REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION PRETORIA

CASE NO: 066197/2023

DOH: 12 AUGUST 2024

DECIDED: 12 FEBRUARY 2025

1) REPORTABLE: NO

2) OF INTEREST TO OTHER JUDGES: NO

3) REVISED.

DATE 12 FEBRUARY 2025

SIGNATURE

In the matter between:

ROGAL HOLDINGS (PTY) LTD
(Registration No. 2014/240061/07) First Applicant

EIFEL PROPERTY (PTY) LTD
(Registration No. 1999/008408/07 Second Applicant

MFUNDO CLEMENT NKUHLU Third Applicant

ERICA NTOMBEKHAYA NKUHLU Fourth Applicant

And

MOGANAM NAIDOO First Respondent

ZESAVAN VERAPPEN NAIDOO Second Respondent

MATHEW SAMUEL DREYER	Third Respondent
RAMESHA NAIDOO DREYER	Fourth Respondent
JERIFANOS MASHAMBA N.O.	Fifth Respondent
THE REGISTRAR OF DEEDS, PRETORIA	Sixth Respondent
THE MASTER OF THE HIGH COURT, JOHANNESBURG	Seventh Respondent
PULENT FELICITY BODIBE N.O. **(In her capacity as duly appointed** **joint liquidator of Victor Turnkey Projects (Pty) Ltd)**	Eigth Respondent
GONASAGREE GOVENDER N.O. **(In his capacities as duly appointed** **joint liquidator of Victor Turnkey Projects (Pty) Ltd)**	Ninth Respondent

This Judgment has been handed down remotely and shall be circulated to the parties by way of email / uploading on Caselines. The date of hand down shall be deemed to be 12 February 2025.

ORDER

(i) The applicants' supplementary affidavit is admitted into evidence.

(ii) Condonation is granted to the fifth respondent.

(iii) The application is dismissed with costs, with counsel's fees on scale B.

JUDGMENT

BAM J

Introduction

1. The main issue in these proceedings is whether this court is at large to set aside the sale and the transfer of the immovable property by the insolvent estate into the names of the first to the fourth respondents. The answer to the question is no, but the path to the answer must first be cleared.

2. The applicants, who refer to themselves as contingent creditors of Victor Turnkey Projects, (Pty) Ltd (in liquidation), VTP, apply to this court, *inter alia*, for a declarator that the sale and transfer[1] of the immovable property, which was then in the insolvent estate of VTP, is void and is set aside (main relief). They bring the application in terms of section 341(2) read with section 348 of the Companies Act[2] [1973 Act]. Section 341(2) provides that every disposition made by the company after the commencement of its winding up, is void. Section 348 deems that the date of commencement of winding up a company, by a court, shall be the date of presentation to court of the application to wind up that company. It is convenient to begin by introducing the parties before delving into the background facts.

Parties

3. The first applicant, Rogal Holdings (Pty) Ltd, is a private company registered as such in terms of South African laws. Its principal place of business is 1[...] K[...] L[...], Kent Avenue, Johannesburg. The second applicant, Eifel Property,

[1] In the sense in which sale and transfer is used, it must be seen as one transaction.
[2] Act 61 of 1973.

(Pty) Ltd, is a private company, duly incorporated in terms of South African laws with its principal place at Unit [...] W[...] O[...] P[...], Woodmead, Johannesburg. The third applicant is Mr Mfundo Clement Nkuhlu, a business man. His address is cited as Riverside, Johannesburg. The fourth applicant is Ms Erica Ntombekhaya Nkuhlu, a business woman, with the same address as the third applicant.

4. The first respondent is Ms Moganam Naidoo, a business woman whose address is cited in the papers as 7[...] R[...] Drive, Randpark Ridge, Johannesburg, Gauteng. The second respondent is Kesavan Verappen Naidoo, a business man. The third respondent is Mr Mathew Samuel Dreyer, a business man. The fourth respondent is Remesha Naidoo Dreyer, a business woman. The second, third and fourth respondents share the same address as the first respondent. The fifth respondent is Jerifanos Mashamba N.O., a male business rescue practitioner whose address is 222 Rivonia Road, Morningside Office Park, Ground Floor, Building A, Sandton, Gauteng Province. The sixth respondent is the Registrar or Deeds. The seventh respondent is the Master of the High Court. The eighth and ninth respondents are the appointed liquidators of VTP's insolvent estate.

