



**IN THE HIGH COURT OF SOUTH AFRICA
WESTERN CAPE DIVISION, CAPE TOWN**

Case number: 7595/2024

In the matter between:

THEODOR WILHELM VAN DEN HEEVER N.O.

First Applicant

MAREDA RITA BENNIGHOFF N.O.

Second Applicant

(in their representative capacities as liquidators of
The insolvent estate of JP Kruger Rand Deals (Pty) Ltd
(in liquidation)

and

**MERCHANT COMMERCIAL FINANCE 1 (PTY) LTD
t/a MERCHANT FACTORS**

First Respondent

**THE MASTER OF THE HIGH COURT,
JOHANNESBURG**

Second Respondent

JUDGMENT DELIVERED ELECTRONICALLY ON 29 JULY 2025

MANGCU-LOCKWOOD, J

A. INTRODUCTION

[1] The issue arising in these proceedings is whether s 348, read with s 341(2) of the Companies Act 61 of 1973 (*“the 1973 Act”*), applies when a liquidation order is obtained in terms of section 130(5)(c) of the Companies Act, 71 of 2008 (*“the 2018 Act”*) instead of s 344 or s 346 of the 1973 Act. The first respondent (*“Merchant”*) claims that it does not. And even if the provision is applicable, says Merchant, it can only apply from the moment that the Court sets aside the company’s resolution to place the company in business rescue.

[2] This is an application by the applicants, in their capacity as joint liquidators of JP Kruger Rand Deals (Pty) Ltd (*“JPK”*), to declare payments made by JPK to Merchant after the presentation of a winding-up application void in terms of section 341(2), read with section 348 of the 1973 Act, and that the payments amounting to R23,172,067.10 be repaid by Merchant to the insolvent estate, together with interest and other costs

[3] The application is opposed by Merchant, whose registered business address is within this Court’s jurisdiction, and it has also filed a conditional counter-application seeking a declarator that the dispositions in issue are not void.

[4] It is common ground that the payments were made after a creditor of JPK, ABSA Bank Ltd (*“Absa”*) had launched an application on 17 February 2017, seeking the following relief:

- “1. Setting aside the resolution placing the first respondent under business rescue supervision in terms of section 130(1)(a)(i) and (ii) and/or section 130(5)(a)(i) and (ii), as read with section 132(2)(a) of the Companies Act, 2008.*
- 2. Declaring, to the extent necessary or required, that the business rescue proceedings initiated by the said resolution have ended as envisaged by s132(2)(a)(i) and (ii) of the Companies Act 2008.*
- 3. Converting the first respondent’s business rescue proceedings to liquidation proceedings, alternatively placing the first respondent under*

liquidation in terms of section 130(5)(c)(i) of the Companies Act 2008.

4. *To the extent required, uplift[ing] the moratorium on legal proceedings in terms of section 133(1)(b) of the Companies Act 2008.”*

[5] At the time of the launch of Absa’s proceedings, JPK was in business rescue pursuant to a company resolution taken on 20 January 2017, in terms of which a business rescue practitioner, Mr Johan Louis Klopper (Klopper), was appointed.

[6] The payments in issue were made between 16 March 2017 and 17 June 2022, and consisted of 70 separate electronic payments made in terms of a loan agreement concluded between JPK and Merchant on 26 October 2016. The loan facility was thereafter annually renewed and extended until 19 April 2022, at the behest of Klopper, without the knowledge or sanction of the creditors.

[7] Absa’s application was opposed only by Merchant, which intervened by way of an application dated 15 October 2020 to support the continuing of the business rescue of JPK. The winding up order was granted by the Gauteng High Court on 19 April 2022, in the following terms:

“1. The resolution placing the first respondent under business rescue supervision is set aside in terms of section 130(1)(a)(i) and (ii) and/or section 130(5)(a)(i) and (ii), as read with section 132(2)(a) of the Companies Act, 2008.

2. To the extent necessary or required, the business rescue proceedings initiated by the said resolution have ended as envisaged by section 132(2)(a)(i) and (ii) of the Companies Act 2008.

3. The first respondent is placed under final winding-up order.

4. To the extent required, the moratorium on legal proceedings in terms of section 133(1)(b) of the Companies Act, 2008 is uplifted.”

B. THE PARTIES’ CASES

[8] The applicants' case is straight-forward. Relying substantially on *Montic Dairy*¹ from this Division, which was confirmed by the Supreme Court of Appeal (SCA) in *Mazar's Recovery*², they argue that since JPK was finally wound up on 19 April 2022, the payments are rendered void by the retrospective paralysing effect of section 341(2), read with section 348 of the 1973 Act.

[9] Section 341(2) provides 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.”

[10] Section 348 provides as follows:

“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.”

[11] Merchant disputes that sections 348 and 341(2) of the 1973 Companies Act find application to this case. In the alternative, it argues that, given the particular facts of this matter, those provisions could only apply from the moment that the Court set aside the resolution that served to place JPK under supervision in business rescue. To summarise the basis of its argument:

11.1 Sections 348 and 341(2) must be read against the background of sections 344(f), 345 and 346, in terms of which a company that is unable to pay its debts may be wound up by a Court upon application which must be accompanied by certification from the Master that sufficient security has been provided for the prosecution of the winding up proceedings, as well as a Master's report, and be served on relevant trade unions, employees, the company and SARS.

¹ *Montic Dairy (Pty) Ltd (in liquidation) & others v Mazar's Recovery & Restructuring (Pty) Ltd & Others* 2021 (3) SA 527 (WCC).

² *Mazar's Recovery & Restructuring (Pty) Ltd & others v Montic Dairy (Pty) Ltd (in liquidation) & Others* 2023 (I) SA 398 (SCA).

11.2 Whilst section 348 provides for a statutory deeming device to backdate the moment of commencement of a winding up to the presentation of the application to the Court, the creditors' rights in such circumstances are only affected when a winding up order is granted by the Court.

11.3 Similarly, business rescue proceedings, whether commenced by board resolution in terms of section 129(1) or by court application in terms of section 131(4) of the 2008 Act, only terminate by Court order, when a Court sets aside the company resolution or the Court order which commenced business rescue, and/or where the Court converts business rescue proceedings to winding-up proceedings in terms of, for example, 132(2)(a).

11.4 Whilst the leave of the Court may be obtained in terms of section 133(1)(b) before commencing or proceeding with legal proceedings against a company undergoing business rescue, the leave of the Court is stillborn until and unless the Court grants it. The same is highlighted in respect of section 130(5)(c)(i).

11.5 Where a winding-up order is made by a Court *mero motu* when dismissing an application for a company to be placed in business rescue in terms of section 131(4)(b), or made *mero motu* by the Court in setting aside a company's business rescue resolution in terms of section 130(5)(c)(i), the winding-up order becomes effective from the date of the order, and no retrospectivity under section 348 finds application. The same applies where the Court converts business rescue proceedings to liquidation proceedings in terms of section 132(2)(a)(ii).

11.6 Because Absa's application was one for conversion of business rescue proceedings into liquidation, as contemplated in section 130(5)(c)(i) read with 131(5)(b) and 132(2)(a)(ii), and did not constitute an application for winding-up brought in terms of section 346 of the 1973 Companies Act, section 348 does not apply.

