liquidators with the powers as set out in s 386(1) of the Companies Act read together with item 9 of Schedule 5 of Act 71 of 2008 of the Close Company known as JMA Petroleum CC.
- [7] The respondent, the owner of premises 39 – 41 Toekoms Street, Upington, and former landlord of JMA Petroleum CC t/a Gas City, is aware of the liquidation proceedings as it was informed telephonically

and by e-mail on 14 July 2021. The applicants appointed Landile Security to safeguard the premises while simultaneously instructing Renet Fouché of Alibia Trading 230 (Pty) Ltd t/a Alibia Asset Disposal to obtain an inventory and valuation of the assets of Gas City.

- [8] The site visits of Gas City by *Alibia* took place on 12 and 13 July 2021 when Landile Security was also granted access. This was followed by an inspection and valuation of the property. Alibia was authorised to collect the remainder of the assets for safe storage to be dealt with in terms of the Insolvency Act. On 14 July 2021 Fouché addressed an email to Mr Herman Kaindibinder notifying him that the assets will be removed on the 19th July 2021 and requested that he furnish her with a copy of the signed lease agreement, which he did. Fouché arranged with Parau Logistics and Transport (Pty) Ltd to attend to the packing and transportation of the assets from 20A Industrial Way Street, Upington and 39 – 41 Toekoms Street, Upington, at a combined cost of R26 000.00. The applicants' representatives visited the site but were denied access.
- [9] The applicants addressed correspondence to the respondent in terms of s 47 of the Insolvency Act to the effect that the respondent has an automatic lien over the assets in respect of arrear rental and that the respondent would retain that lien regardless of having released the assets to the applicants. Further, the applicants elected to take over the property at the full amount of the respondent's claim for arrear rental in terms of s 83(3) of the Insolvency Act which offer was declined by the respondent. It is on that basis that the applicants approached Court maintaining that the respondent is unlawfully withholding and concealing assets of the insolvent estate and thereby contravened sections 142 and 145 of the Insolvency Act.

- [10] The respondent's attorneys, Bekker Bergh & More Inc, addressed a letter to Ms Venter on 22 July 2021 stating that their client had entered into a five-year lease agreement on 14 June 2019 effective from 01 July 2019; that there was an outstanding rental amount of R69 467.65 which entitled their client to a tacit hypothec over the property that was on the premises. Notwithstanding that the liquidators had since 21 July 2021 assured the respondent that it will not lose its hypothec by releasing the affected assets however on 22 July 2021 Bekker Bergh & More Inc. served the applicants with a notice in terms of s 47 of the Insolvency Act.
- [11] On 26 July 2021, an email was addressed to Kock, Bekker Bergh & More Inc and Liebenberg by the liquidators informing them that they will pay to the respondent the full amount of the respondent's claim in terms of s 83(3) of the Insolvency Act in order to take over the property but received no response. On 02 August 2021, a further email was addressed to the same parties and referred them to the provisions of s 145 of the Insolvency Act which makes it a criminal offence to wrongfully withhold assets. The assets have still not been released to the applicants hence this application.

FOUR POINTS *IN LIMINE* WERE RAISED

The first point *in limine*: Whether the Magistrates Court has Exclusive jurisdiction to adjudicate the matter in terms of s 69(3) of the Insolvency Act or not

- [12] Section 69 stipulates:

"(1) A trustee shall, as soon as possible after his appointment, but not before the deputy-sheriff has made the inventory referred to in sub-section (1) of section nineteen, take into his possession or under his control all movable property, books and documents belonging to the estate of which he is trustee and shall furnish the Master with a valuation of such movable property by an appraiser appointed under

any law relating to the administration of the estates of deceased persons or by a person approved by the Master for the purpose.

(2) If the trustee has reason to believe that any such property, book or document is concealed or otherwise unlawfully withheld from him, he may apply to the magistrate having jurisdiction for a search warrant mentioned in sub-section (3).

(3) If it appears to a magistrate to whom such application is made, from a statement made upon oath, that there are reasonable grounds for suspecting that any property, book or document belonging to an insolvent estate is concealed upon any person, or at any place or upon or in any vehicle or vessel or receptacle of whatever nature, or is otherwise unlawfully withheld from the trustee concerned, within the area of the magistrate's jurisdiction, he may issue a warrant to search for and take possession of that property, book or document."