5. The first to the fourth respondents had filed a notice to abide but later decided to file their answering papers on the day of the hearing, during the proceedings, without leaveof the court. Neither the court nor the other parties had been forewarned. I have also had a look at their papers. No case is made for their acceptance, given the respondents' extra-ordinary conduct. Consequently, this judgment has been prepared without taking into account their input. In any event, given the view I take of the matter, there is no prejudice to them. The sixth and seventh respondents took no part in these proceedings. The eighth and ninth respondents filed a notice to abide.

6. The application is opposed only by the fifth respondent, the erstwhile BRP of VTP. He raises several points *in limine.* Firstly, he suggests that the applicants' failure to join First Rand Bank Limited, (FRB) and all the creditors

who were paid from the proceeds of the sale, is fatal to the applicants' application. Secondly, he challenges the applicants' *locus standi.* Lastly, he contends that the applicants' case is made up of hearsay and inadmissible evidence. With regard to the merits, the BRP submits that the applicants cannot cherry pick from the sale. He says that the sale, the payment of the purchase price and the transfer, make up one composite transaction. The BRP denies the charges of impropriety levelled against him by the applicants.

Background

7. The applicants are individuals who had contracted with VTP for building and construction matters. Their claims at the time of instituting these proceedings had not yet been liquidated and had not been proved before the liquidators. They say, their claims combined, are in the region of R14 million.

8. VTP was placed into business rescue, on 6 September 2021, following the company's adoption of a resolution to that effect. The fifth respondent was appointed BRP. Business rescue proceedings, according to the record, commenced on 7 September 2021.

9. On 21 September 2021, the first meeting of interested and affected persons was held. On 22 October 2021, the first applicant filed papers to the urgent court for an order setting aside the resolution to commence the business rescue proceedings or convert the proceedings to liquidation. Both the BRP and VTP filed papers opposing the relief.

10. On 29 November 2021, the BRP concluded an agreement for the sale of the property, in the amount of R 5 129 000. 00 (Five Million One Hundred and Twenty Nine Thousand Rand) with the first to the fourth respondents. The property is described as Erf 1[...] M[...], Gauteng, held by Deed of Transfer T29837/2022.

11. The BRP signed the Power of Attorney authorising transfer of the property on 1 March 2022.

12. VTP was placed under provisional liquidation by an order of this court on 28 March 2022.

13. The transfer to the names of the first to the fourth respondents was effected on 13 April 2022. VTP finally wound up on 16 May 2022.

14. When the applicants became aware of the transfer, they, through their attorneys, wrote numerous letters to the liquidators demanding that they take steps to recover the property, for the benefit of the VTP's creditors. The liquidators were instructed to further recover the fees and whatever monies were paid to the BRP on the basis that such funds had been stolen from the insolvent estate. The amounts paid as commission to the auctioneers were branded as void. The liquidators were instructed to claw the amounts back, on the basis that the sale is void, so too were the commission.

15. It did not end there. The first to the fourth respondents, whom had taken occupation of their newly purchased home, in April 2023, were not spared. Addressed as unlawful occupiers, they were issued with a demand and placed on terms to provide an undertaking that they will sign the necessary transfer papers to have the property transferred back to the insolvent estate.

16. The liquidators had previously written to the applicants' attorneys, wherein they stated that the estate is impecunious and on that basis, they were not prepared to engage in legal skirmishes. The applicants persisted that the liquidators' view was incorrect. On 21 April 2023, the liquidators wrote to the applicants' attorneys and informed them, *inter alia*, that they had investigated the transaction involving the sale and the transfer of the immovable property. That they had elected, as they were entitled in terms of section 386 (g) of the 1973 Act, to ratify the transaction. The provision empowers liquidators,

> ‘‘to exercise ‘mutatis mutandis the same powers as are by sections 35 and 37 of the Insolvency Act, 1936, (Act 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''.

17. The liquidators' letter further set out, *inter alia*, that:

(i) The offer was concluded by *bona fide* parties in 2021;

(ii) It was common cause that the property was encumbered with a mortgage in favour of FRB. Thus, whether the proceeds came from business rescue or liquidation process, the order of preference would be the same. With reference to *Diener NO* v *Minister of Justice and Correctional Services and Others*, the liquidators mentioned that FRB, as the creditor holding security against the property, stood first in line for payment and would have to be paid in full. Thereafter, the BRP's fees and disbursements would have to be paid, followed by preferred creditors such as SARS. In the event there were remaining funds, the concurrent creditors would be paid.

