

FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Application Number : 2538/2010

In the matter between:-

NEDBANK LIMITED

Applicant

and

CHAVONNE BADENHORST ST. CLAIR

COOPER N.O.

First Respondent

TSIU VINCENT MATSEPE N.O.

Second Respondent

THE MASTER OF THE HIGH COURT

Third Respondent

CORAM:

VAN ZYL, R

DELIVERED ON:

25 OCTOBER 2012;
11 FEBRUARY 2013

[1] The applicant initially instituted motion proceedings for certain relief against the first and second respondents in their capacities as the finally appointed joint liquidators of Marlim Group (Proprietary) Limited (In Liquidation) (hereinafter referred to as “Marlim”). In the said proceedings the Master of the High Court was cited as third respondent. The

applicant and the first and second respondents, with the consent of the third respondent, subsequently concluded an agreement that the dispute be determined in terms of Rule 33(1) upon a written statement of facts in the form of a stated case. Such stated case, titled “Amended Written Statement of Facts for Adjudication in terms of Rule 33(1)” was consequently filed and the third respondent (hereinafter referred to as “the Master”) duly filed a report in response thereto.

CHRONOLOGY OF EVENTS AS REFLECTED IN THE STATED CASE:

[2] Prior to being placed under winding-up, Marlim was a client of the applicant and was granted certain loan and banking facilities by the applicant. As security for the indebtedness of Marlim to the applicant, Marlim executed certain securities in favour of the applicant, including:

2.1 A deed of pledge and cession, and an additional pledge and cession (hereinafter referred to as “the first pledge”), executed on 25 July 2008, in terms of

which Marlim ceded, assigned and made over to the applicant *in securitatem debiti, inter alia*, all its right, title and interest in and to, and pledged and delivered to the applicant, Momentum policy number 01004414854 (hereinafter referred to as “the first Momentum policy”).

2.2 A further deed of pledge and cession and an additional pledge and cession, both of which were also executed on 25 July 2008, in terms whereof Marlim ceded, assigned and made over to the applicant *in securitatem debiti, inter alia*, all its right, title and interest in and to, and pledged and delivered to the applicant, Momentum policy number 01004414862 (hereinafter referred to as “the second Momentum policy”).

[3] On 9 January 2009 the applicant addressed a letter to Marlim, calling up its banking facilities and informing Marlim that the security held by the applicant would be realised and applied in reducing the indebtedness of Marlim to the applicant.

- [4] On 27 January 2009 the debit balance on Marlim's current account with the applicant, was an amount of R2 129 592-04.
- [5] On 30 January 2009 the applicant surrendered the first and second Momentum policies and requested payment of the policy proceeds from Momentum.
- [6] On 4 February 2009 (hereinafter referred to as "the deemed date") an application by AIM Group (Pty) Ltd for the winding-up of Marlim was issued by the Registrar of this Court.
- [7] Pursuant to the surrender by the applicant of the first and second Momentum policies and prior to Marlim being placed under provisional winding-up, the applicant received payment of the following amounts from Momentum:
- 7.1 On 10 February 2009, the sum of R1 387 512-00;
- 7.2 On 11 February 2009, the sum of R525 006-00.
- [8] On 26 February 2009 Marlim was placed under provisional winding-up by means of a court order granted pursuant to

the application issued on 4 February 2009.

[9] On 11 March 2009 the applicant received payment of the further amounts of R3 519-34 and R1 331-65 from Momentum.

[10] On 19 March 2009 the first and second respondents were appointed as provisional liquidators of Marlim and as final liquidators of Marlim on 12 November 2009.

[11] Marlim was placed under final winding-up by order of this Court on 9 April 2009.

[12] The applicant submitted claims in the insolvent estate of Marlim for:

12.1 An amount of R5 023 743-17 plus interest, being the balance outstanding on a term loan granted to Marlim;

12.2 An amount of R3 599 132-61 plus interest, being the balance outstanding on Marlim's Nedbond loan.

[13] Applicant's aforesaid claims were drawn based on the indebtedness of Marlim to the applicant as at the date on which Marlim was placed under provisional winding-up, hence 26 February 2009. The applicant is a proved creditor in the Marlim estate - both the aforesaid claims having been proved and admitted.

[14] In terms of the liquidation and distribution account, the first and second respondents levied a fee of:

14.1 1% on the proceeds of the Momentum policies received by the applicant on 10 and 11 February 2009;

14.2 3% on the proceeds of the Momentum policies received by the applicant on 11 March 2009.

[15] It is evident that the liquidation and distribution account, annexed to the stated case as Annexure "SC5", was drawn as at the deemed date, being 4 February 2009, with the headnote to the said account reflecting the date of the liquidation order as 26 February 2009, but with the following

inscription:

“Effective date of liquidation: Effective date of winding-up in terms of Section 348 is the date of issue of the papers namely 4 February 2009.”

