

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

- (1) REPORTABLE: **NO**
(2) OF INTEREST TO OTHER JUDGES: **NO**
(3) REVISED:

Date: **29th September 2021** Signature: _____

A handwritten signature in black ink, appearing to be "R. J. J.", is written over the signature line.

CASE NO: 18358/2020

DATE: 29TH SEPTEMBER 2021

In the matter between:

EDUCATED RISK INVESTMENTS 54 (PTY) LIMITED

Applicant

and

THE MASTER OF THE HIGH COURT, JOHANNESBURG

First Respondent

POLLOCK, RICHARD KEAY N O

Second Respondent

SYKES, MARYNA ESTELLE N O

Third Respondent

KOTZE, OLGA N O

Fourth Respondent

[The second to fourth respondents are cited *nomine officio*

in their official capacities as the duly appointed joint liquidators of

FARM BOTHASFONTEIN (KYALAMI) (PTY) LIMITED (in liquidation)]

NEDBANK LIMITED

Fifth Respondent

IMPERIAL HOLDINGS LIMITED

Sixth Respondent

Coram: Adams J

Heard: 19 July 2021 – The 'virtual hearing' of the application was conducted as a videoconference on *Microsoft Teams*.

Delivered: 29 September 2021 – This judgment was handed down electronically by circulation to the parties' representatives by email, by being uploaded to *CaseLines* and by release to SAFLII. The date and time for hand-down is deemed to be 11:00 on 29 September 2020.

Summary: Company – Winding-up – s 408 of the Companies Act 61 of 1973 — confirmation of liquidation and distribution account by joint liquidators – have the same effect as final judgment of a Court –

Re-opening of L & D Account – section 157 of the Insolvency Act 24 of 1936 – nothing done under that Act shall be invalid by reason of a formal defect or irregularity, unless a substantial injustice has thereby been done – *in casu* substantial injustice has not been done by confirmation of the L & D Account – Motion court procedure – applicant's case to be made out in founding papers.

ORDER

- (1) The applicant's application for a stay of the main application in terms of its notice of motion dated 29 June 2021 is dismissed;
- (2) The applicant's application for leave to deliver a supplementary replying affidavit in terms of the notice of motion dated 28 May 2021 is dismissed;
- (3) The applicant's main application in terms of the notice of motion dated 11 July 2020 is dismissed;
- (4) The applicant shall pay the costs of the second to fourth respondents and the fifth and sixth respondents, in respect of all three applications, on the attorney and client scale, including the costs occasioned by the employment of two counsel, where so employed.

JUDGMENT

Adams J:

[1]. The litigation between the parties in this opposed application has had a long and a tedious history dating back to July 2004 when an agreement was concluded between the then shareholders of Farm Bothasfontein (Kyalami) (Pty) Limited ('Farm Bothasfontein') and the fifth respondent ('Nedbank') and the sixth respondent ('Imperial'), in terms of which the latter companies acquired sixty percent shareholding in Farm Bothasfontein. This company, which at that time was the owner of the renowned Kyalami Race Track, has since been liquidated and it is the finalisation of that liquidation which is at the heart of the opposed applications before me presently.

[2]. As has become the norm in the litigation between the parties, there are a myriad of peripheral issues and preliminary and interlocutory disputes between them in addition to the main dispute. So, for example, the applicant, to which I shall refer to as 'Educated Risk' for ease of reference, apply for an interim order staying the main application. Also, shortly before the hearing of the applications, Educated Risk filed an application for leave to file a supplementary replying affidavit. I intend giving short shrift to these applications for the simple reason that my finding on the main application dispenses with the need for me to deal in detail with these issues.

[3]. In the main application, Educated Risk applies for the re-opening of the second and final liquidation and distribution account ('the second L & D Account') in respect of Farm Bothasfontein (In Liquidation) ('Farm Bothasfontein'). This account was duly confirmed by the Master of the High Court on 1 June 2020 in terms of section 408 of the Companies Act, Act 61 of 1973 ('the 1973 Companies Act'). Pursuant to such confirmation, the second, third and fourth respondents ('the liquidators') commenced with the distribution of dividends to the shareholders of Farm Bothasfontein in terms of the second L & D account, and payments were made to Nedbank and to Imperial. The liquidators also tendered

payment to Educated Risk of the amount of the distribution due to it in terms of the said account.

[4]. Section 408 of the 1973 Companies Act provides that the Master's confirmation –

‘... shall have the effect of a final judgment, save as against such persons as may be permitted by the Court to re-open the account after such confirmation but before the liquidator commences with the distribution.’

[5]. In view of s 408, so the respondents contend, the orders prayed for by the applicant, the effect of which would be to re-open the L & D Account, are not competent and therefore the main application must fail for this reason alone.

[6]. In *Wispeco (Pty) Ltd v Herrigel NO and Another*¹ the principle applicable after payment of a dividend was stated as follows:

‘It is perfectly clear from the wording of the section that, if in fact a dividend had been paid under the account, the Court would have no power to reopen the account.’