11.7 Even if Absa's application for the winding-up of JPK were treated as one in terms of section 346, sections 348 and 341(2) could not apply unless and until, and only from the date of, the Court's leave having been granted in terms of section

133(1)(b). That only occurred on 19 April 2022, when the section 133 moratorium was lifted in terms of paragraph 4 of the winding up order.

11.8 As for *Montic Dairy* and *Mazars Recovery*, they are distinguishable from this case, says Merchant, on the following bases:

11.8.1 On the facts of those cases, it was the business rescue practitioners who had applied to Court in terms of section 141(2)(a) for the discontinuation of business rescue proceedings and for the company's winding-up. No leave of the Court was required for them to do so. The Court held that the moment the business rescue practitioners launched their application for winding-up, business rescue was at an end. That is not the case here.

11.8.2 In those cases, the application of section 348 was common cause, and as a result, the issue was not under discussion and the Court did not have to address itself to this question.

11.8.3 The argument of the business rescue practitioners in those cases was a different one, namely that the payments made to them after they launched the winding-up application could not be construed as "dispositions" as contemplated in section 341(2), because sections 143(1), 135(3) and 143(5) of the 2008 Companies Act statutorily entitled them to payment.

11.8.4 By contrast, in these proceedings the application was not one for winding-up by the Court in terms of section 346 of the 1973 Companies Act. It was an application by Absa for the setting aside of the business rescue resolution and conversion of the proceedings from business rescue to winding-up; and a jurisdictional pre-requisite for granting the application to wind-up was the leave of the Court in terms of section 133(1)(b).

11.8.5 And unlike the position which pertained in *Montic Dairy*, business rescue had not terminated when Absa launched its application; business rescue only terminated on the day when the winding up order was granted.

11.9 There is also a submission made in the answering affidavit that the *Montic Dairy* and *Mazars Recovery* were incorrectly decided, but that was not pursued in the heads of argument.

C. RELEVANT LAW

[12] In terms of Items 9(1) and (2) of Schedule 5 to the 2008 Companies Act, certain provisions of the 1973 Act are preserved, and apply to the winding up of commercially insolvent companies. That includes s 341(2) and s 348.

[13] As this Division stated at paragraphs 28 and 29 in *Montic Dairy*:

“[28] It has been established law for more than a century that the effect of s348 is to establish the *concursum creditorum* at the time that the application for winding up is lodged. The retention of that provision from the old Act as part of the overall matrix of the law relating to the winding up of companies means that the Legislature intended it to apply both to insolvent companies wound up under the old statutory dispensation and to companies wound up under the new Companies Act where business rescue proceedings have not achieved the desired result and s141(2)(ii) is implemented.

[29] It therefore follows that s341(2) proscribes the disposition of a company’s assets after the lodging of an application to wind up (whether that application is at the behest of an ordinary unpaid creditor or a BRP who concludes that the company cannot be rescued) while s143 only affords the BRP a limited measure of priority when his/her claim for remuneration is considered by the liquidator in the winding up process.”

[14] In both *Eravin Construction CC v Bekker N O and Others*³ and *Pride Milling Company (Pty) Ltd v Bekker N O and Another*⁴, the SCA emphasized that the

³ *Eravin Construction CC v Bekker N O and Others* [2016] ZASCA 30; 2016 (6) SA 589 (SCA) para 21.

⁴ *Pride Milling Company (Pty) Ltd v Bekker N O and Another* [2021] ZASCA 127; [2021] 4 All SA 696 (SCA); 2022 (2) SA 410 (SCA).

starting point is that s 341(2) states expressly that a disposition in the terms contemplated by it “*shall be void*”.⁵

[15] Petse DP (as he then was) continued as follows in *Pride Milling*:

“...What s 341(2) does as its predominant purpose is to decree that all dispositions made by a company being wound-up are void. This provision must of course be read with s 348, which provides that the winding-up of a company by a court shall be deemed to have commenced at the time of the presentation of the application for winding-up to the court. The effect is that the payments are potentially invalid at the moment they are made, because the grant of a winding-up order will render s 341(2) operative. This is different from saying that they are rendered invalid retrospectively, or that they were initially lawful and valid. That suggests that the invalidation of all such payments is presumptively harsh or undesirable, which is not the case.”⁶

[16] At paragraph 30, the SCA continued as follows:

“The provisions of s 341(2) could not be clearer. They, in unequivocal terms, decree that every disposition of its property by a company being wound-up is void. Thus, the default position ordained by this section is that all such dispositions have no force and effect in the eyes of the law ie the disposition is regarded as if it had never occurred. The mischief that s 341(2) seeks to obviate is plain enough. It is to prevent a company being wound-up from dissipating its assets and thereby frustrating the claims of its creditors.”⁷

[17] Discussing s 348, the Court stated⁸ as follows:

“[14] Dealing with s 115 of the 1926 Companies Act that was couched in identical terms as s 348, Snyman J pointed out in *Lief NO v Western Credit (Africa) (Pty) Ltd* 1966 (3) SA 344 (W) that the mischief that the section was designed to obviate was: ‘. . . a possible attempt by a dishonest company, or directors, or creditors or

⁵ See also *Mazars Recovery* at para [10] and *Pride Milling* para [30].

⁶ At para [13].

⁷ At para 30.

⁸ See paras 14 – 16.

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' by, for example, dissipating the assets of the company or, as it happened in this case, preferring one creditor above another to the prejudice of the *concursum creditorum*.

[15] The effect of a winding-up order, said De Villiers CJ in *Walker v Syfret* NO 1911 AD 141 at 160, 'is to establish a *concursum creditorum*, and nothing can thereafter be allowed to be done by any of the creditors to alter the rights of the other creditors'. In the same case Innes JA succinctly stated the legal position as follows (at 166):

'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 each creditor must be dealt with as it existed at the issue of the order.'

[16] In *Incedon (Welkom) (Pty) Ltd v Qwaqwa Development Corporation* [1990] ZASCA 85; 1990 (4) SA 798 (A) Goldstone AJA stated:

'As between the estate and the creditors and as between the creditors *inter se* their relationship becomes fixed and their rights and obligations become vested and complete.'"

D. DISCUSSION

[18] Merchant's argument that s 348 does not apply to the facts of this case requires consideration of a number of related provisions. It is by now trite that the interpretation of statute is an objective unitary process where consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; and the apparent purpose to which it is directed and the material known to those responsible for its production⁹. The inevitable point of departure is the language used in the provision under consideration.

⁹ *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] ZASCA 13; 2012 4 SA 593 (SCA) para 18. *Airports Company South Africa v Big Five Duty Free (Pty) Ltd and Others* [2018] ZACC 33; 2019 (5) SA 1 (CC) para 29. See *C:SARS v United Manganese of Kalahari (Pty) Ltd* (264/2019) [2020] ZASCA 16 (25 March 2020) para 8.