[16] I deem it efficacious to record paragraphs 21 to 24.4 of the stated case, as supplemented by means of paragraph 24.5 as agreed upon by the applicant and the first and second respondents at the outset of the hearing of this application:

“21. The applicant contends that the first and second respondents are not entitled to levy fees on the proceeds of the first or second Momentum policies as the proceeds vested in the applicant on 30 January 2009, being the date that the applicant surrendered, and thereby realised the policies.

22. The first and second respondents contend that:

22.1 In terms of Section 348 of the said Companies Act, 1973 (‘Section 348’) the winding-up of the company by the Court

is deemed to commence at the time the application for the winding-up, being when the application was duly lodged with the Registrar of the Court, which is the 4th February 2009;

22.2 The proceeds of the first and second Momentum policies therefore vest in the Marlim estate; and

22.3 The first and second respondents are entitled to levy a commission on the proceeds of the first and second Momentum policies, albeit that they levied a nominal commission on the proceeds of such policies.

23. The proceeds of the first and second Momentum policies were received by the applicant after 4th February 2009.

24. The essential dispute therefore between applicant on the one hand, and the first and second respondents on the other hand, is the following:

- 24.1 The difference in law between the date of provisional winding-up, namely 26 February 2009, and the date of issue of the application, namely 4 February 2009;
- 24.2 While the first and second respondents agree with the applicant that the applicant's claim should be drawn as at date of provisional liquidation, namely 26 February 2009, as provided for by section 44 of the Insolvency Act, 1936, applicant and respondent differ about the effect of section 348 in respect to the vesting of the proceeds of the first and second Momentum policies;
- 24.3 The applicant and the first and second respondents differ in respect to the drawing of the L & D account, in that the respondents contend that the L & D account is required to be drawn with reference to the deemed date of liquidation in terms of the said section 348 (i.e. 4 February 2009), whereas the

applicant contends that the L & D account is required to be drawn with reference to the date of provisional winding-up (i.e. 26 February 2009);

24.4 If the L & D account is required to be redrawn as at 26 February 2009 the L & D account is erroneous due to a *bona fide* error by the first and second respondents.

24.5 To the extent that the winding-up regulations provide for liquidation and distribution accounts to be drawn with reference to the date of the provisional winding-up order, whether the regulations are to such extent *ultra vires*.”

[17] The applicant did not object to the liquidation and distribution account prior to the confirmation thereof by the Master on 12 March 2010, although the parties are in agreement that the applicant attempted to do so and was not dilatory in the steps it took to object to the liquidation and

distribution account. Therefore the parties are in agreement that should certain findings be made in favour of one or the other party, I should permit the re-opening of the liquidation and distribution account in terms of section 408 of the Companies Act, 61 of 1973 (hereinafter referred to as “the act”).

[18] The stated case was concluded with the heading “Relief Claimed” and the following paragraphs:

“26. Having regard to the agreed facts set out above, there is a dispute between the applicant, on the one hand, and the first and second respondents, on the other, as to whether or not the proceeds of the first and second Momentum policies vested in the Marlim estate and as to whether the L & D account should be drawn as at 4 February 2009 or as at 26 February 2009.

27. The applicant claims the following relief:

27.1 An order declaring that the proceeds of the first and second Momentum policies did not vest in the Marlim estate, and

consequently, the first and second respondents are not entitled to levy any fee(s) thereon;

- 27.2 An order that the confirmation by the Master of the First Liquidation and Distribution account in the matter of Marlim Group (Proprietary) Limited (In Liquidation), Master's reference B33/2009, be and is hereby set aside in terms of Section 408 of the Companies Act, 1973;
- 27.3 An order declaring that the Liquidation & Distribution account should be drawn as at 26 February 2009;
- 27.4 The costs of suit to be paid as costs of administration in the Marlim estate;
- 27.5 Granting to the applicant further and/or alternative relief.
28. First and second respondents claim that they acted correctly in view of vesting, as well as the date of the

drafting of the L & D account, namely 4 February 2009, and contend that the relief claimed by the applicant should be dismissed.

29. The parties agree that in the event of this Honourable Court finding that the applicant's claims should have been drawn as at 4 February 2009, that the Applicant be given leave to rectify its claims accordingly.

30. The applicant and the respondents have agreed to present a stated case to the Honourable Court, and that the costs thereof be costs in the administration of the Marlim estate."

QUESTIONS OF LAW TO BE DECIDED:

[19] On close scrutiny of the stated case, in some respects considered in conjunction with the arguments presented to me by counsel, it is evident that the (alleged) common cause facts between the parties on the one hand and the questions of law/issues to be decided together with the subsequent relief claimed by the applicant on the other hand, have not been set out as clearly and eloquently as one would have

preferred. I will however deal with the respective problems as I go along.