(iii) The liquidators concluded that it would not be in the interests of the general body of creditors to undo the transaction (sale and transfer). They reminded the applicants that the sale cannot be reversed without joining FRB to these proceedings.

18. I return later in this judgment to the election made and conveyed by the liquidators in their letter of 21 April along with the implications for this case. I may perhaps point out now, that that election is not addressed anywhere in the applicants' papers.

19. The present application was issued on 6 July 2023 and was enrolled to be heard in the unopposed court on 15 February 2024. It was not heard on that day, instead, it was postponed *sine die* and the fifth respondent was ordered to file his answering affidavit together with an application for condonation by 5 March 2024. The fifth respondent's answering papers were eventually filed on 8 May. On 10 May, he filed a Notice of Application setting out the prayers he would seek from this court in relation to his condonation application. Meanwhile, on 2 February 2024, the applicants served and filed a

supplementary affidavit together with a Notice of Application asking that the supplementary affidavit be received into evidence. I deal with the applications in turn.

Whether the applicants' supplementary affidavit should be admitted into evidence

20. The fifth respondent is opposing the admission of the supplementary affidavit on the basis that the applicants have failed to make a case for its admission into evidence. He submits that applicants should not be permitted to 'make their case as they go along'. It is trite that,

> 'The case in the founding affidavit is the one on which the applicant brings the respondent to court. That is the case that the respondent must respond to; and the applicant must, at the hearing, succeed or fail on the case in the founding affidavit. The respondent is given one opportunity only, to deal with the applicant's cause of action and present evidence in opposition in the answering affidavit.'[3]

21. The legal position dealing with the sets and sequence of affidavits to be filed in motion proceedings is captured in J*ames Brown & Hamer (Pty) Ltd (previously named Gilbert Hamer & Co Ltd)* v *Simmons NO.* There the court said:

> 'It is in the interests of the administration of justice that the well-known and well-established general rules regarding the number of sets and proper sequence of affidavits in motion proceedings should ordinarily be observed. That is not to say that those general rules must always be rigidly applied:…Where, as in the present case, an affidavit is tendered in motion proceedings both late and out of its ordinary sequence, the party tendering it is seeking, not a right, but an indulgence from the Court: he must both advance his explanation of why the affidavit is out of time and satisfy the

[3] *Gold Fields Limited and Others v Motley Rice LLC*, In re: *Nkala v Harmony Gold Mining Company Limited and Others* (48226/12) [2015] ZAGPJHC 62; 2015 (4) SA 299 (GJ); [2015] 2 All SA 686 (GJ) (19 March 2015), paragraphs 121-122.

Court that, although the affidavit is late, it should, having regard to all the circumstances of the case, nevertheless be received.'[4]

22. The applicants had indicated in their founding papers that their disputes with VTP had to first be referred to arbitration. Since arbitration had failed, the disputes had to be referred to court. They had further sought leave to file supplementary papers to bring to the attention of this court their liquid claims. The supplementary affidavit thus confirms judgment in favour of the first applicant, against VTP, in the amount of R 1 345 231. There can be no prejudice to the fifth respondent. On this basis, this court admits the supplementary affidavit into evidence.

Whether the fifth respondent should be granted condonation

23. A day after the application was issued, it was served on the fifth respondent. On 14 February 2024, hours before the matter was heard on the unopposed roll, the fifth respondent delivered a notice of intention to oppose. On 15 February 2024, the court postponed the matter *sine die* and ordered the fifth respondent to file his answering affidavit by 5 March 2024, along with an application for condonation. Two months later, on 8 May 2024, the fifth respondent filed his answering affidavit.

24. On 9 May 2024 the Deputy Judge President issued directives which included that the fifth respondent file an application for condonation by no later than 10 May 2024. The respondent filed only a Notice of Application on 10 May detailing the prayers he intended to seek in relation to condonation, on the day of the hearing. The case made for condonation in the answering affidavit may be summarised thus: The fifth respondent complains about his citation in the present application, long after his office as BRP had ceased. He points to the fact that he had to personally fund his legal fees in order to resist the relief sought by the applicants. He says he had no funds and had to seek financial assistance which he was able to secure only on 19 April 2024. The

[4] 1963 4 SA 656 (A) At 660 D-H.

application is opposed by the applicants. They are dismissive of the fifth respondent's financial problems. They say he has failed to make a case for condonation.