[19] Items 9(1) to (3) of the 2008 Act, headed “[c]ontinued application of previous Act to winding-up and liquidation”, provide as follows:

“(1) Despite the repeal of the previous Act, until the date determined in terms of sub-item (4), Chapter 14 of that Act continues to apply with respect to the winding-up and liquidation of companies under this Act, as if that Act had not been repealed subject to sub-items (2) and (3).

(2) Despite sub-item (1), sections 343, 344, 346, and 348 to 353 do not apply to the winding-up of a solvent company, except to the extent necessary to give full effect to the provisions of Part G of Chapter 2.

(3) If there is a conflict between a provision of the previous Act that continues to apply in terms of sub-item (1), and a provision of Part G of Chapter 2 of this Act with respect to a solvent company, the provision of this Act prevails.”

[20] As foreshadowed in sub-item (1), s 348 and s 341(2) are indeed found in Chapter 14 of the 1973 Act and, as a result, continue to apply. The effect of s 348 is to make the commencement of the winding-up retrospective to the time of the presentation of the application to the Court - when it is lodged with the Registrar of the Court.¹⁰ In order for the provision to operate, a winding-up order - provisional or final - must be subsequently granted.¹¹ It is in that context that it has been stated that the mere presentation of the application does not have the effect of a winding-up order and does not affect creditors’ rights.¹²

[21] The argument invoked by Merchant bears similarity to an argument made in *Reebib Rentals*¹³, where the Court was urged to use the discretion available to it in terms of s 347 of the 1973 Act - which is to grant “any other order it may deem just” - to order that the winding up in that case should only commence on the date upon

¹⁰ *Development Bank of Southern Africa Ltd v Van Rensburg NNO* 2002 (5) 425 SCA para 431. *Venter N.O. v Farley* 1991 (1) SA 316 (C) at 320.

¹¹ *Henochsberg* Vol 1, p740(2). *Vermeulen v CC Bauermeister (Edms) Bpk* 1982 (4) SA 159 (T) at 162, *Khalil v Decotex (Pty) Ltd* 19881 SA 9438 at 961-962.

¹² *Vermeulen* at 162.

¹³ *Reebib Rentals (Pty) Limited v Lets Trade* 1163 CC (7219/2008) [2009] ZAKZHC 4; 2009 (3) SA 396 (D) (19 February 2009).

which a further provisional winding up order was granted. In rejecting the argument, the Court referred to *S v Rosenthal*¹⁴, where the following was stated:

“The words ‘shall be deemed’ (‘word geag’ in the signed, Afrikaans text) are a familiar and useful expression often used in legislation in order to predicate that a certain subject matter, eg a person, thing, situation or matter, shall be regarded or accepted for the purpose of the statute in question as being of a particular, specified kind whether or not the subject-matter is ordinarily of that kind. The expression has no technical or uniform connotation. Its precise meaning, and especially its effect, must be ascertained from its context and the ordinary canons of construction. Some of the usual meanings and effect it can have are the following. That which is deemed shall be regarded or accepted (i) as being exhaustive of the subject-matter in question and thus excluding what would or might otherwise have been included therein but for the deeming, or (ii) in contradistinction thereto, as being merely supplementary, ie, extending and not curtailing what the subject-matter includes, or (iii) as being conclusive or irrebuttable, or (iv) contrarily thereto, as being merely *prima facie* or rebuttable. I should add that, in the absence of any indication in the statute to the contrary, a deeming that is exhaustive is also usually conclusive, and one which is merely *prima facie* or rebuttable is likely to be supplementary and not exhaustive.”¹⁵

[22] It is in the light of this understanding that our Courts, as indicated in the case law set out earlier, have taken it as a conclusive, irrebuttable starting point that, in circumstances where s 348 finds application, winding up is deemed to commence at presentation to the Court of the application for the winding up without further ado. That, after all, is the whole point of a deeming provision - to obviate the type of argument raised by Merchant.

[23] In following this approach, the Courts have been mindful that it is a matter of great importance to commerce in general and companies in particular that there be

¹⁴ *S v Rosenthal* 1981 SA 65 (A) at 75G – 76A.

¹⁵ *Reebib* para 18.

certainty as to the ascertainment regarding the date of commencement of the winding up.¹⁶

[24] Another well-recognized objective of s 348, which applies to the facts of this case, is to prevent –

“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 the Court.”¹⁷

[25] This is what the applicants state occurred in this case, namely that by receiving the payments from JPK, Merchant attained an advantage ahead of, without the knowledge of, and to the exclusion of, the other creditors during the intervening period between the presentation of the application for a winding up order and the granting of that order by the Court. Thus, the interpretation sought by Merchant flies directly in the face of the very purpose sought to be achieved by the deeming provision.

[26] But most significantly, the principal authorities which stand in the way of Merchant are *Montic Dairy* from this Division and *Mazars Refinery*, both of which hold the weight of *stare decisis* on this issue. Merchant has yet to raise a persuasive argument regarding why those decisions should be departed from. The fact that the decisions did not delve into an in-depth discussion of the applicability of s 348 flows from the above principles, and from the parties’ concession regarding the applicability of that provision, to the satisfaction of both courts.¹⁸

[27] The fact that the application here was launched by the creditors as opposed to the business rescue practitioners has no bearing on whether s 348 and s 341(2) find application.¹⁹ That is because an order for the winding up of a company,

¹⁶ *The Nantai Princess Nantai Line Company Limited and another v Cargo laden on the MV Nantai Princess and other vessels and others* 1997 (2) 580 (D) at 585 E – F. See *Reebib Rentals (Pty) Limited v Lets Trade* 1163 CC (7219/2008) [2009] ZAKZHC 4; 2009 (3) SA 396 (D) (19 February 2009) para 20.

¹⁷ *Lief N.O. v Western Credit (Africa) (Pty) Limited* 1966 (3) SA 344 (W) at 347 B-C.

¹⁸ *Mazars Refinery* para 23.

¹⁹ *Mazars Refinery* para 27.

provisional or final in nature, is not personal to the petitioning creditor but determines the status of the company, the effect of which is to establish a *concursum creditorum*.²⁰

[28] There is no requirement in s 348 for a winding up application to be made in terms of sections 344, 345 or 346 of the 1973 Act in order for the deeming provision to apply. Neither is there any indication, express or implied, that a winding-up application brought in terms of s 130 of the 2008 Act excludes the application of the deeming provision. Nor has Merchant pointed to any conflict between the provisions of the 1973 Act and the 2008 Act, as envisaged in sub-item 9(3) which might justify its exemption from the application of s 348.

[29] An interpretation which requires, of necessity, that the provisions of the 1973 Act should apply in order for the deeming provision to apply runs contrary to the purpose of the transitional provisions in Item 9(1) to (3) referred to above, which renders s 348, amongst other provisions of the 1973 Act, applicable to winding-up and liquidation which is brought about in terms of the provisions of 2008 Act. Section 130 of the 2008 Act is one such provision, and its sub-provisions were expressly referred to in Absa's application, namely ss 130(1)(a)(i) and (ii), 130(5)(a)(i) and (ii), and 132(2)(a)(i) and (ii). Section 130(1) provides as follows:

“ (1) Subject to subsection (2), at any time after the adoption of a resolution in terms of section 129, until the adoption of a business rescue plan in terms of section 152, an affected person may apply to a court for an order-

(a) setting aside the resolution, on the grounds that-

(i) there is no reasonable basis for believing that the company is financially distressed;

(ii) there is no reasonable prospect for rescuing the company; or

(iii) the company has failed to satisfy the procedural requirements set out in section 129.”