The first question of law:

[20] With regard to the relief claimed in paragraph 27.1 of the stated case pertaining to the vesting of the proceeds of the Momentum policies and first and second respondents' entitlement to have levied fees thereon, this aspect is in fact in dispute between the parties. However, it was recorded in paragraph 24.2 of the stated case that "applicant and respondents differ about the effect of Section 348 in respect to the vesting of the proceeds of the first and second Momentum policies". This is not entirely correct. Although the arguments of Mr Steyn, on behalf of the first and second respondents, were in fact presented on this basis, the arguments of Mr Rood, on behalf of the applicant, was not based on the effect of Section 348 in relation to when the payments were actually made, but rather on the effect of the fact that the applicant surrendered, and thereby realized, the policies on 30 January 2009, hence, even before the deemed date of liquidation (and irrespective of whether the deemed date or

the date of the provisional winding-up order be considered to be the effective date), as is also evident from the contents of paragraph 21 of the stated case.

[21] I however accept and it seems evident that the parties are *ad idem* that the question of law I have to decide is whether the proceeds of the first and second Momentum policies in fact vested in the Marlim estate (or not) and consequently, whether the first and second respondents were in fact entitled to levy fees thereon (or not).

[22] It is clear from the terms and the wording of both the pledges and cessions that they constituted cessions *in securitatem debiti* and not out-and-out cessions. Mr Rood did not at any stage, in my view correctly so, try to argue differently. The effect of a cession *in securitatem debiti* has been summarised in WILLE'S PRINCIPLES OF SOUTH AFRICAN LAW, F du Bois *et al*, 9th Edition, pages 846 – 847:

“The effect of a cession *in securitatem debiti* has for many years been a vexed issue. The traditional view,

now firmly entrenched in the practice of the courts, is that such a cession is analogous to the pledge of a movable: the cedent pledges his right as security for a debt owed by him to the cessionary; the bare dominium (or 'reversionary interest') in the right remains vested in the cedent, and accordingly the right falls into his estate upon his insolvency."

[23] The liquidator is entitled to claim and administer claims of an insolvent company which have been ceded *in securitatem debiti*. This right flows from the fact that the dominium in the policy remains vested in the cedent and the proceeds recovered form an asset in the estate of the company in liquidation. In MILLMAN N.O. v TWIGGS AND ANOTHER 1995 (3) SA 674 (A) at 676 H – I the position was stated as follows:

"When a right is ceded with the avowed object of securing a debt the cession is regarded as a pledge of the right in question: dominium of the right remains with the cedent and vests upon his insolvency in his trustee, who is under the common law entitled to administer it 'in the interests of all creditors' and with due regard to the special position of the pledgee'."

In INCORPORATED GENERAL INSURANCES LIMITED v GUSH AND ANOTHER 1990 (4) SA 573 (WLD) at 577 A and at 580 B – C it was stated as follows:

“It will be appreciated that the trustee’s right to administer the proceeds of the policy flowed from the conclusion that the so-called dominium in the policy remained with the cedent.

....

Accordingly, on the authority of the Appellate Division cases, by which I am of course bound, I conclude that the issue in the special case before me is indistinguishable from the facts in the National Bank case *supra*. The latter is authority for the proposition that the proceeds of the collection of the book debts properly fell into the estate of the company in liquidation as being an asset of such company. It follows that the first defendant was empowered and indeed obliged to collect them. Accordingly he is entitled to 10% of the proceeds in terms of para 1 of tariff B.”

[24] An amount collected by a liquidator which does not constitute an asset of the estate being wound up, does not form the

basis for a fee provided for in the tariff. See INCORPORATED GENERAL INSURANCES LIMITED, *supra*, at 576 B – C.

- [25] Although Mr Rood agreed that the aforesaid is in fact the correct legal position, he submitted that the current matter is distinguishable from those dealing with cessions *in securitatem debiti* of book debt. In this regard he submitted that upon the surrender of the policies, whatever rights may have vested in Marlim, terminated and the only rights which were capable of enforcement were the rights which had been then exercised by the applicant. Mr Rood contended that the policies were terminated by the surrendering thereof and consequently nothing remained vested in Marlim. Mr Rood therefore argued that the contractual nexus as between the insurer (Momentum) and the insured (Marlim) terminated and at the deemed date of sequestration the policies were no longer an asset in the estate. Mr Rood relied on a statement in GORDON & GETZ, THE SOUTH AFRICAN LAW OF INSURANCE, DM DAVIS, 4TH EDITION at p. 166, where the following is stated:

“The surrender of a life policy terminates it.”

He also referred to the authority contained in footnote 27 thereof in support of the said statement, being PIENAAR v AFRICAN LIFE ASSURANCE SOCIETY (1930) 16 PH A82 (W). The aforesaid judgment is very short and it doesn't give a detailed exposition of the relevant legal position which was used as basis for the finding. It seems that the finding was also very much based upon the specific terms and conditions of the contracts of insurance which were concluded with the defendant in that specific instance. The judgment deals with an exception which was upheld on the following basis:

“That there was no right in existence after the surrender which enured to the benefit of the plaintiff: that the contract was put an end to by the surrender, and that, therefore, that put an end to the contractual relations between the parties.”