[13] In his answering affidavit, Mr Arno Kock, a director of the respondent, contended that s 69(2) requires the applicant to apply to the Magistrate having jurisdiction for a search warrant if there is reason to believe that any property, book or document belonging to the insolvent estate is concealed or unlawfully withheld. He further contended that s 69(3) specifically authorises the Magistrate to issue a warrant to search for and take possession of the property belonging to the insolvent estate and for that reason, the Magistrate has exclusive jurisdiction in terms of s 69 and the relief sought by the applicants falls outside the jurisdiction of the High Court.

[14] Mr Van Rensburg, for the respondent, contended that the Act gives exclusive jurisdiction to the Magistrate to adjudicate over applications in terms of s 69(3) and the applicants have not furnished any reasons why they approached the High Court for the

relief sought. The respondent's interpretation of s 69(3) implies that the jurisdiction of the High Court is ousted.

- [15] Mr Carstens, for the applicants, relied on *Richards Bay Bulk Storage (Pty) Ltd v Minister of Public Enterprises*⁴ where EM Grosskopf JA, writing for the unanimous court, said:

"The question at issue is therefore whether the Court a quo had jurisdiction to hear the review application. This in turn depends on whether the Act excluded such jurisdiction. The Act does not do so in express terms, and the question then is whether it contains an implication to that effect. The parties were ad idem that there is a strong presumption against such an implication:

'...(T)he Court's jurisdiction is excluded only if that conclusion flows by necessary implication from the particular provisions under consideration, and then only to the extent indicated by such necessary implication...'"

- [16] In *Standard Bank of South Africa Ltd And Others v Mpongo And Others*⁵, the Supreme Court of Appeal pronounced:

"[69] The threshold to sustain the proposition that there is an ouster of the High Court's jurisdiction is very high. In Metcash Trading Ltd v Commissioner, South African Revenue Service and Another, Kriegler J, in the course of determining whether a statute had ousted the jurisdiction, the High Court demonstrated the method of deciding the question. He said that 'there is nothing in s 36 to suggest that the inherent jurisdiction of a High Court to grant appropriate other or ancillary relief is excluded' and that the section 'does not say so expressly nor is such an ouster necessarily implicit

⁴ 1996 (4) SA 490 (A) at 494G-H

⁵ 2021 (6) SA 403 (SCA)

in its terms, while it is trite that there is a strong presumption against such an implication’.”

- [17] The applicants, invoking the unreported judgment by Dlodlo J in *Duku N.O. and others v Bermy Packaging (Pty) Ltd*⁶, submitted that it is permissible to approach the High Court as a court of first instance in seeking redress under s 69(3). It is further not in dispute that the High Court’s jurisdiction is vested in terms of s 169(1) of the Constitution of the Republic of South Africa read with s 21 of the Superior Courts Act⁷ which stipulates:

“Persons over whom and matters in relation to which Divisions have jurisdiction.- (1) A Division has jurisdiction over all persons residing or being in, and in relation to all causes arising and all offences triable within, its area of jurisdiction and all other matters of which it may according to law take cognisance, and has the power –

- (a) to hear and determine appeals from all Magistrates’ Courts within its area of jurisdiction;*
- (b) to review the proceedings of all such courts;*
- (c) in its discretion, and at the instance of any interested person, to enquire into and determine any existing, future or contingent right or obligation, notwithstanding that such person cannot claim any relief consequential upon the determination.”*

- [18] Mr Van Rensburg did not furnish any authority to counter the submission that a litigant may approach this Court as a court of first instance. I am of the view that s 69(2) of the Insolvency Act does not expressly oust the jurisdiction of the High Court. It can also not

⁶ Case No 6174/2009, Western Cape High Court, (07 December 2010)

⁷ 10 of 2013

be reasonably inferred from the reading of the section that the High Court's jurisdiction is ousted by implication. It therefore follows that the High Court, having inherent jurisdiction, cannot refuse to hear a matter that is within its jurisdiction. In my view, the fact that the applicants did not apply to the Magistrates Court cannot be used as an impediment to non-suit them.