25. In *Competition Commission of South Africa* v *Pickfords Removals SA (Pty) Limited it was said that:*

> 'Condonation is not a mere formality – good cause must be shown. The concept of "good cause" is well-known in our law. A large body of jurisprudence has developed in our courts, particularly concerning rescission and condonation applications. The requirements for "good cause" are thus well-established. Courts are afforded a wide discretion in evaluating what constitutes "good cause", so as to ensure that justice is done. Ultimately, the overriding consideration is the interests of justice, which must be considered on the facts of each case. Factors germane to this enquiry may include: the extent and cause of the delay; the effect of the delay on the administration of justice and other litigants; the reasonableness of the explanation for the delay; the issue(s) to be raised in the matter; and the prospects of success. In Ferris, this Court said:
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> "[L]ateness is not the only consideration in determining whether condonation may be granted . . . the test for condonation is whether it is in the interests of justice to grant it . . . an applicant's prospects of success and the importance of the issue to be determined are relevant factors"..'[5]

26. The question that must be answered is whether it would be in the interests of justice to grant the fifth respondent condonation. This calls for the exercise of this court's discretion. I am of the view that it is in the interests of justice that the fifth respondent be granted condonation. Fortifying my reasoning are the following:

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[5] (CCT123/19) [2020] ZACC 14; 2020 (10) BCLR 1204 (CC); 2021 (3) SA 1 (CC); [2020] 1 CPLR 1 (CC) (24 June 2020), paragraph 54; *Madinda v Minister of Safety and Security, Republic of South Africa*, (153/07) [2008] ZASCA 34; [2008] 3 All SA 143 (SCA); 2008 (4) SA 312 (SCA) (28 March 2008), paragraph 12; *Turnbull-Jackson v Hibiscus Coast Municipality and Others*, [2014] ZACC 24, paragraph 23.

(i) Save for the initial postponement, where the matter could have gone unopposed, there appears to be minimal impact on the administration of justice. The matter was set down for 12 August 2024 and it was indeed heard on that day.

(ii) The delay since the day of the order of 15 February is about three months. I do not consider the delay egregious;

(i) The explanation, bar the failure to account for the whole period, is reasonable.

(ii) The issues raised in this litigation are critical for the office of a BRP.

(iii) Even though the fifth respondent breached a court order, there appears to be no contumacy in his conduct.

(iv) The applicants had the opportunity to reply to the fifth respondent's papers. In that event, there can be no prejudice on the applicants.

27. In so far as the applicants' reliance on *Millu* v *City of Johannesburg Metropolitan Municipality and Another*[6] to resist the fifth respondent's condonation application, this case is distinguishable from *Millu.* In that case, the City had eschewed numerous opportunities to file its papers. Throughout the various stages of the case, the City had to be prodded in some way to file its papers. Ultimately, its conduct was seen as an abuse by the court as may be gleaned from this extract:

> 'The sheer arrogant indifference of the City and its dishonourable behaviour is manifest. Organs of state are expected to behave honourably. Apparently, the City expects that it can at the same time disrespect the fundamentals of the litigation system and continue with impunity to participate in that litigation system to protect its rights. Such behaviour cannot be tolerated precisely because it is calculated to abuse the process of the court.'

Applicants' case

[6] (25039/2021) [2024] ZAGPJHC 419 (18 March 2024).

28. As already indicated, the applicants' case is rooted in the provisions of section 341(2) read with section 348. The applicants rely on the winding up order and contend it must be read, in terms of section 348 of the 1973 Act, to have come into effect on 21 October 2021. They submit that both the sale (effected on 29 November 2021) and transfer effected on 23 April 2022 are struck by 341(2) as void and must be set aside. They state that this court has no choice but to issue an order declaring that the sale and the transfer are void. The applicants assert that the view propagated by the liquidators in their letter of 21 April 2023, that reversing the transfer would not be in the interests of the general body of the creditors, is flawed.

29. It is now appropriate to consider the points *in limine* raised by the fifth respondent. I commence with the issue of non-joinder since it would be dispositive of the case in the event it is upheld.