[26] Mr Steyn on the other hand pointed out that given the established legal position that the reversionary interest, the dominium, remains with the cedent, it is common cause that if the money that the policies were worth was in excess of

the debt owed to the applicant, the excess must be paid back to the cedent based on his reversionary interest. Using this established principle as basis, Mr Steyn submitted that the surrendering of a policy always creates a potential asset in an insolvent estate, in that more money may be realised than what is owed to the creditor. If not, there would be no basis for a liquidator or a trustee of an insolvent estate to claim the balance back from the said creditor. He submitted that should Mr Rood's argument be accepted, it would have the result that the policies, which policies were given as a cession *in securitatem debiti*, become an out-and-out cession because of the surrendering thereof, which cannot be correct. Mr Steyn therefore submitted that where the proceeds of the policies had not yet been paid out on the deemed date, their surrender values still formed an asset in the insolvent estate. He also pointed out that it should be remembered that when Momentum was to pay the proceeds to the applicant, it would still have been utilised in favour of Marlim to reduce Marlim's liability towards the applicant.

[27] I have to agree with the submissions by Mr Steyn. It is evident that by means of a cession *in securitatem debiti*, a

personal right is pledged, the pledgor retains the dominium of the right, he transfers only the power to realise the right to the pledgee and accordingly the right falls into his estate upon his insolvency. See THE LAW OF CESSION, SUSAN SCOTT, par 12.2.1.5.1, at p. 240 – 241. Therefore, when book debts are ceded *in securitatem debiti*, the effect thereof is as was held in BANK OF LISBON AND SOUTH AFRICA LTD v THE MASTER AND OTHERS 1987 (1) SA 276 (AD) at 294 C – D:

“When book debts are ceded *in securitatem debiti*, as in the cession to Nedbank, the cedent cedes to the cessionary the exclusive right to claim and perceive from the existing and future ‘book debtors’ the amounts owing by them. The amount so collected by the cessionary are credited to the account of the cedent. Any amount collected in excess of the cedent’s debt belongs to the latter. Thus it cannot be said that by such a cession that it was intended to pass ownership.”

Therefore even it is to be accepted that in the current instance the surrendering of the policies terminated them as such, it is irrelevant. What was effectively ceded in this

instance was Marlim's right to claim and receive the surrender value of the policies. Therefore, even if the policies were terminated because of the surrendering thereof, Marlim still held the dominium in the said right, being, *inter alia*, the "entitlement" to the money. That is why when the money was to be received by the applicant (had it not been for the liquidation of Marlim), it still was to be credited to the account of Marlim to reduce Marlim's liability towards the applicant. Should there have been any excess, Marlim would have been entitled to claim it back from the applicant.

- [28] Therefore, where the proceeds had not yet been received by the applicant by the deemed date of liquidation, Marlim was still to be considered to have held the ownership of those proceeds and accordingly it vested in Marlim's estate upon its liquidation. Even if it is to be accepted that the surrendering of the policies terminated them, up and until the proceeds of the policies were in fact paid out, the dominium of the right to receive payment of the surrender values of the policies remained vested in Marlim and form an asset in the estate of Marlim. In my view the money (in

the form of the surrender values of the policies) does not, for the reasons mentioned, stand on a different footing from the policies themselves. See NATIONAL BANK OF SOUTH-AFRICA LIMITED v COHEN'S TRUSTEE 1911 AD 235 at 245 and 254. Considering the findings I have already made, I therefore also do not agree with Mr Rood's argument that the facts *in casu* are distinguishable from the facts in the last mentioned case.

[29] As I have already indicated, Mr Rood conceded in his argument that should I find in favour of the first and second respondents regarding the issue as to whether the proceeds of the policies formed an asset in the estate of Marlim, the finding should be applicable to all four payments. I agree with his concession. The first and second respondents were consequently entitled to levy fees on the said proceeds of the policies, both with regard to the payments made before the deemed date of liquidation and those made after the actual provisional liquidation of Marlim.

[30] The relief claimed by the applicant in paragraph 27.1 of the stated case can therefore not be granted.

Determining the further questions of law:

[31] With regard to the further questions of law, it is evident from the relief claimed in paragraph 27.3 of the stated case that the applicant also seeks an order declaring that the liquidation and distribution account should be drawn as at 26 February 2009, hence as at date of the provisional winding-up order and not as at the deemed date. In this regard Mr Rood referred to paragraph 18 of the stated case which reads as follows:

“As liquidation and distribution accounts (‘L & D accounts’) are generally drawn as at date of provisional liquidation, the applicant contends that the date from which all liabilities and assets of Marlim are to be brought to account is the date of provisional liquidation and not the deemed date of liquidation and accordingly.....”