[7]. In the present matter, as already indicated, the Master confirmed the second L & D account on 1 June 2020 and the distribution in terms thereof had commenced on 5 June 2020 in that two payments of R3 435 227.23 each were made to Nedbank and to Imperial on the said date.

[8]. I therefore find myself in agreement with the submission made on behalf of the Liquidators and Nedbank and Imperial. The Court has no power to reopen the account. The wording of the section is peremptory and, in my view, once the distribution had commenced, the confirmation, which has the effect of a final judgment, stands. For this reason alone, the main application should be dismissed.

[9]. In sum, Educated Risk applies for an order setting aside the second L & D account as it is aggrieved by the fact that Nedbank and Imperial received distributions on the basis of their sixty percent shareholding in the liquidated company. This sixty percent shareholding, so Educated Risk contends, was acquired unlawfully during 2004 by Nedbank and Imperial and in contravention

¹ *Wispeco (Pty) Ltd v Herrigel NO and Another* 1983 (2) SA 20 (C) at 28A-C

of section 38 of the 1973 Companies Act in that, the company had financed the purchase of its own shares. The difficulty with the case of Educated Risk is that the dispute relating to s 38 was settled and compromised between all of the interested parties, including Educated Risk, on 14 November 2018, when a settlement agreement was made an Order of this Court by Van der Linde J under case number 19943/2016. Under this case number Educated Risk and its related entities and persons had counter-applied for an order that the acquisition of the sixty percent shareholding in Farm Bothasfontein be set aside. As already indicated, that claim by Educated Risk was compromised as part and parcel of the settlement agreement, which was made an Order of Court on 14 November 2018.

[10]. Therefore, as matters stand, Educated Risk is not entitled to the relief claimed in the main application. No purpose would be served by ordering a re-opening of the second and final L & D Account even if there is merit in the technical issues raised by Educated Risk, such as the fact that there has not been proper compliance with the formalities relating to the advertising and publication of the said account. This is so because the second and final L & D Account was in accordance with the factual and legal position at the time, taking into account the aforementioned settlement agreement.

[11]. In order to overcome this hurdle, Educated Risk instituted action out of this Court on 19 March 2021 under case number 14038/2021 against all of the interested parties, including the respondents in this application. In the said action, Educated Risk and its aligned entities and persons claim, rather belatedly and some twenty-eight months after the fact, a setting aside of the settlement reached between the parties in November 2018 and a rescission of the Court Orders making the settlement agreements orders of this Court.

[12]. The success of the main application is dependent on the prospects of success of the aforementioned action, which, in essence, is based on the fact that, according to Educated Risk, the settlement agreements were concluded unlawfully. The unlawfulness of the agreements, which were made Orders of Court by Van der Linde J, stems from the fact, so I understand the case for

Educated Risk, that there was an unlawful Contingency Fee Agreement in place between Educated Risk and its attorneys at the time, namely Schindlers Attorneys. Nedbank and Imperial are of the view that there are no prospects of success for this action. I agree. How can it be that the attorney and client agreement between Educated Risk and Schindlers Attorneys can have an effect on the validity of the agreement with Nedbank and Imperial? I ask this question rhetorically.

[13]. The point is that Educated Risk cannot overcome an insurmountable hurdle, that being section 157 of the Insolvency Act, Act 24 of 1936 ('the Insolvency Act'), which provides that nothing done under that Act shall be invalid by reason of a formal defect or irregularity, unless a substantial injustice has thereby been done. In this matter, it cannot possibly be said that a substantial injustice had been done by the confirmation of the second L & D Account by the Master as it accorded with the prevailing factual and legal position at the time. In my view, Educated Risk has failed to demonstrate any such substantial injustice.

[14]. Moreover, Educated Risk bears the further onus of having to show the Court that there is merit in the reopening of the account, since a Court will not reopen an account if it cannot be shown that the applicant has some prospect of success of having the account varied or corrected. The main application cannot succeed because no such prospect has been established.

[15]. The express provisions of a settlement agreement concluded on 14 November 2018, which was made an order of Court on the same day, and in terms of which Educated Risk had finally and unconditionally abandoned the Section 38 issue, counts against Educated Risk. I am of the view that the action has no merit whatsoever. The Section 38 issue is not capable of being revived.

[16]. The main application therefore stands to be dismissed and the applicant's other interlocutory applications should suffer the same fate. In that regard, the application for leave to file a supplementary replying affidavit should be dismissed for the simple reason that, even if I have regard to the issues raised by the applicant in the supplementary affidavit, the main application is still doomed. Therefore, that application – which, in any event, has not been properly motivated

by Educated Risk – should be dismissed as should the application for the stay of the main application. There is no point in staying an application which should fail however one views same.