It therefore follows that the contention by the respondent that the Magistrates Court has exclusive jurisdiction stands to fail.

The second point *in limine*: That the applicants failed to comply with s 19(1) of the Insolvency Act

[19] It was contended on behalf of the respondent that the applicants have failed to comply with s 19(1) of the Insolvency Act in that the deputy sheriff did not conduct an inventory of the movable property, books and documents belonging to the insolvent estate before the applicants approached the Court in terms of s 69 of the Insolvency Act.

[20] In para 4.1 of the applicants' founding affidavit, they allege that Gas City was placed into liquidation by Special Resolution in terms of s 352(2) of the Companies Act on 10 June 2021. The respondent admits this allegation at para 26 of its answering affidavit. It is contended on behalf of the applicants that since Gas City was placed in final liquidation by way of a Special Resolution and not by a Court order, no court order could be provided to the deputy sheriff to trigger the s 19(1) obligations. Of importance, is the fact that the assets belonging to Gas City are in the possession of the respondent and subject to a tacit hypothec and that the applicants have offered to take over the property at the full amount of the respondent's

claim. Sec 391 of the Companies Act⁸ requires the liquidators to recover the assets forthwith. It is further significant to note that Renet Fouché of Alibia Trading had conducted an inventory and valuation of the assets of Gas City. I am of the view that the need for an inventory by the sheriff under the current circumstances does not arise.

It follows that the contention *in limine* that the applicants failed to comply with s 19(1) of the Insolvency Act ought not to succeed.

The third point *in limine*: That the liquidator cannot rely on the provisions of s 69 of the Insolvency Act but rather on s 386 of the Companies Act

- [21] The respondent in *Duku*⁹ took a similar point *that* the relief sought by the applicants in terms of s 69 of the Insolvency Act is not competent because the liquidators are empowered to act in terms of s 386(4) of the Companies Act and did not succeed. Section 386 deals with the general powers of the liquidators. I align with the remarks by Bertelsmann J, concurred in by Poswa J in the unreported judgment *De Beer v Hamman NO & Others*¹⁰ :

" A liquidator and/or trustee is obliged to ensure that goods belonging to the insolvent estate are found, secured and liquidated in accordance with the provisions of the Insolvency Act and/or the Companies Act for the benefit of the creditors of the insolvent estate."

⁸ **General duties.** —A liquidator in any winding-up shall proceed forthwith to recover and reduce into possession all the assets and property of the company, movable and immovable, shall apply the same so far as they extend in satisfaction of the costs of the winding-up and the claims of creditors, and shall distribute the balance among those who are entitled thereto.

⁹ *Duku* Above N.8

¹⁰ [2005] JOL 15137 (T); (A1290 /04) [2005] ZAGPHC 71 (25 July 2005) at para 33

Regard being had to the discussions above pertaining to s 69, I am of the view that this point can also not succeed because s69 provides the mechanism that the applicants can utilise and it remains available to the liquidators.

The supplementary founding affidavit

[22] The applicants sought leave to file a supplementary founding affidavit to the opposing affidavit of the respondent. They maintain that it is required because upon receipt of the respondent's heads of argument, they realised that the respondent seeks to rely on a point of law which was not raised in its answering affidavit, namely, that this Court lacks jurisdiction in terms of s 69 of the Insolvency Act to determine the matter as no allegation has been made that Gas City was insolvent and unable to pay its debts. This application is opposed by the respondent who submits that it can raise a point of law at any stage of the proceedings and specifically in its heads of argument that were filed more than four months before the matter was heard. The applicants' failure to address the matter sooner or to file their explanation for the delay and seek condonation from the court should attract a dismissal of their application.

[23] Mr Van Rensburg, for the respondent, relied on *Putter v Minister of Law and Order and Another NO*¹¹ where the Court pronounced:

"Clearly, it is fundamental that the company being wound up must be a company unable to pay its debts before any provision of the Insolvency Act can be applicable to such winding up."

The Court in *Putter* dealt with an application to set aside a warrant issued by the magistrate in terms of s 69(3) of the Insolvency Act without any notice to the applicant whose rights were affected. The

¹¹ 1988 (2) SA 259 (T)

allegation was that the applicant was unlawfully withholding a Mercedes Benz motor vehicle from the liquidator.