Non-joinder

30. It is common ground that the FRB is a secured creditor as envisaged in section 134 (3) of the 2008 Act[7], in that it held a mortgage bond against the immovable property. In the event, not only was the BRP obliged to seek permission from FRB prior to disposing of the property during his tenor, he was obliged to pay FRB in full including any disbursements and maintenance costs associated with the property[8]. It is further not in dispute that FRB was paid about 80% of the proceeds. Several other creditors were paid from the proceeds as illustrated in the applicants' papers. The question then is whether FRB and all the creditors whom were paid from the proceeds of the sale ought to have been joined in these proceedings.

31. The applicants suggest FRB has no legal interest in these proceedings. However, if the court finds that FRB has a legal interest, it will not warrant a dismissal, submit the applicants. The submission that FRB has no interest in

[7] The section is discussed later in this judgment.
[8] *Diener NO v Minister of Justice and Correctional Services and Others* (CCT03/18) [2018] ZACC 48; 2019 (2) BCLR 214 (CC); 2019 (4) SA 374 (CC) (29 November 2018).

proceedings assailing the sale of the immovable property for purpose of setting it aside is denied by the fifth respondent. He submits that the failure to join FRB and all the creditors that were paid from the proceeds of the sale is fatal to the applicants' application.

Applicable legal principles

32. The question of non-joinder arose in *Gordon* v *Department of Health*, where the court reasoned the issue thus:

> 'In the Amalgamated Engineering Union case (supra) it was found that 'the question of joinder should . . . not depend on the nature of the subject matter . . . but . . . on the manner in which, and the extent to which, the court's order may affect the interests of third parties'. The court formulated the approach as, first, to consider whether the third party would have locus standi to claim relief concerning the same subject-matter, and then to examine whether a situation could arise in which, because the third party had not been joined, any order the court might make would not be res judicata against him, entitling him to approach the courts again concerning the same subject-matter and possibly obtain an order irreconcilable with the order made in the first instance. This has been found to mean that if the order or 'judgment sought cannot be sustained and carried into effect without necessarily prejudicing the interests' of a party or parties not joined in the proceedings, then that party or parties have a legal interest in the matter and must be joined. '[9]

33. The common cause facts are: During November 2021, whilst the BRP was still in office, he concluded the sale of the immovable property in question. As part of their performance in terms of the sale agreement, the first

[9] (337/07) [2008] ZASCA 99; 2008 (6) SA 522 (SCA); [2009] 1 All SA 39 (SCA) ; 2009 (1) BCLR 44 (SCA); [2008] 11 BLLR 1023 (SCA); (2008) 29 ILJ 2535 (SCA) (17 September 2008), paragraph 9; *Absa Bank Limited v Naude N.O and Others* (20264/2014) [2015] ZASCA 97; 2016 (6) SA 540 (SCA) (1 June 2015), paragraph 10; *Golden Dividend 339 (Pty) Ltd and Another v Absa Bank Limited* (569/2015) [2016] ZASCA 78 (30 May 2016); *Kransfontein Beleggings (Pty) Ltd v Corlink Twenty Five (Pty) Ltd and Others* (624/2016) [2017] ZASCA 131 (29 September 2017), paragraph 17.

to the fourth respondents paid R5 129 000. (Five million, One Hundred and Twenty Nine Thousand Rand) in favour of the insolvent estate, to acquire the property. Although the applicants contend that the BRP acted fraudulently in disposing of the property, which is vehemently refuted by the BRP, they do not suggest that the first to the fourth respondents knowingly participated in furtherance of the alleged fraudulent scheme. Nonetheless, on the common cause facts, after payment of the purchase price, the property was delivered to the purchasers.

34. A declaration that the sale is void and is set aside means whoever was paid from the proceeds must repay that money to the estate. It does not matter that the applicants do not ask for that order in these proceedings, the consequence of setting aside the sale means whatever was paid to the creditors, must be repaid to the estate. This was pointedly raised by the liquidators in their letter of 21 April 2023 to the applicants. The applicants paid no heed. The applicants ought to have joined FRB and all the creditors who were paid from the proceeds of the sale. In the event, the application cannot succeed.