²⁰ See for example *Walker v Syfret* NO 1911 AD 141 at 160

[30] In terms of s 130(1) an affected person may at any time between adoption of the resolution in terms of s 129 and adoption of the business rescue plan in terms of s 152 apply to the Court for setting aside the resolution taken by the company as well as the appointment of the business rescue practitioner.

[31] Section 129(1) provides for the voluntary decision of a company to place itself under business rescue, as follows:

“(1) Subject to subsection (2) (a), the board of a company may resolve that the company voluntarily begin business rescue proceedings and place the company under supervision, if the board has reasonable grounds to believe that-

(a) the company is financially distressed; and

(b) there appears to be a reasonable prospect of rescuing the company.”

[32] An application brought in terms of s 130 to set aside a resolution may not be brought once a business rescue plan has been adopted. It is common cause here that no business rescue plan was adopted despite two drafts being produced by Klopper.

[33] In terms of 130(1)(a)(i) and (ii), the grounds upon which the passing of a business resolution made in terms of s 129(1) may be set aside include the fact that there is no reasonable basis for believing that the company is financially distressed and there is no reasonable prospect for rescuing the company. In *Panamo*²¹ it was stated that those grounds are to the effect that the basis for the passing of a resolution set out in s 129(1) was absent.²² This is in line with the view espoused in *Henochsberg*²³, that the requirements of sub-section (1)(a)(i) and (ii) should be tested as at the time the resolution was adopted, not when the application is launched. On application to this case, that means as at 17 February 2017 when the company was placed under business rescue, there were no grounds for doing so. In

²¹ *Panamo Properties (Pty) Ltd and Another v Nel N.O. and Others* (35/2014) [2015] ZASCA 76; 2015 (5) SA 63 (SCA); [2015] 3 All SA 274 (SCA) (27 May 2015) at para 12.

²² *Panamo* at para 12.

²³ See Piet Delpont and Quintus Vorster (authors) with other contributors *Henochsberg on the Companies Act 71 of 2008* (looseleaf, Issue 9) Vol 1 at 472, rejecting the view espoused in *DH Brothers Industries (Pty)Ltd v Gribnitz NO and Others* [2014] 1 All SA 173 (KZP) para 12.

my view, this is one of the reasons why it is equitable to apply s 348, read with s 341(2) to the facts of this case.

[34] There appear to be divergent views in our case law regarding whether it is necessary, when bringing an application which complies with the provisions of s 130(1), to apply for a lifting of the statutory moratorium prescribed by s 133(1). That provision puts in place a general moratorium on legal proceedings against the company during business rescue proceedings, except with the written consent of the business rescue practitioner or with the leave of the Court, as follows:

“During business rescue proceedings, no legal proceeding, including enforcement action, against the company, or in relation to any property belonging to the company, or lawfully in its possession, may be commenced or proceeded with in any forum, except-

- (a) with the written consent of the practitioner;
- (b) with the leave of the court and in accordance with any terms the court considers suitable...”

[35] Two relevant cases in this regard are the Gauteng Division cases of *BP Southern Africa*²⁴ and *Nedbank Limited*²⁵. Similar to Absa in the present case, the applicants in those cases applied for a lifting of the statutory moratorium imposed by s 133, notwithstanding that the business rescue plans in those cases had not yet been adopted in line with the requirements of s 130(1). Although in *Nedbank* the Court raised the antecedent question of whether it was necessary to bring the s 133 application, it resolved the issue by referring to *BP Southern Africa*’s decision which had discussed the proper timing and form of such an application, and held, in essence, that there is no need for separate *a priori* proceedings by way of a substantive application to lift the moratorium on legal proceedings imposed by s 133(1)(b) of the 2008 Act before an application in terms of s 130(1) may be brought.

²⁴ *BP Southern Africa (Pty) Ltd v Intertrans Oil SA (Pty) Ltd and Others* (34716/2016) [2016] ZAGPJHC 310; 2017 (4) SA 592 (GJ) (25 November 2016) para 26 - 28.

²⁵ *Nedbank Limited v Sana Developers (Pty) Ltd and Another* (2023/080710) [2024] ZAGPJHC 1087 (23 October 2024) para 11.

From my reading of both cases, however, the legal question of whether s 133(1)(b) finds application was not decided.²⁶

[36] Nevertheless, it was observed in *Booyesen*²⁷ in this Division, after a survey of numerous decisions across various divisions²⁸, that our courts have consistently held that proceedings brought in terms of the provisions of s 130(1) of the 2008 Act are not subject to the provisions of s 133.

[37] That view is shared in *Henochsberg*, where it is opined that no leave of the Court (or consent of the practitioner) is required when approaching a Court to set aside a voluntary business rescue process initiated in terms of s 129. Dealing with the argument that s 133 finds application, the learned authors state as follows:

“If this was the case, the application for leave would, in itself, also be subject to leave by the Court, *ad infinitum* and, in addition, the right to approach the Court is an essential counterweight to the curtailment of the affected persons’ rights licenced by the (unilateral) action by the company by way of a board resolution. The purpose of the measures does not require section 130(1) to be subject to section 133(1), the contrary is correct. There is also no textual indication that the right in section 130(1) is subject to section 133(1)...”

...

and, in addition... the direct access without leave of the Court or the business rescue practitioner is necessary because “the opposition to the request for relaxation will be self-evidently frivolous and lacking in substance, an exercise in empty formalism, designed cynically to perpetuate the advantages of immunity from the normal processes of the law which a company can secure for itself under the business rescue regime in the new Companies Act by a stroke of its own pen [by using section 129], and no more”... ”²⁹

²⁷ *Booyesen v Jonkheer Boerewynmakery (Pty) Ltd and Another* (10999/16) [2016] ZAWCHC 192; [2017] 1 All SA 862 (WCC); 2017 (4) SA 51 (WCC) (15 December 2016) para 26.

²⁸ *DH Bros Industries v Gribnitz NO* 2014 (1) SA 103 (KZP); *LA Sport 4X4 Outdoors CC and Ano v Broadsword t/a 20 (Pty) Ltd and Ors* [2015] ZAGPPHC 78; *Resource Washing (Pty) Ltd v Zululand Coal Reclaimers (Pty) Ltd and Ors* [2015] ZAKZPHC 21; *ABSA Bank Ltd v Golden Dividend 339 (Pty) Ltd* 2015 (5) SA 272 (GP); *Griessel and Ano v Lizemore and Ors* 2016 (6) SCA 236 (GJ); *Cordeiro Holdings CC and Ors v Market Demand Trading 254 (Pty) Ltd and Ors* [2016] ZAGPJHC 284.

²⁹ *Henochsberg* on the Companies Act, 71 of 2008, Service Issue 33, November 2023, p470.