Based on the first part of the quoted paragraph, Mr Rood submitted that it is actually an agreed fact between the parties that it is the prevailing practice that liquidation and distribution accounts are generally drawn as at date of

provisional liquidation. Mr Steyn, on the other hand, submitted that although the said paragraph might be considered to have been drawn ineloquently, the intention of the parties was to the effect that the first part of the sentence actually forms part of the applicant's contention. He submitted that the last mentioned interpretation of the wording is confirmed by paragraph 24, read with paragraph 24.3 of the stated case, where it is specifically stated that the applicant and the first and second respondents differ in respect to the drawing of the liquidation and distribution account, being whether it should be drawn with reference to the deemed date of liquidation or whether it should be drawn with reference to the actual date of the provisional winding-up order.

[32] I have to agree with Mr Steyn's submissions. When the stated case is read in totality, it is in my view very evident that the relevant part of paragraph 18 could never have been intended to be interpreted to the effect that the first and second respondents agree that it is the general practice that a liquidation and distribution account be drawn as at date of provisional liquidation. It is evident from the rest of

the stated case that this is clearly one of the issues in dispute between the parties, as specifically recorded in paragraph 24 and 24.3. The last mentioned interpretation is furthermore confirmed by paragraph 26 of the stated case where it is also clearly recorded that there is a dispute between the applicant, on the one hand, and the first and second respondents, on the other, “as to whether the L & D account should be drawn as at 4 February 2009 or as at 26 February 2009”. That is also why the relevant relief in the form of a declaratory order is sought in paragraph 27.3 of the stated case. As correctly pointed out by Mr Steyn, if the parties were in fact in agreement that liquidation and distribution accounts are usually drawn as at date of the provisional winding-up order, there would have been no need for me to rule on this issue.

- [33] Another issue which in my view was also dealt with in a very confusing manner in the stated case, is the question as to how the applicant's claim should be drawn, in the sense of as at date of provisional liquidation or as at the deemed date. In this regard the following was stated in paragraph 24.2 of the stated case:

“...while the first and second respondents agree with the applicant that the applicant's claim should be drawn as at date of provisional liquidation, namely 26 February 2009, as provided by Section 44 of the Insolvency Act, 1936...”

In paragraph 18 of the stated case the applicant specifically stated that it has in fact drawn its claims as at 26 February 2009, together with interest as from 27 February 2009 to date of final payment, hence as at date of provisional liquidation. Both these claims have been proved and admitted. In a letter of 24 March 2010 which the applicant's attorney of first instance addressed to the liquidators raising certain objections and queries in regard to the liquidation and distribution account, which letter is annexed to the stated case as Annexure “SC7”, this issue was also raised in paragraphs 7.2 and 7.3 thereof:

“7.2 In any event it appears from correspondence addressed by you to our client on the 22nd of February 2010, you agreed that the date of liquidation for calculation of our client's claim was to be the 26th of February 2010.

7.3 In your first liquidation and distribution account you record the effective date of liquidation being the 4th of February 2010 which is contrary to your correspondence to our client.”

Therefore, contrary to what was stated in paragraph 24.2 of the stated case, it is evident that this issue is also in dispute between the parties. This is furthermore confirmed by paragraph 29 of the stated case which reads as follows:

“The parties agree that in the event of this Honourable Court finding that the applicant’s claim should have been drawn as at 4 February 2009, that the applicant be given leave to rectify its claims accordingly.”

[34] The question now arises whether I can adjudicate the aforesaid two issues in circumstances where same have not been clearly formulated and where it is not so clear what was actually agreed upon between the parties. Rule 33(1) and 33(2)(a) read as follows:

“(1) The parties to any dispute may, after institution

of proceedings, agree upon a written statement of facts in the form of a special case for the adjudication of the court.

(2)(a) Such statement shall set forth the facts agreed upon, the questions of law in dispute between the parties and the contentions thereon...”

In ERASMUS, SUPERIOR COURT PRACTICE D E van Loggerenberg *et al*, at p. B1-234 the following relevant discussion regarding this part of Rule 33 appears:

“The agreement contemplated by subrules (1) and (2)(a) relates primarily to the facts and not to the questions of law in dispute between the parties. If the parties were to overlook a question of law arising from the facts agreed upon, a question fundamental to the issues they have discerned and stated, the court is not confined to the issues of law explicitly raised in the stated case.”

In PADDOCK MOTORS (PTY) LTD v IGESUND 1976 (3) SA 16 (A) at 24 B – C it was stated as follows:

“If e.g. the parties were to overlook a question of law

arising from the facts agreed upon, a question fundamental to the issues they have discerned and stated, the Court could hardly be bound to ignore the fundamental problem and only decide the secondary and depended issues actually mentioned in the special case. This would be a fruitless exercise, divorced from reality, and may lead to a wrong decision. It follows that the Court cannot be confined in all circumstances to the issues of law explicitly raised in the special case. This does not mean that the Court will always be free to enlarge the issues, whether *mero motu* or at the request of a party. The question of prejudice may arise, e.g., where a party would not have agreed on material facts, or on only those stated in the special case, had he realised that other legal issues, not stated in the special case, were involved. In the present instance such considerations do not arise as the question the appellant now seeks to raise was actually part of the special case when the facts were agreed upon... Moreover, the contention as to the fulfilment of the 'condition precedent' turn on the proper construction of the contract, which is also basic to the adjudication upon the other two points of law."