Merits

35. The facts as stated by the applicants, ie, that the sale was signed in November 2021 and the transfer effected in April 2022 are correct, including the meaning of the provisions of sections 341(2) and 348. Where I part ways with the applicants is where they assert voidness of the transaction and in the process, ignore the liquidators' election. In addition, in their attacks levelled against the BRP and the liquidators, the applicants ignore the provisions of sections 134(3) and 135 of the 2008 Act. I deal with the provisions now. Section 134 of the 2008 Act deals with protection of property interests during business rescue. Subsection (3) reads:

> 'If, during a company's business rescue proceedings, the company wishes to dispose of any property over which another person has any security or title interest, the company must-

(a) obtain the prior consent of that other person, unless the proceeds of the disposal would be sufficient to fully discharge the indebtedness protected by that person‟s security or title interest; and

(b) promptly-

(i) pay to that other person the sale proceeds attributable to that property up to the amount of the company’s indebtedness to that other person; or

(ii) provide security for the amount of those proceeds, to the reasonable satisfaction of that other person.

Section 135 deals with Post-commencement finance:

(1) To the extent that any remuneration, reimbursement for expenses or other amount of money relating to employment becomes due and payable by a company to an employee during the company’s business rescue proceedings, but is not paid to the employee-

(a) the money is regarded to be post-commencement financing; and

(b) will be paid in the order of preference set out in subsection (3)(a).

(2) During its business rescue proceedings, the company may obtain financing other than as contemplated is subsection (1), and any such financing-

(a) may be secured to the lender by utilising any asset of the company to the extent that it is not otherwise encumbered; and

(b) will be paid in the order of preference set out in subsection (3)(b).

(3) After payment of the practitioner’s remuneration and expenses referred to in section 143, and other claims arising out of the costs of the business rescue proceedings, all claims contemplated:

(a) in subsection (1) will be treated equally, but will have preference over-

(i) all claims contemplated in subsection (2), irrespective of whether or not they are secured; and

(ii) all unsecured claims against the company; or

(b) in subsection (2) will have preference in the order in which they were incurred over all unsecured claims against the company.

36. Sections 339 reads:

> '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, in so far as they are applicable, be applied mutatis mutandis in respect of any matter not specially provided for by this Act.'

37. In terms of section 134 (3), if during business rescue a company wishes to sell property, over which another person holds security, they must obtain consent from that person, prior to disposing of the property, unless the proceeds from the property would fully discharge indebtedness covered by that security or title. It is common cause that on 29 November 2021, while the BRP was in office, he could dispose of the property over which FRB held security, provided the conditions stipulated in section 134 (3) were met.

38. The sale had not been completed when VTP was placed under provisional winding up on 28 March 2022. The sale was interrupted by the intervention of the *concursus creditorium*, which in terms of section 348, must be deemed to have taken effect as of 21 October 2021, the date when the winding up application was presented to court. The liquidators, according to the common cause facts, after investigating the entire transaction, elected to ratify or continue with the transaction. That election was conveyed in their letter of 21 April 2023 to the applicants.

39. The letter of 21 April was not just attached to the applicants' papers and cursorily referred to by the applicants, the court was asked to take specific cognisance thereof. Indeed, the letter is the very basis of the applicants' bringing of these proceedings. While the applicants criticise the liquidators for concerning themselves with protecting the interests of FRB in refusing to take steps to assail the sale and transfer, and being generally obstructive, they are silent on the election made by the liquidators to ratify the sale and transfer.

40. The principle is explained in *Du Plessis NO and Another* v *Rolfes Ltd*. thus:

> ‘[28] As pointed out by Friedman J in Smith and Another v Parton NO 1980 (3) SA 724 (D) 728 H to 729 B:
>
> "there is nothing in the law of insolvency which affects uncompleted contracts in general; the contract is neither terminated nor modified nor in any other way altered by the insolvency of one of the parties (cf Uys and Another v Sam Friedman Ltd 1935 AD 165) except in one respect, and that is that, because of the supervening concursus.
>
> [29] It follows, as previously mentioned, that if a trustee elects to continue with the contract after liquidation this is an act of administration and the payments which he has to make under the contract are expenses of administration. Such expenses taken in conjunction with the value of the performance of the other party may swell or diminish the free residue available to the general body of creditors. This is of course a factor which a prudent liquidator will have to have regard to in arriving at a decision whether or not to abide by an executory contract or to terminate it.’[10]