[38] Similarly, in *Cordeiro Holdings*³⁰, where the applicants sought an order in terms of s 130(5)(c), the Court held there was no need to invoke s 133(1)(b) “because section 130(5)(c) read together with section 133 implies that section 133 does not apply to the setting aside of a resolution or the conversion into liquidation proceedings”³¹.

[39] Respectfully, I am in agreement with the views espoused in the above authorities. As a result, Merchant’s argument which relies significantly on the applicability of s 133(1)(b) is misconceived. It is also not supported by precedent emanating from this Division, including *Booyesen* as discussed earlier, and *Limbouris*³².

[40] In addition, as highlighted in *Climax Concrete*³³ business rescue initiated by resolution may provide an undeserved moratorium “by a stroke of the company pen by passing and filing a section 129(1) resolution”³⁴ Needless to say, the potential for abuse needs to be guarded against as it would adversely affect the interests of creditors.

[41] Even if s 133(1)(b) was applicable, there is no support in our legal system for Merchant’s argument that the leave of the Court required in terms of that provision is to be characterised as a jurisdictional fact or a condition precedent for the proceedings to proceed or continue, the absence of which means that a Court has no power or competence to determine the application. That argument was put paid in *Chetty*³⁵, although the main focus of that case was the consent obtainable from the business rescue practitioners in terms of s 133(1)(a).

³⁰ *Cordeiro Holdings CC and Others v Market Demand Trading 254 (Pty) Ltd and Others* (2016/24747) [2016] ZAGPJHC 284 (6 September 2016) para 13.

³¹ At para 13.

³² *Limbouris and Others v Du Toit N.O and Others* (23112/2023) [2024] ZAWCHC 213; [2024] 4 All SA 562 (WCC); 2025 (1) SA 247 (WCC) (16 August 2024)

³³ *Climax Concrete Products CC v Evening Flame Trading 449 (Pty) Ltd* 2012 (JDR) 1053 (ECP).

³⁴ At para 38.

³⁵ *Chetty t/a Nationwide Electrical v Hart and Ano NNO* 2015 (6) SA 424 (SCA) paras 36 – 47.

[42] The SCA in *Chetty* observed that the statutory moratorium is crafted in a manner that balances the rights and interests of the company and claimants against the company. This is why there is no absolute bar against legal proceedings, and why, a creditor may approach the court directly under s 133(1)(b), whether or not the creditor first asked the practitioner for consent.³⁶ Referring to *Cloete Murray*³⁷, the SCA stated there is no other indication in the section that non-compliance carries with it the implication that the proceedings are a nullity.³⁸

[43] Although the discussion in *Chetty* concerned the written consent required from a business practitioner in terms of s 133(1)(a) as opposed to the leave of a Court in ss (b), and also concerned arbitration proceedings as opposed to court proceedings, there is no reason why the SCA's reasoning should not apply in respect of s 133(1)(b), and the SCA intimated as much in *obiter*³⁹. A similar interpretation of the SCA's view was adopted in *Booyesen* of this Division.

[44] Significant to note is that the appellant in *Chetty* relied on the same foreign judgment relied upon by Merchant in these proceedings, namely *Re Taylor (a bankrupt); Davenham Trust plc (t/a Booker Montagu Leasing v CV Distribution (UK) Ltd & Another*⁴⁰ where a Chancery Division in the United Kingdom was asked to decide whether a claimant's failure to obtain the leave of the court in accordance with a statutory requirement before instituting proceedings against a bankrupt debtor rendered the proceedings a nullity. Although the SCA in *Chetty* distinguished that case because it dealt with a provision similar to s 133(1)(b) as opposed to s 133(1)(a), the SCA also expressed doubt as to whether s 133(1)(b) can be construed as a jurisdictional requirement.⁴¹ I have found no reason to conclude otherwise.

[45] There is no statutory support for such a conclusion in circumstances similar to the present case, namely that failure to obtain leave of the Court would result in a nullity. Such a conclusion would unnecessarily restrict the wide discretion afforded to

³⁶ *Chetty* para 45.

³⁷ *Cloete Murray & another NNO v Firstrand Bank Ltd t/a Wesbank 2015 (3) SA 438 (SCA) para 24.*

³⁸ *Chetty* para 41.

³⁹ *Chetty* footnote 31.

⁴⁰ *Re Taylor (a bankrupt); Davenham Trust plc (t/a Booker Montagu Leasing v CV Distribution (UK) Ltd & another* [2006] EWHC 3029; [2007] 3 All ER 638.

⁴¹ *Chetty* footnote 31.

a Court setting aside the company's resolution in terms of section 130(5)(c), in terms of which a court, may make any further necessary and appropriate order.⁴² Such an order may, in my view, include an order setting aside an order obtained without leave or consent, though a Court is not obliged to do so.⁴³

[46] As stated in *C&E*⁴⁴ at heart of the consent and leave requirements in s133(1)(a) and (b) is a procedural and pragmatic purpose, not to non-suit a creditor who might, as in that case, be unaware of the company's status. To do so would place form over substance, and would elevate what are essentially requirements directed at procedure to the status of a substantive jurisdictional requirements. The effect of the section, as the Court stated, is to stay the initiation or further conduct of proceedings unless consent or leave is obtained, not to nullify them.⁴⁵

[47] Apart from liquidation, one of the orders granted by the Court on 19 April 2022, was Absa's prayer to set aside the resolution, in terms of s 130(5) which provides as follows:

"When considering an application in terms of subsection (1) (a) to set aside the company's resolution, the court may-

(a) set aside the resolution-

(i) on any grounds set out in subsection (1); or

(ii) if, having regard to all of the evidence, the court considers that it is otherwise just and equitable to do so;

[48] In *Alderbaran*⁴⁶, a case from this Division, it was held that the enquiry postulated in s 130(5)(a)(ii) is similar to that in s 344(h) of the 1973 Act which dealt with the liquidation of companies on the ground that it appeared just and equitable to

⁴² *Alderbaran (Pty) Ltd and Another v Bouwer and Others* 2018 (5) SA 215 (WCC).

⁴³ See *Standard Bank of South Africa Limited v C and E Engineering (Pty) Ltd and Others; Standard Bank of South Africa Limited v C and E Engineering (Pty) Ltd* (18085/20; 16611/20) [2020] ZAGPJHC 255 (14 August 2020) paras [73] – [82].

⁴⁴ *Standard Bank of South Africa Limited v C and E Engineering (Pty) Ltd and Others; Standard Bank of South Africa Limited v C and E Engineering (Pty) Ltd* (18085/20; 16611/20) [2020] ZAGPJHC 255 (14 August 2020) paras [75] – [76].

⁴⁵ *Ibid*, para [77].

⁴⁶ *Alderbaran (Pty) Ltd and Another v Bouwer and Others* (19992/2017) [2018] ZAWCHC 38; [2018] 3 All SA 71 (WCC); 2018 (5) SA 215 (WCC) (22 March 2018) para 47.

the Court. In that event, there is no reason why s 348 would not find application to this case, although it must be underscored that s 348 does not require that applications must be made in terms of s 344 in order for the deeming provision to apply.