[35] In my view, the issues on which the parties contradict

themselves when the stated case is read as a whole, are two questions of law and not factual issues, being as at which date the liquidation and distribution account should be drawn and as at which date the applicant's claims should be drawn. These two issues go hand in hand and I deem it necessary in the circumstances to rule on both issues, which apparently was also the intention of the parties. In these circumstances and where these issues have in any event been properly ventilated in argument on behalf of both parties, there can be no prejudice in handling it in this manner.

The second and third questions of law:

[36] I therefore now turn to the aforesaid two questions, namely whether the liquidation and distribution account should be drawn as at the deemed date of liquidation in terms of Section 348 (4 February 2009) or as at date of the provisional winding-up order (26 February 2009), and furthermore as at which of the aforesaid dates should the applicant's claims be drawn.

[37] Section 348 of the Act reads as follows:

“348. Commencement of winding-up by Court. - A winding-up of a company by the Court shall be deemed to commence at the time of the presentation to the Court of the application for the winding-up.”

The effect of this section is described in HENOCHSBERG ON THE COMPANIES ACT, Meskin, Vol 1, at p. 740 (2):

“The effect of this section is to make the commencement of the winding-up retrospective to the time of the presentation to the Court of the application, i.e. when it is lodged with the Registrar of the Court (DEVELOPMENT BANK OF SOUTHERN AFRICA LTD v VAN RENSBURG NNO 2002 (5) SA 425 (SCA). In this case the Court held (at 431) that the phrase ‘at the time’ in s 348 means ‘at the specific point in time’ when the application was lodged with the Court and not the date of such lodgement, and that the section is to be interpreted restrictively since ‘it retrospectively avoids transactions that may have been perfectly legitimate at the time they were entered into’); but for this retrospectivity to operate the winding-up order must be granted (VERMEULEN v CC BAUERMEISTER (EDMS) BPK 1982 (4) SA 159 (T) at 162...”

[38] The purpose of section 348 is to nullify “a possible attempt by a dishonest company, or directors, or creditors or others, to snatch some unfair advantage during the period between the presentation of the petition for a winding-up order and the granting of that order by a Court”. See LIEF N.O. v WESTERN CREDIT (AFRICA) (PTY) LTD 1966 (3) SA 344 at 347 C, with reference to the similar provisions of s 115 of the 1926 Act.

[39] Mr Rood and Mr Steyn were *ad idem* that a *concurso creditorum* was established when the application for Marlim’s winding-up was filed with the Registrar of the Court – hence, at the deeming date. See THOMAS CONSTRUCTION (PTY) LTD (IN LIQUIDATION) v GRAFTON FURNITURE 1988 (2) SA 546 (AD) at p. 566 H. The effect of the *concurso* is stated in WALKER v SYFRET N.O. 1911 AD 141 at p. 166 as follows:

“The object of the Insolvent Ordinance is to ensure a due distribution of assets among creditors in the order of their preference. And with this object all the debtors’ rights are vested in the Master or the trustee from the moment insolvency commences. The sequestration order crystallises the insolvent’s position; the hand of

the law is laid upon the estate, and at once the rights of the general body of creditors have to be taken into consideration. No transaction can thereafter be entered into with regard to estate matters by a single creditor to the prejudice of the general body. The claim of its creditor must be dealt with as it existed at the issue of the order.”

It is important to take note that the last mentioned quotation deals with a *conkursus* in the event of a sequestration, in which instance no deeming provision is applicable and therefore the sequestration and consequent *conkursus* commence at the date of the issue of the provisional sequestration order. When the principle is applied to liquidation, considering the deeming provision contained in section 348, a *conkursus*, as already stated, is instituted at the deeming date in terms of section 348, with the result that the aforesaid stated principle means that the claim of a creditor must be dealt with as it existed at the deeming date. This is indicative thereof that a creditor should draw its claim against a liquidated estate as at the deemed date and that the liquidation and distribution account should consequently also reflect the position of the estate as at the deemed date.

[40] The importance and the conclusiveness of this deeming provision was dealt with in REEBIB RENTALS (PTY) LTD v LETS TRADE 1163 CC 2009 (3) SA 396 (D&CLD) at 400 C – 401 B and I will refer to only certain relevant parts thereof:

“[17] Mr De Beer S.C., who appeared for the applicant, answered this argument by submitting that the court was vested with a discretion in terms of s 347 of the Companies Act to grant ‘any other order it may deem just’ in any application for the winding-up. I therefore possessed a discretion to order that the winding-up of the respondent should only commence on the date upon which a further provisional winding-up order was granted.