- [24] Sec 339 of the Companies Act¹² is applicable to companies and Close Corporations, and stipulates:

"Law of insolvency to be applied mutatis mutandis.-

In the winding-up of a company unable to pay its debts the provisions of the law relating to insolvency shall, insofar as they are applicable, be applied mutatis mutandis in respect of any matter not specifically provided for by this Act."

- [25] Mr Van Rensburg submitted that the applicant must allege in the founding papers that Gas City is unable to pay its debts and it has not done so. The respondent has raised the alleged flaw in January 2022 but the applicants waited until a week before the hearing to bring the application. Invoking *Van Wyk v Unitas Hospital and Another (Open Democratic Advice Centre as Amicus Curiae)*¹³, Mr Van Rensburg argued that the applicants failed to apply for condonation for the late filing of the supplementary founding affidavit and must stand or fall by the founding affidavit and urged this Court to dismiss their application. Mr Carstens, for the Liquidators, submitted that the applicants are not seeking condonation but merely asking the Court to grant the applicants leave to file an additional affidavit. What the respondent is doing, argued counsel, is approbating and reprobating because a company in liquidation is insolvent and it will be to the benefit of the creditors who are already prejudiced by the insolvency to derive the best possible dividend from the winding up of the estate.

¹² 61 of 1973

¹³ 2008 (2) SA 472 (CC) at para 22

[26] On the issue of whether the applicants should be permitted to file a further affidavit or not. The general practice relating to the number of affidavits is settled. Ordinarily, the rule is that three sets of affidavits are allowed. The Court may in its discretion permit the filing of further affidavits (*See Rule 6(5) of the Uniform Rules of Court*). The filing of a further affidavit is therefore not there merely for the asking as without the Court's leave to do so, such affidavit may be regarded as *pro non scripto*.

[27] A litigant who seeks to serve additional affidavits is under a duty to provide a proper and satisfactory explanation acceptable to the Court as to the cause or reasons why the information was not placed before the Court at an appropriate stage. I am of the view that since the respondent's case is that the applicants have failed to demonstrate in their case that Gas City is unable to pay its debts in the founding affidavit, the additional affidavit seeks to elaborate on para 4.1 of the applicants' founding affidavit pertaining to the certificate issued by the Commissioner: CIPC. This court retains the discretion to admit further affidavits if it is in the interests of justice to do so.

I am satisfied that no prejudice is caused to the respondent in accepting the additional affidavit with its annexures.¹⁴

[28] Mr Van Rensburg argued that there is also a fundamental flaw in the applicants' founding papers caused by the failure of the second applicant to show that they are acting jointly as liquidators. In countering this submission Mr Carstens submitted that both liquidators are before court and had that not been the case, the respondent should have invoked Rule 7 of the Uniform Rules of Court

¹⁴ See *Diener v Minister of Justice* 2019 (4) SA 374 (CC) at paras 31-32; see also *Mostert v FirstRand Bank* 2018 (4) SA 443 (SCA) at 448 D - F

to attack their authority, which was not done. The second applicant has also deposed to a confirmatory affidavit confirming the contents of the founding affidavit. Attacking the absence of a confirmatory affidavit is without merit.

I am satisfied that both liquidators are properly before me.

The fourth point *in limine*: That the applicants lack jurisdiction to seek a declaratory order

[29] It was submitted on behalf of the respondent that the relief sought in Part B is misconstrued as the Court is not competent to grant such an order. The contention by the respondent is that whereas ss 142 and 145 provide criminal penalties for the contravention of the Insolvency Act, it was for the National Prosecuting Authority (NPA) to prosecute such crimes. The criminal courts must then decide on such matters based on the merits. It is for that reason, so the argument went, that the applicants do not need the High Court to refer the matter to the NPA for investigation and further, s 142(2) does not apply to the assets, known to the trustee. The section is designed to punish transgressors who fail to disclose to a trustee the existence and whereabouts of the insolvent's assets and fail to deliver them to the trustee. It is on this basis that the respondent argues that the application in Part B is an abuse of Court process used for an ulterior motive or to intimidate and harass the respondent.