[49] In terms of paragraph 3 of the order of 19 April 2022, the Court granted an order placing JPK under final liquidation. Contrary to the argument of Merchant, the liquidation of JPK is one of the prayers that were sought in Absa's notice of motion of 17 February 2017, where paragraph 3 specifically sought an order: "*Converting the first respondent's business rescue proceedings to liquidation proceedings, alternatively placing the first respondent under liquidation in terms of section 130(5)(c)(i) of the Companies Act 2008*". As with the rest of the prayers sought in the notice of motion, that relief stood to be considered and adjudicated by the Court. The argument to the effect that the liquidation was incidental to the relief sought, as if it was not part of the litigation, is discredited by this prayer.

[50] So aware was Merchant of the liquidation prayer sought by Absa, that it intervened, not only to oppose the setting aside of the business rescue, but to oppose the liquidation sought, as is apparent from its intervention application which is part of the record. It is clear from the pleadings that, even before the launch of the proceedings, Absa was not in favour of the business rescue plans proposed by JPK at the instance of Klopper, and rather favoured liquidation. It is therefore sophistry to now argue that the winding-up date should be reckoned from the date of the Court order of 19 April 2022, as if Merchant was not aware of the paralysing effect of sections 341(2) and 348 of the 1973 Act at the presentation of Absa's proceedings, if not before.

[51] One assumes that, in granting the final order of winding-up, the Court was satisfied that a clear case – not *prima facie* - had been established that JPK was unable to pay its debts as contemplated in s 344(f) and/or (h) and s 345(1) of the 1973 Act, which continues to find application to the winding-up of insolvent companies by virtue of Item 9 of Schedule 5 to the 2008 Act, as already discussed.

[52] The Court would also have been satisfied that all affected or interested persons or entities; those with a direct and substantial interest in the liquidation of the company; and those whose legal interests in the company were likely to be prejudicially affected by a final winding up order, had knowledge of the application. Otherwise, at the very least, a provisional order would have been granted, calling on such affected or interested persons or entities to put forward reasons why the court should not order the final winding up of the company.⁴⁷

[53] In granting its order to Absa, the Court made specific reference to sections 130(2)(a), which provides as follows:

“(2) Business rescue proceedings end when-

(a) the court-

- (i) sets aside the resolution or order that began those proceedings; or
- (ii) has converted the proceedings to liquidation proceedings;

[54] Section 132(2)(a)(i) provides that business rescue proceedings terminate when the court sets aside the resolution that commenced those proceedings. In other words, when a court grants an order in terms of s 130(5)(a) of the Act, the effect of that order is not merely to set the resolution aside, but to terminate the business rescue proceedings.⁴⁸

[55] The question is whether that means the winding up takes effect at that point. In *Diener*⁴⁹ the SCA considered the date of resumption of liquidation when voluntary business rescue proceedings are converted into liquidation proceedings in the context of section 141(2)(a) of the 2008 Act.⁵⁰ At paragraphs 54 to 56, the SCA stated as follows:

⁴⁷ In *Business Partners Limited v Montache Villas (Pty) Ltd* (62454/2021) [2023] ZAGPPHC 1147 (6 September 2023) para 46, it was held that the retrospective effect of s 348 is one of the reasons why the default position in this type of application is a final, as opposed to a provisional, winding up order.

⁴⁸ *Panamo* paras 28-29.

⁴⁹ *Diener N.O. v Minister of Justice* (926/2016) [2017] ZASCA 180 (1 December 2017). The SCA judgment was confirmed by the Constitutional Court in *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).

⁵⁰ See para 15.

“[54] Thirdly, irrespective of whether the 1973 Act or the 2008 Act applied to the liquidation of J D Bester, the effective date of the liquidation would be the same. In terms of item 9 of Schedule 5 of the 2008 Act, despite the repeal of the 1973 Act, chapter XIV of that Act continued to apply to the ‘winding-up and liquidation of companies under this Act, as if that Act had not been repealed’. This is made subject, inter alia, to item 9(2) which provides that ‘[d]espite subitem (1), sections 343, 344, 346 and 348 to 353 do not apply to the winding-up of a solvent company. . .’. The effect of items 9(1) and 9(2) is that the relevant provisions of the 1973 Act are preserved and apply to the winding-up of commercially insolvent companies, while the 2008 Act applies directly to the winding-up of commercially solvent companies.

[55] In all likelihood, [the company] was commercially insolvent, so the 1973 Act applied. If this is so, s 348 of that Act states that a winding-up of a company ‘shall be deemed to commence at the time of the presentation to the Court of the application for the winding-up’. If [the company] was commercially solvent, which seems unlikely, the 2008 Act applied. In these circumstances, s 81(4)(a) provides that a winding-up of a company commences when ‘an application has been made to the court in terms of subsection 1(a) or (b)’.

[56] In either event, the effective date of the liquidation is 1 August 2012, the day, according to the bill of costs of Cawood Attorneys, that the liquidation application was filed.”

[56] There is no reason why the same logic should not apply in this case. Merchant cannot escape the consequences of s 348 by appealing to provisions of the 2008 Act as opposed to the 1973 Act. In either event, as *Diener* indicates, the consequences of the deeming provision apply.

[57] For all the reasons discussed above, the argument that s 348, read with s 341(2) does not find application to this case is not sustainable. Neither is the argument that, if those provisions find application, the effect of the winding up order should be with effect from the granting of the order. There no justification shown for such a departure in this case.

E. THE COUNTER-APPLICATION

[58] Next is a consideration of Merchant's plea that, if s 348 and s 341(2) are found to be applicable, the Court should exercise its discretion to validate the payments in terms of s 341(2) of the 1973 Act. That is, save for the last payment of R360 000.00 made on 17 June 2022 after JPK had already been placed under winding up by the Court, which it has tendered to pay.

[59] The Court has a wide discretion in this regard.⁵¹ The aim of the remedy in the proviso is to cater for any undue hardship that may be incurred, in this case by Merchant, if the disposition is rendered void by the operation of section 341(2).⁵²

[60] Some guidelines have been developed by our courts⁵³ in exercising the discretion granted in section 341(2), although it has also been stated that it is near impossible to catalogue exhaustively all the relevant factors. As the SCA stated in *Pride Milling*, what the Court should keep at the forefront of its mind is –

“that the legislature has ordained that all dispositions by a company of its property whilst it is being wound up are void. But at the same time a court must be alive to the fact that in an appropriate case it may order otherwise. And, I daresay, that when sanctioning a departure from the statutorily ordained default position, ie voidness of the disposition, a court must guard against a result that would undermine the underlying purpose of the provision.”⁵⁴

[61] Chief amongst Merchant's arguments in this regard is its assertion that its position in relation to JPK was that of a post-commencement financier in terms of s 135 of the 2008 Companies Act, because it assisted JPK by agreeing, on several occasions, to extend the repayment period of the loan agreement and to accept reduced instalments, consisting of interest only, whilst JPK was in business rescue, thereby assisting JPK with its cash flow, and also by having advanced a further R700 000.00 to JPK during March 2022 whilst it was in business rescue.

⁵¹ Ponnann JA in *Mazars Recovery* para [28].