[18] ...

[19] ...

[20] Consider the object of this section, together with the following words of Levinsohn J (as he then was) in the case of THE NANTAI PRINCESS: NANTAI LINE CO LTD AND ANOTHER v CARGO LADEN ON THE MV NANTAI

PRINCESS AND OTHER VESSELS AND OTHERS 1997 (2) SA 580 (D) at 585 E – F, namely –

‘The fact of the matter, however, is that `the existing legislation provides for the date of commencement of the winding-up and it is obviously a matter of great importance to commerce in general and companies in particular that there be certainty as to its ascertainment.’

I am satisfied that the deeming provision in s 348 must be regarded as conclusive or irrebuttable. I therefore consider that I do not possess a discretion contended for by Mr De Beer S.C.” (Own emphasis)

[41] Section 341(2) of the Act determines as follows:

“Every disposition of its property (including rights of action) by any company being wound-up and unable to pay its debts made after the commencement of the winding-up shall be void unless the Court otherwise

orders.”

Both “disposition” and “property” have the meaning assigned to them in section 2 of the Insolvency Act and therefore cover a very wide range of transactions. See HERRIGOL N.O. v BON ROADS CONSTRUCTION COMPANY (PTY) LTD 1980 (4) SA 669 (SWA) at 674.

- [42] In my view section 341(2) (read with section 348) is a very strong indication that the deemed date is the obvious “cut-off point” to protect the financial position of a soon to be liquidated company which is unable to pay its debts in favour of the body of creditors of such a company. The intention of the Legislature is clearly that by the time such a company is actually wind-up by means of a provisional winding-up order, its financial position, specifically with regard to property, should be as near as possible to what it was at the deeming date and therefore be “brought back” to what it was at the deeming date. This intention of the Legislature also corresponds with the principle that a *concursum creditorum* is established at the deeming date. See PRUDENTIAL SHIPPERS SA LTD v TEMPEST CLOTHING CO (PTY) LTD

1976 (4) SA 75 (W) at 83 A – B. Also see SCHMIDT AND ANOTHER v ABSA BANK LTD 2002 (6) SA 706 (WLD) at 711J – 713B.

[43] The aforesaid intention of the Legislature is also reflected is also reflected in similar protective sections of the Act, such as section 359.

[44] Section 366 of the Act provides, *inter alia*, that in the winding-up of a company by the Court the claims against the company shall be proved at a meeting of creditors *mutatis mutandis* in accordance with the provisions relating to the proof of claims against an insolvent estate under the law relating to insolvency. In the discussion in HENOCHSBERG ON THE COMPANIES ACT, *supra* at p. 782, it is evident that the deemed date of liquidation is considered to be the relevant date for purposes of calculating a claim:

“It is submitted that, since at the commencement of the winding-up a *concursum creditorum* is instituted, the rate which must be applied to convert to rands approved claim in a foreign currency is the rate

prevailing at the date of such commencement.

A claim for a debt carrying interest, which became due prior to the date of the commencement of the winding-up, may be proved for its amount and for the arrear interest to such date (s 50(1) of the Insolvency Act).

...if a debt is payable only after such date, the creditor may prove a claim for such debt as if it were due at such date (s 50(2) of the Insolvency Act)."

From the aforesaid it is evident that "such date" refers to the deemed date of winding-up.

I am therefore also of the view that where, as a result of the aforesaid section 366 of the Act, a claim must be proved by affidavit in a form corresponding substantially with Form D or C contained in the First Schedule to the Insolvency Act (in terms of section 44 of the Insolvency Act), the words on the said Forms that read "was at the date of sequestration" indebted to the relevant creditor, should be, for purposes of a winding-up, be interpreted to mean and refer to the deemed date of winding-up in light of the provisions of Section 348 of the Act.

[45] Section 339 of the Act determines as follows:

“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 specially provided for by this Act.”

It is evident that it is the intention of the Legislature that the law relating to insolvency is applicable only in respect of matters for which the Companies Act itself makes no provision. Where section 348 provides for a deemed date of commencement of winding-up, without any qualification or restriction thereto, I am of the view that it has to be applied throughout the winding-up process, including pertaining to as at what date a creditor's claim should be calculated and as at what date the liquidation and distribution account should be drawn.

[46] Mr Rood referred to Section 403 of the Act, more specifically Section 403(2), which deals with the content of the liquidation and distribution account, which is submitted is

peremptory:

“(2) Any account shall be lodged in duplicate in the prescribed form, shall be fully supported by vouchers, including the liquidator’s bank statements or certified extracts from his bank and building society account showing all deposits and withdrawals and shall be verified by an affidavit in the prescribed form.”