41. In *Nedcor Investment Bank* v *Pretoria Belgrave Hotel (Pty) Ltd*:

> ‘The legal principles applicable to the effect of insolvency on executory contracts such as the present, that is those in which one or the other, or all the obligations undertaken remain unfulfilled, are clear and appear from decisions such as Bryant and Flanagan (Pty) Ltd v Muller and Another NNO 1977 (1) SA 800 (N) at 804F-805G, which was confirmed on appeal in Muller and Another NNO v Bryant & Flanagan (Pty) Ltd 1978 (2) SA 807 (A), and Du Plessis and Another NNO v Rolfes Ltd 1997 (2) SA 354 (A). A trustee in insolvency, and thus a liquidator of a company in liquidation, is invested with a discretion whether to abide by or terminate an executory contract not specifically provided for in the Insolvency Act which had been concluded by the company in liquidation before its liquidation. Such an

[10] (500/94) [1996] ZASCA 45; 1997 (2) SA 354 (SCA); [1996] 2 All SA 390 (A); (29 March 1996), paragraph 28 and 29; *Murray and Others NNO v Ntombela and Others* (729/2022) [2024] ZASCA 24 (14 March 2024), paragraph 15.

agreement does not terminate automatically on the company being placed in liquidation. The liquidator must make his election within a reasonable time. Should he elect to abide by the agreement the liquidator steps into the shoes of the company in liquidation and is obliged to the other party to the agreement to whatever counter-prestation is required of the company in terms of the agreement. Once the liquidator has accepted the benefits of the contract, he cannot limit the other party to a concurrent claim against the free residue of the estate for anything reciprocally due to it.'[11]

42. The liquidators' power to elect whether to continue or terminate executory contracts, and the provisions of sections 134 (3) and 135 are at the heart of the complaint made by the applicants. The liquidators' letter of 21 April addresses their complaints. In short, the letter simply conveys that after taking into account, *inter alia,* the finances of the insolvent estate and the statutory provisions mentioned in this paragraph, whether the proceeds utilised came from liquidation or business rescue, the result would be the same. In everything that the applicants have placed before the court, that conclusion has not been displaced. I interpose that there is nothing in the applicants' complaint that suggests that the property was sold below its market value.

43. The applicants simply reduced the liquidators' letter of 21 April to a misdirection and failure to appreciate that the *concursus creditorium* arose as of 21 October 2021. They attack the liquidators' conclusions by citing that there were people whom where paid from the proceeds who were never creditors of VTP prior to business rescue. The liquidators address these matters in their letter of 21 April 2023. And if the applicants had queries, they were entitled to seek information from the liquidators. Their complaints about a motor vehicle X5 which they claim was allegedly sold below its market value after settling the financiers and the tools sold for R90 000, in no way disturbs the liquidators' conclusion that it will not be in the interests of the general body of creditors to undo the transaction.

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[11] 2003 (5) SA 189 (SCA) para 6.

44. What must be considered here is that as soon as the liquidators undo the transactions, their fees, which must be paid before those of the BRP will add to the costs. The applicants' claims combined are about R14 million, before any other concurrent creditor's claim. There is no basis to upset the sale and the transfer. On these grounds, the applicants are not entitled to the order they seek. There is no reason why costs should not follow the result.

Concluding remarks

45. The manner in which the applicants pursued this matter as demonstrated in the various letters they presented before court cannot be left unattended. The attacks against various professionals, in particular against the liquidators, were gratuitous and unwarranted and must be condemned. Various professionals were insulted and threatened with costs *debonis propriis* taxed on attorney client scale. This court distances itself from such conduct and states in clear terms that it does not endorse it.

Order

(i) The applicants' supplementary affidavit is admitted into evidence.

(ii) Condonation is granted to the fifth respondent.

(iii) The application is dismissed with costs, with counsel's fees on scale B.

N.N BAM J

JUDGE OF THE HIGH COURT,

GAUTENG DIVISION, PRETORIA

DATE OF HEARING:	**12 August 2024**
DATE OF JUDGMENT:	**12 February 2025**

<u>Appearances:</u>

Counsel for the Applicants:	**Adv L van Gaas & Adv R de Leeuw**

Instructed by:	Van Greunen & Associates Inc Highveld, Centurion
Counsel for the Fifth Respondent:	**Adv R Raubenheimer**
Instructed by:	Goodes Attorneys % Lourens Koen Attorneys Loftus, Pretoria