[30] In countering the aforementioned submissions Mr Carstens submitted that both the common law and s 21 (1)(c) of the Superior Courts Act¹⁵ authorise declaratory relief. Contrary to what the respondent alleges in its answering affidavit, namely, that the High Court lacks jurisdiction to grant a declaratory order to the effect that

¹⁵ 10 of 2013

the respondent is guilty of a criminal offence, without a criminal trial, the applicants do not seek such finding. What they are seeking is a finding that the respondent has contravened sections 142 and 145 of the Insolvency Act and thereafter to refer the matter to the NPA, an independent institution, which will decide whether to institute criminal proceedings or not.

- [31] The Supreme Court of Appeal in *Langa CJ and Others v Hlophe*¹⁶ made these instructive remarks:

"[28] The jurisdiction of a High Court to grant a declaration of rights is derived from s 19(1)(a)(ii) of the Supreme Court Act. The Court may, at the instance of any interested person, enquire into and declare any existing, future or contingent right or obligation, notwithstanding that the applicant cannot claim any relief consequential upon such determination. This involves a two-stage enquiry: First, the court must be satisfied that the applicant is a person interested in an 'existing, future or contingent right or obligation', and then, if satisfied, it must decide whether the case is a proper one for the exercise of its discretion (Durban City Council v Association of Building Societies 1942 AD 27 at 32)."

- [32] Mahomed CJ cautioned against abuse of process in *Beinash v Wixley*¹⁷ in these terms:

"There can be no doubt that every Court is entitled to protect itself and others against an abuse of its processes. As was said by De Villiers JA in Hudson v Hudson and Another 1927 AD 259 at 268:

'When.....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.'

¹⁶ 2009 (4) SA 382 (SCA) at para 28; See also, *Cordiant Trading CC v Daimler Chrysler Financial Services (Pty) Ltd* 2005 (6) SA 205 (SCA).

¹⁷ 1997 (3) SA 721 (SCA) at 734

What does constitute an abuse of the process of the Court is a matter which needs to be determined by circumstances of each case. There can be no all-encompassing definition of the concept of 'abuse of process'. It can be said in general terms, however, that an abuse of process takes place where the procedures permitted by the Rules of the Court to facilitate the pursuit of the truth are used for a purpose extraneous to that objective."

[33] Regard being had to the circumstances of this case, I am of the view that a proper case has been made out that in the exercise of my discretion I should find that there has been a contravention of sections 142 and 145 of the Insolvency Act. I could not discern any basis for the respondent's refusal to release the assets against the backdrop of the assurance for its lien not to be disturbed and the offer to take over the full amount of the respondent's claim. It is only proper that this matter be referred to the NPA for investigation. It follows that the point *in limine* pertaining to the lack of jurisdiction for a declarator is without merit and also stands to fail.

[34] **Coming to the issue of costs.** The general rule is that costs should follow the result. In the Notice of Motion in both Parts A and B costs are sought on the scale as between attorney and own client. Mr Carstens, in pressing for the punitive order of costs, submitted that the respondent's conduct was wholly unreasonable and to the detriment of the general body of creditors who have already been prejudiced by the liquidation and it was unnecessary to engage in the current litigation. Mr Van Rensburg on the other hand asked the Court to dismiss the application with costs on an attorney and client scale.

[35] It is trite that costs are within the discretion of the court, which must be exercised judicially upon a consideration of the relevant

facts and must be fair to the parties. In *Public Protector v South African Reserve Bank*¹⁸ the Constitutional Court made the following insightful remarks pertaining to punitive costs:

"[221] This court has endorsed the principle that a personal costs order may also be granted on a punitive scale. The punitive costs mechanism exists to counteract reprehensible behaviour on the part of a litigant. As explained by this court in *Eskom*, the usual costs order on a scale as between party and party is theoretically meant to ensure that the successful party is not left 'out of pocket' in respect of expenses incurred by them in the litigation. Almost invariably, however, a costs order on a party and party scale will be insufficient to cover all the expenses incurred by the successful party in the litigation. An award of punitive costs on an attorney and client scale may be warranted in circumstances where it would be unfair to expect a party to bear any of the costs occasioned by litigation. [222] The question whether a party should bear the full brunt of a costs order on an attorney and own client scale must be answered with reference to what would be just and equitable in the circumstances of a particular case. A court is bound to secure a just and fair outcome.