The “prescribed form” is the form set out in Annexures “CM101” to the regulations. Item 2 of the said Annexure provides as follows:

“A detailed account of all the liquidator’s receipts and payments in respect of the company must be given. The account of receipts must contain a record of all receipts derived from the realisation of assets existing at the date of the winding-up order or resolution including any balance in the bank, book debts and calls collected, property sold....”

Mr Rood submitted that the words “the date of the winding-up

order” is the date of the actual issue of the provisional winding-up order. Had the legislature intended the liquidation and distribution account to be framed with reference to the deemed date of commencement of winding-up within the meaning of Section 348 of the Act, the legislature could have specified it in that manner.

[47] Mr Rood made reference to the well-known primary rule of statutory interpretation and the fact that the rules applicable to the interpretation of statutes also applied to the interpretation of subordinate legislation.

[48] However, Mr Rood also referred to the very important principle that regulations are not to be read in isolation, but where possible, are to be construed consistently with the empowering statute under which they are made. In SA RESERVE BANK v KHUMALO 2010 (5) SA 449 (SCA) at 455 F – H this principle was stated as follows:

“The next question is whether regulation, by omitting any reference to a time limit, means that the President sought to give a power to the Treasury that is not

limited in time. I think not. The regulations are not to be read in isolation. Where possible, they are to be construed consistently with the empowering Act under which they were made. No matter how clear and unequivocal regulations may appear to be, 'their interpretation and validity by depending upon their empowering provisions which authorise them'. The regulations must therefore be read in the light of the provisions of s 9(2) and its purpose and objectives – including that the attachment of money and goods may not be for a period longer than that prescribed in the Act. It therefore cannot be argued that, merely because no mention of the time limitation contained in s 9(2)(4) is made in the regulations, it does not apply to an attachment made under the regulations."

[49] I have already dealt with section 348 of the Act, as well as other sections of the Act which are clearly confirmation of the purpose and objective of section 348 of the Act. When the aforesaid regulations are to be interpreted in conjunction with the empowering statute, it is in my view clear that the words "at the date of the winding-up order" should likewise be interpreted to mean the deemed date as provided for in section 348. This interpretation is necessary in order to

comply with the intention of the Legislature as reflected in section 348 of the Act. This viewpoint is also confirmed by the fact that the said regulation also contains the words “or resolution”. Such a resolution is clearly a reference to the resolution authorising the winding-up in the instance of a voluntary winding-up. The commencement of a voluntary winding-up is provided for in section 352 of the Act. The regulation therefore seems to have attempted to provide for the commencement of the two forms of winding-up, one by the Court and the other voluntarily. It will lead to an absurdity if the regulation is to be interpreted to amend the commencement of the respective forms of winding-up from that which is contained in sections 348 and 352 of the Act respectively.

[50] I however do not find the relevant regulation to be *ultra vires*. In my view it is rather a matter of proper and appropriate interpretation thereof in view of the purpose of the enabling statute.

[51] It is evident from the Master’s report that it is also the viewpoint of the Master that for the purposes of drawing a

liquidation and distribution account, the date referred to is the date when the application was issued by the Registrar of the High Court and not the date of the actual provisional winding-up order.

[52] In the premises I find:

52.1 That the liquidation and distribution account was correctly drawn as at the deemed commencement date of the winding-up, being 4 February 2009;

52.2 That the applicant's claims should have been drawn as at the deemed commencement date of the winding-up, being 4 February 2009.

RE-OPENING OF THE LIQUIDATION AND DISTRIBUTION ACCOUNT:

[53] Section 408 of the Act determines as follows:

“408. **Confirmation of account.** – When an account has lain open for inspection as prescribed in Section 406 and –

(a)

(b) ...

(c) ...

The Master shall confirm the account and his 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.”

[54] The parties were *ad idem* that should I find that the applicant’s claims should have been drawn as at 4 February 2009, the applicant should be given leave to rectify its claims accordingly. Considering the relevant facts and circumstances explained in the stated case, I agree with them. I therefore intend granting leave to the applicant that the first liquidation and distribution account be re-opened by the Master, but for the aforesaid restricted purpose only.

COSTS:

[55] The parties hereto have agreed that the costs of the application and stated case are to be costs in the

administration of the Marlim estate and therefore I intend ordering as such.

[56] In the premises the following orders are made:

1. The relief sought by the applicant in paragraphs 27.1 to 27.3 of the amended stated case dated 15 February 2012, is dismissed.
2. With reference to paragraph 29 of the amended stated case, leave is granted to the applicant that the first liquidation and distribution account pertaining to Marlim Group (Pty) Ltd (In Liquidation) (Master's reference: B33/2009) be re-opened by the Master in terms of Section 408 of the Companies Act, 61 of 1973, solely for the purpose of allowing applicant to rectify its claims and submit same with reference to the deemed date of liquidation, being 4 February 2009.
3. Costs of the application, which include the costs of the stated case, are to be costs in the administration of the aforesaid Marlim estate.

C. VAN ZYL, J

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