⁵² Ponnann JA in *Mazars Recovery* paras [28] and [30].

⁵³ *Lane N.O v Olivier Transport* referred to with approval by the Supreme Court of Appeal in *Pride Milling*.

⁵⁴ *Pride Milling* para [25].

[62] According to Merchant, the loan was renewed annually. It explains that it reached agreement with Klopper to not call up the capital of the loan and to only accept payment of interest only for the period of business rescue until the final order of winding up. It states that the arrangement was manifestly to the benefit of JPK and the viability of its business and thus to the benefit of its creditors as a whole.

[63] The relevant provision, s 135(2) provides as follows:

“During its business rescue proceedings, the company may obtain financing ..., 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).”

[64] It is explained in *Henochsberg*⁵⁵ that post-commencement finance refers to funding that is made available to a company after the commencement of the business rescue proceedings for the purpose of enabling the company to continue trading. That is clearly not the case here.

[65] The loan agreement was concluded on 26 October 2016, before the company was placed in business rescue, and in terms thereof Merchant lent to JPK an amount of R15 million, which was repayable within 18 months, with interest payable monthly in advance on the first day of each month. The funds provided in terms of the loan facility were advanced prior to the resolution in terms of section 129 to place JPK under supervision and business rescue. They constituted pre-commencement financing.

[66] It was rather the combined decisions to extend the loan facility, amend the repayment terms, and to register additional notarial bonds over JPK assets to further secure Merchant’s claims that were made after commencement of business rescue. The effect of these arrangements was the servicing of pre-commencement debt by

⁵⁵ Volume 1 526(27) [issue 34].

way of payment of interest, in preference and to the prejudice of other creditors. Far from doing JPK a favour by not insisting on the repayment of the full capital amount, the legal position in terms of s 133, is that Merchant would not have been able to enforce repayment of the debt by virtue of the statutory moratorium in s 133.

[67] Clearly, these subsequent arrangements, which were made after JPK was placed under business rescue had the effect of undermining the essence of *concursum creditorum*. They also had the opposite effect of the objective of the business rescue process set out in section 7(k) of the 2008 Act, which is the balancing of rights of all affected persons, including creditors, employees, and shareholders above other creditors.⁵⁶

[68] I am accordingly not satisfied that the arrangement constituted post-commencement finance. Apart from the fact that JPK's indebtedness to Merchant stands in the statutorily created proverbial queue created by the *concursum creditorum* provisions, I have also not found that there is any undue hardship that it is able to point to.

[69] Another argument raised by Merchant is that, in advancing the extensions of the loan, it was acting in good faith with a company that was under business rescue under the direction of Klopper, the business rescue practitioner, though it concedes it was aware of the launch of Absa's application. In *Gainsford N.O and Others v Tanzer Transport (Pty) Ltd, In re; Gainsford N.O and Others v Tanzer Transport (Pty) Limited* the Supreme Court of Appeal rejected a similar argument, namely that the disposition should be declared valid because it was made in good faith and in the ordinary course of business. The SCA stated as follows:

'... The court will only order otherwise in terms of this section in limited circumstances. To have the defence proffered by Tanzer upheld in general terms would have the effect of avoiding the objects of the Act in that it would undoubtedly prefer one creditor above another.'

⁵⁶ *Diener N.O. v Minister of Justice and Correctional Services and Others* [2018] ZACC 48 para 54. *Panamo Properties* above n 21 at para 1; *Cloete Murray N.O. v Firststrand Bank Ltd t/a Wesbank* [2015] ZASCA 39; 2015 (3) SA 438 (SCA) at para 12; *Oakdene Square Properties (Pty) Ltd v Farm Bothasfontein (Kyalami) (Pty) Ltd* [2013] ZASCA 68; 2013 (4) SA 539 (SCA) at para 23.

[70] In any event, the good faith argument here is overshadowed by the fact that Merchant was aware of the court proceedings launched by Absa, and it participated therein. It has not been suggested that it was not aware of the consequences of s 341(2) and s 348 when it continued to make the special arrangements with JPK beyond the date of presentation of that application, and to the exclusion of the other creditors. In this regard, Merchant emphasises that the application was merely for discontinuing the business rescue proceedings or conversion thereof, not for winding up. I have already found this argument to be unpersuasive and contrived.

[71] Merchant also claims that the payments were made and received in the ordinary course of the conduct of JPK's business operations. It has been stated⁵⁷ that, although a disposition made in the *bona fide* carrying on of the company's operations in the ordinary course will ordinarily be validated, a Court will also ordinarily refuse to validate it where it was made with the object of securing an advantage to a particular creditor in the winding-up which otherwise it would not have enjoyed or with the intention of giving a particular creditor a preference.

[72] Professor M S Blackman⁵⁸ explains it thus:

'The central issue is whether the payments were made so as to allow the company to carry on business for the ultimate benefit of the creditors. The element of benefit to the company will usually be satisfied if the transaction relates to the need to continue business and earn income or save loss during the pendency of the application.

This will usually involve a counter-performance from the recipient after the date of the commencement of the liquidation. Thus, usually, if the payment is made honestly and in the ordinary course of business for the benefit of the company for goods or services supplied to the company after the commencement of the liquidation, a validation order will generally be made on the grounds that the delivery of goods or performance of the services increased the assets of the company. . . Even if no benefit actually accrued in the sense that the company's undertaking or assets were built up by the attacked transaction, the payments may still be validated if they were

⁵⁷ P M Meskin et al *Henochsberg on the Companies Act 61 of 1973* vol 1 5ed (1994) at 680.

⁵⁸ M S Blackman 4(3) *Lawsa* 2ed para 125.

made in good faith for the benefit of the company. In the case where some form of commercial assessment is required, this will not involve an examination of minute detail such as the necessity or otherwise to make particular telephone calls; nor will it involve any element of reasoning by hindsight in an endeavour to determine whether the transactions provided actual benefit to the creditors. But at the very least the court should consider whether: (a) the company was carrying on business; (b) the continuation of the business might be considered to be in the best interests of the creditors; and (c) the provision of the services by the appellant (in this case the recipient of the payments) appeared, at the time of the transactions, to be necessary or desirable for the continuation of business operations. Knowledge at the time of the transaction by anyone of the parties that an application for the winding-up has been presented and that a winding-up order may be made is not fatal to the success of an application for validation of a transaction otherwise rendered void by the section.⁵⁹

[73] There is a dispute regarding the exact nature of the ordinary business of JPK. There are allegations, though disputed, its business involved the unlawful activity of smelting Krugerrands and then levying VAT thereon. It is not necessary to decide this issue because of another related dispute, which loomed large during the proceedings, regarding Merchant's allegation that JPK was trading profitably.

[74] It was contended by Merchant that JPK's bank statements reflect that it was trading profitably during business rescue and was conducting business as usual, during the course of which a large number of its creditors, over and above Merchant, were being paid. In support of this argument, Merchant attached bank statements of two FNB bank accounts, which were said to be the account statements of JPK. The bank statements were, in turn, analysed by a Ms Griffiths whose affidavit was confirmed by a confirmatory affidavit of Klopper.