[17]. Moreover, as correctly argued by Mr Botha SC, who appeared for Nedbank and Imperial together with Mr Kromhout, as a general rule Educated Risk cannot and should not be allowed to make out a case in its replying papers if one is not made out in its founding affidavit. Even more so, in an application a case cannot be made out by an applicant at some future date, many years after the final adjudication of its action. Moreover, in my view, that action, in any event, has no prospects of success as it faces an insurmountable hurdle in that the issue raised therein has been settled and compromised.

[18]. In sum, the cause of action of Educated Risk in the main application is incomplete on its own version. It is trite that in motion proceedings, you cannot make out a case other than in your founding papers. Even more so, an applicant cannot issue an application whilst its cause of action is still being developed, which is exactly what Educated Risk is doing *in casu*. For this reason, the main application stands to be dismissed as does the other applications by Educated Risk.

[19]. I am also satisfied that Educated Risk should, in terms of the general rule that a successful party should be awarded costs, pay the costs of the second to sixth respondents in respect of the applications.

[20]. The next question is whether a punitive costs order should be granted against Educated Risk, as submitted by Mr Botha, as well as by Mr Smit, who appeared on behalf of the Liquidators. It is trite that the rationale for a punitive attorney and client costs order is more than mere punishment of the losing party. Tindall JA explained it as follows in *Nel v Waterberg Landbouwers v Ko-operatiewe Vereeniging*²:

‘[t]he true explanation of awards of attorney and client costs not expressly authorised by Statute seems to be that, by reason of special consideration arising either from the circumstances which give rise to the action or from the conduct of the losing party, the

² *Nel v Waterberg Landbouwers v Ko-operatiewe Vereeniging* 1946 (1) AD 597 at 607;

court in a particular case considers it just, by means of such an order, to ensure more effectually than it can do by means of a judgment for party and party costs that the successful party will not be out of pocket in respect of the expense caused to him by the litigation.’

[21]. And see further: *Swartbooi v Brink*³. The issue of costs is a matter for the discretion of a trial court. Smalberger JA elaborated on the nature of this discretion as follows (in the context of an agreement between parties that attorney client costs be paid) in *Intercontinental Exports (Pty) Ltd v Fowles*⁴ at para 25:

‘The court’s discretion is a wide, unfettered and equitable one. It is a facet of the court’s control over the proceedings before it. It is to be exercised judicially with due regard to all relevant consideration. These would include the nature of the litigation being conducted before it and the conduct before it and the conduct of the parties (or their representatives). A court may wish, in certain circumstances, to deprive a party of costs, or a portion thereof, or order lesser costs than it might otherwise have done as a mark of its displeasure at such party’s conduct in relation to the litigation.’

[22]. Applying these principles *in casu*, I am persuaded that a punitive costs order would be appropriate. I agree with the submissions on behalf of the respondents that the present proceedings are clearly frivolous and vexatious, both in intent and in effect. The application is also an abuse of the processes of this Court.

Order

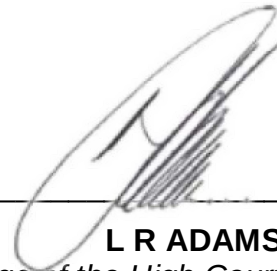
[23]. Accordingly, I make the following order: -

- (1) The applicant’s application in terms of its notice of motion dated 29 June 2021, for a stay of the main application is dismissed;
- (2) The applicant’s application for leave to deliver a supplementary replying affidavit in terms of the notice of motion dated 28 May 2021 is dismissed;
- (3) The applicant’s main application in terms of the notice of motion dated 11 July 2020 is dismissed;

³ *Swartbooi v Brink* 2006 (1) SA 203 (CC) par 27;

⁴ *Intercontinental Exports (Pty) Ltd v Fowles* 1999 (2) SA 1045 (SCA).

- (4) The applicant shall pay the costs of the second to fourth respondents and the fifth and sixth respondents, in respect of all three applications, on the attorney and client scale, including the costs occasioned by the employment of two counsel, where so employed.



L R ADAMS
Judge of the High Court
Gauteng Local Division, Johannesburg

HEARD ON:	19 th July 2021 – in a ‘virtual hearing’ during a videoconference on <i>Microsoft Teams</i> .
JUDGMENT DATE:	27 th September 2021 – judgment handed down electronically
FOR THE APPLICANT:	Advocate P F Louw SC, together with Advocate J W Steyn
INSTRUCTED BY:	Van Hulsteyns Attorneys, Sandton
FOR THE FIRST RESPONDENT:	No appearance
INSTRUCTED BY:	No appearance
FOR THE SECOND, THIRD AND FOURTH RESPONDENTS:	Advocate Johan E Smit
INSTRUCTED BY:	Reitz Attorneys, Johannesburg
FOR THE FIFTH RESPONDENT:	Advocate A C Botha SC, with Advocate E Kromhout
INSTRUCTED BY:	Lowndes Dlamini Attorneys, Sandton
FOR THE SIXTH RESPONDENT:	Advocate A C Botha SC, with Advocate E Kromhout
INSTRUCTED BY:	Tugendhaft Wapnick Banchetti Attorneys, Sandton