[223] More than 100 years ago, Innes CJ stated the principle that costs on an attorney and client scale are awarded when a court wishes to mark its disapproval of the conduct of a litigant. Since then this principle has been endorsed and applied in a long line of cases and remains applicable. Over the years, courts have awarded costs on an attorney and client scale to mark their disapproval of fraudulent, dishonest or *mala fides* (bad faith) conduct; vexatious conduct; and conduct that amounts to an abuse of the process of court."

¹⁸ 2019 (6) SA 253 (CC)

- [36] It is warranted in this case for the respondent to bear the full brunt of a costs order on an attorney and own client scale. In the result, the following order is made:

PART A

1. The applicants are hereby authorised in terms of section 18(3) of the Insolvency Act, 24 of 1936 as amended, read with section 386(4) of the Companies Act, 61 of 1973, as amended, to launch this application.
2. The applicants are authorised under the provisions of section 69 of the Insolvency Act, 24 of 1936 to enter properties 39 – 41 Toekoms Street, Upington.
3. Should the applicants be unable to make such entry without disturbance, they be and are hereby authorised:
 - 3.1 to engage the services of a locksmith and/or the South African Police Service members (SAPS) or the sheriff, as may be necessary, to remove any obstruction to them from entering upon the said property;
 - 3.2 to thereafter enter the properties, where necessary, with the assistance of the SAPS and the sheriff:
 - 3.2.1 to search for any assets, stock, property, motor vehicles, books, records or documents, computers and office furniture under the control of the respondent belonging to JMA Petroleum CC t/a Gas City [in liquidation];
 - 3.2.2 to take possession of any and all assets, stock, property, motor vehicles, books, records, documents, computers and office furniture belonging to JMA Petroleum CC t/a Gas City or which may be in possession of the respondent or under its control;
 - 3.2.3 to remove any such assets, stock, property, motor vehicles, books, records or documents, computers

and office furniture so found and to hand same over to the applicants and/or their duly appointed representatives.

4. For effecting the foregoing, a search warrant marked Annexure "X" attached to the founding affidavit is hereby authorised.
5. The warrant shall be executed in a like manner as a warrant of search of stolen property and the person executing the warrant shall deliver any articles seized thereunder to the applicants.
6. The said warrant is to be executed either by a member(s) of the South African Police Service, alternatively, by the sheriff of the court.
7. Costs of this application be paid by the respondent on an attorney and own client scale.

2. **PART B**

2.1 That the respondent is in contravention of section 142(1) of the Insolvency Act, 24 of 1936, as amended, in that the respondent either before or after the liquidation of JMA Petroleum CC t/a Gas City removed, concealed, disposed of, or dealt with or received assets belonging to the insolvent estate with the intent to defeat an attachment by virtue of the liquidation or with the intent to prejudice the creditors of the insolvent estate.

2.2 That the respondent is in contravention of section 142 (2) of the Insolvency Act in that the respondent has in its possession and/or under its custody and/or under its control property that belongs to the insolvent estate knowing of the liquidation and that the property belongs to the insolvent estate.

2.3 That the respondent is in contravention of section 145 of the Insolvency Act, 24 of 1936, in that the respondent hindered and still hinders the liquidators and their representatives in the performance of their functions.

2.4 Notwithstanding the finding that this Court had in law to make, this matter is remitted to the National Prosecuting Authority (NPA) to investigate the contraventions of ss 142 and 145 of the Insolvency Act, 24 of 1936.

2.5 Costs of this application be paid by the respondent on an attorney and own client scale.


M.C. MAMOSEBO

**JUDGE OF THE HIGH COURT
NORTHERN CAPE DIVISION**

For the applicant:
Instructed by:

Adv. WC Carstens
Hertzenberg Attorneys
c/o Engelsman Magabane Inc

For the respondents:
Instructed by:

Adv. FG Janse Van Rensburg
Becker Bergh & More Inc
c/o Haarhoffs Inc