[75] Based on these bank statements Merchant argues that between February 2017 and April 2022, JPK's total income amounted to R11 559 301 945.70 (over 11 and a half billion rand), whereas its total expenses for the same period amounted to only R 1 268 750 446.77 (just under one point three billion rand), translating to nett

⁵⁹ 4(3) *Lawsa* 2ed para 125.

earnings of R 10 290 551 498.93 (approximately ten point three billion rand). According to Merchant, the payments made to it, totalling R 22 218 067.10, comprised only 0.197% of JPK's total income and only 1.79% of its total expenditure for the relevant period.

[76] It was in relation to the disputed issue of whether JPK has continued to trade profitably that the applicants applied to strike out paragraphs 14, 15.1, 15.2, 15.3 and 15.4 of Merchant's replying affidavit, and the accompanying confirmatory affidavits of Griffiths and Klopper, on the basis that they constitute hearsay evidence and impermissible opinion evidence which is uncorroborated.

[77] Ms Griffiths, who identifies herself as "*the Senior Financial Manager of a company specialising in bookkeeping, tax and financial interpretation*", states in her affidavit supporting the replying affidavit that she created a company profile in an accounting software programme called QuickBooks, and captured the bank account statements according to the description of the entries mentioned in them and from that, prepared summaries. The applicants complain that Ms Griffiths has not qualified herself as an expert, nor has she filed a report setting out the facts on which her opinion is based.

[78] There was also a dispute regarding the bank statements used in support of Merchant's arguments. Merchant explains that the statements of the first bank account were obtained from Klopper on 30 September 2024. As regards the second set of bank statements, which are for the period 31 January 2017 to 24 October 2022, Merchant states they were annexed by the applicants to their replying affidavit, although it is not disputed that the applicants did not give the nature of the evidence regarding the statements that Merchant has extracted out of them, and in fact did not give any direct evidence in relation to their detail. Merchant explains that Ms Griffiths was placed in possession of the bank statements for both accounts and undertook her analysis of them.

[79] Given the disputed nature and significance of all this evidence which was only advanced in reply in the counter-application, it is understandable that the applicants have applied to strike it. As the applicants point out, if the evidence of Griffiths and

Klopper is to be believed, it would indicate there was no need for business rescue and there would be no reason for the creditors to have their claims reduced by way of a business rescue plan; or for a winding up order.

[80] It is conceded in Merchant's supplementary heads of argument that Ms Griffiths effectively gives opinion evidence without identifying her qualification to do so. However, it is argued there that this might go to the weight to be attached to her evidence. Merchant was also not able to refute the charge that Ms Griffiths also fails to indicate the facts on which her opinion is based, or on what basis she relies thereon. The applicants also correctly state that the descriptions in the entries are not supported by any evidence of the persons who made them, and insofar as they purport to give an indication of the nature of the transactions, they themselves constitute hearsay.

[81] The applicants further point out that the information set out in Griffiths' affidavit is in any event unreliable because it is directly contradicted by the content of the second proposed business rescue plan filed by Merchant, which shows: (a) a retained income of only R8,432,000.00; (b) a nett profit before tax of only R700,000.00 per month; and (c) a shortfall on assets over liabilities of some R55,000,000.00. According to the applicants, if the summaries put forward are to be believed, there were nett earnings of R10,2 billion during the period February 2017 to 2022, including payments made including an amount of R67,000,000.00 apparently owed to itself.

[82] This evidence is in direct contradiction of the findings of the Court on 19 April 2022, which held that JPK was unable to pay its debts. It goes to the heart of the liquidation order, and raises more questions than answers as it contains unexplained inconsistencies. To admit it at this late stage would not only be prejudicial to the applicants, but would also be against the proper and efficient administration of justice because of the fact that the Court has effectively adjudicated on these issues. The evidence is furthermore unreliable and there no explanation for why it is produced at such a late stage. In fact, the replying affidavit itself was delivered late.

[83] There are no books and records produced to enable either Griffiths or Klopper to conclude that the allegations they make fall within their personal knowledge. They fail to address the apparent conflict between the latest business rescue plan and their findings. Insofar as they claim that JPK was in a position to, and in fact did, pay pre-commencement creditors other than Merchant, neither of them identifies a single one such creditor, thus adding to the mysteriousness, if not obfuscation and vagueness of their claims.

[84] The offending paragraphs therefore constitute inadmissible hearsay, and I am not persuaded that it is in the interests of justice to admit them, whether in terms of the common law or in terms of section 3(1) of the Law of Evidence Amendment Act, No. 45 of 1988. They also constitute inadmissible opinion evidence. The offending paragraphs therefore fall to be struck. As a result, it has not been established that JPK was trading profitably during the period in question.

[85] For all the above reasons, I am of the considered view that validating the payments in this case would mean that Merchant would be left to enjoy the benefit of its claim being settled in full, whilst the other creditors would have to be content with whatever residue might still be available. That would evidently not be just and fair to all affected parties. It is accordingly not in the interests of justice to grant the relief sought in the counter-application.

[86] As regards the total amount repayable, Merchant has tendered to repay the last payment of R360 000,00 which it admits receiving on 17 June 2022, after the date of the Court Order placing JPK into winding-up.

[87] There was a dispute regarding two other payments, which are reflected as having been paid on 20 and 22 April 2022 in the schedule of payments that is part of the record, amounting to R720 000. Merchant denies receiving those amounts, stating that the debit orders were returned unpaid. At the hearing, the applicants conceded that, on the application of Plascon-Evans, those two amounts stand to be set-off from the overall amounts claimed. As a result, the total amount to be awarded is minus R720 000, amounting to R 22, 452, 067.10.

[88] There is a further amount of R700 000, which Merchant claims it advanced as post-commencement finance on March 2022, but details are lacking regarding the repayment terms. In any event, should this amount qualify as post-commencement finance, it is open to Merchant to prove a claim against the estate of JPK. I have found no basis to set off the amount against the sum claimed by the applicants.

[89] There is no reason why costs should not follow the result.

F. ORDER

[90] In all these circumstances, the following order is granted:

(a) The payments made by JP Kruger Rand Deals (Pty) Ltd (in liquidation) (“JPK”) during the period 16 March 2017 to 17 June 2022 in the total amount of R22, 452, 067.10 are declared void in terms of Section 341 (2) of the Companies Act 61 of 1973.

(b) The first respondent is ordered to pay to the applicants, in their capacity as liquidators of JPK, the sum of R22,452,067.10.

(c) The first respondent is pay to the applicants interest on the sum of R22,452,067.10 at the rate of 11.75% per annum from 16 April 2024 to date of payment.

(d) The counter-application is dismissed.

(e) Paragraphs 14, 15.1, 15.2, 15.3 and 15.4 of the first respondent’s replying affidavit are struck, and paragraphs 5 and 6 of Ms Griffiths’ confirmatory affidavit

(f) The costs of the main application, counter-application and striking out applications are to be paid by the first respondent on scale C, including the costs of senior counsel.

N. MANGCU-LOCKWOOD
Judge of the High Court

APPEARANCES

For the applicants : Adv M. Leathern SC

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