

**REPUBLIC OF SOUTH AFRICA**



**IN THE HIGH COURT OF SOUTH AFRICA  
GAUTENG DIVISION, JOHANNESBURG**

**CASE NO: 14639/2019**

**DELETE WHICHEVER IS NOT APPLICABLE**

1.REPORTABLE: NO

2.OF INTEREST TO OTHER JUDGES: NO

3.REVISED:

31 December 2024

**Judge Dippenaar**

In the matter between:

**GAVIN RYAN KLEIN N.O.**

First Plaintiff

**TSHEPO MEDUPE N.O.**

Second Plaintiff

**SHARADANAND PURMANUND MAHARAJ N.O.**

Third Plaintiff

and

**SASFIN BANK LIMITED**

First Defendant

**SASFIN PRIVATE EQUITY HOLDINGS (PTY) LIMITED**

Second Defendant

**JOE PEREIRA**

Third Defendant

**JADE CORPORATE CLOTHING CONCEPTS (PTY) LIMITED**  
**(“IN LIQUIDATION”)**

Fourth Defendant

**MINISTER OF JUSTICE AND CONSTITUTIONAL**  
**DEVELOPMENT**

Fifth Defendant

**ANDREW ROBINSON**

Third Party

## **JUDGMENT**

**Delivered:** This judgment was handed down electronically by circulation to the parties’ legal representatives by e-mail and uploading onto the electronic platform. The date and time for hand-down is deemed to be 10h00 on the 31st of December 2024.

**Summary:** Trial – voidable disposition under s 31 as read with s 32 of Insolvency Act - principles restated– general principles pertaining to evaluation of witnesses’ evidence restated - jurisdictional requirements of s 31 not met - principles pertaining to expert evidence restated – evidence of plaintiffs’ expert witnesses deficient - no cogent quantification of plaintiffs’ claim – claim for contribution against third party – lack of locus standi.

### **DIPPENAAR J:**

#### *Introduction*

[1] This action concerns an alleged collusive transaction under s 31 of the Insolvency Act<sup>1</sup> (“the Act”), pertaining to the estate of M1 Latex Products (Pty) Ltd (“Latex”) <sup>2</sup>. Latex was also known by its trading name, “Kit”. Latex was a clothing company which specialised in the supply and distribution of uniforms and protective clothing in the private security, industrial work wear and corporate clothing markets.

<sup>1</sup> 24 of 1936.

<sup>2</sup> appointed provisionally on 11 January 2017 and finally on 21 April 2017

[2] The plaintiffs are the joint liquidators of Latex. The first defendant is Sasfin Bank Ltd ('Sasfin'), a creditor of Latex under a consignment agreement. Security was provided by Latex *inter alia* in terms of a general notarial bond ("GNB") registered over its assets, the perfection of which is central to the disputes between the parties. The GNB entitled Sasfin to take possession of Latex's stock, fixed assets and trademarks.

[3] The second defendant is Sasfin Private Equity Holdings (Pty) Ltd ('SPE'). SPE<sup>3</sup> was an investor in Latex, holding a 28.5% shareholding. It was also a creditor of Latex under its shareholders' loan account, similarly secured by the GNB in terms of a series of interlinked agreements. Both Sasfin and SPE are wholly owned subsidiaries of Sasfin Holdings Limited. Where convenient, Sasfin and SPE will collectively be referred to as 'the Sasfin defendants'.

[4] The third defendant is Mr Pereira, the founder of Latex and a shareholder and director. The third party is Mr Robinson, a turnaround specialist who was appointed as Chief Executive Officer of Latex on 1 June 2015 at the behest of SPE to help restructure its business.

[5] The fourth defendant is Jade Corporate Clothing Concepts (Pty) Ltd (in liquidation) ('Jade'), represented by its joint liquidators. Jade was the purchaser of Latex's assets, pursuant to perfection of the GNB. Mr Pereira, Mr Robinson and SPE were involved in Jade. No relief was sought against Jade, save in the event of opposition. Jade's business rescue proceedings commenced on 13 May 2016. Jade was placed under compulsory winding up by order of court during October 2016 on the grounds that it was unable to pay its debts. Jade did not actively participate in the trial proceedings.

[6] The fifth defendant is the Minister of Justice and Constitutional Development ("the Minister"). He was joined as a defendant<sup>4</sup> at the instance of the Sasfin defendants in

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<sup>3</sup> Sasfin Private Equity Investment Holdings (Pty) Ltd.

<sup>4</sup> By way of application dated 6 January 2021.

terms of a consent order granted on 15 September 2021, pursuant to a constitutional challenge raised by them under r 16A.

[7] The action was designated as a commercial court case under the revised commercial court practice directives <sup>5</sup> and proceeded on that basis. The parties had provided detailed witness statements and, in certain instances, supplementary witness statements containing the evidence to be presented at trial. Attached to those statements were the relevant documents relied on. The parties agreed that such statements would constitute the respective witnesses' evidence in chief. In evidence, each of the witnesses confirmed the correctness of his witness statement and confirmed the documentary evidence attached thereto. The trial consisted mainly of the cross examination and re-examination of the various witnesses. At the trial, the plaintiffs produced a list of exhibits pertaining to the various bundles of documents which stands entered as such into the record.

### *The pleading and issues*

[8] For context, it is necessary to deal in some detail with the cases made out by the respective parties in their pleadings. There are various iterations of the pleadings. The plaintiffs amended their statement of claim some six times and the quantum of the claim vacillated. The nub of the plaintiffs' case at the time of the hearing, was pleaded as follows as constituting the collusive transaction <sup>6</sup>:

'23. *From January 2016 to July 2016, the Company* <sup>7</sup>, *Pereira, Sasfin, Robinson, and SPE colluded to affect the disposition of the Company's rights of possession in the Company's stock, fixed assets and trademarks and the transfer of possession of the Company's stock, fixed assets and trademarks to Sasfin and to dispose of the Company's rights under the general notarial bond to have Sasfin realise such*

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<sup>5</sup> Revised with effect from 1 June 2022, chapters 4 to 6.

<sup>6</sup> In para 23.

<sup>7</sup> Referring to Latex.

*stock, fixed assets and trademarks at fair value and to account and to pay over to the company any excess over the indebtedness of the Company to Sasfin, in order to advance the interests of Pereira, Sasfin and SPE and with the intention to defraud the other creditors of the Company.*

*(Hereinafter referred to as the collusive transaction)”.*

*24. The Company, Pereira, Robinson, Sasfin and SPE colluded to take the following steps to achieve and implement the collusive transaction:*

*24.1.1 the Company, (with the collusion of Pereira, Robinson, Sasfin and SPE) intentionally engineered a breach of the terms of the consignment agreement in order to give Sasfin purported grounds to perfect its security over the Company’s movable assets, more specifically its stock, fixed assets and trademarks;*

*24.1.2 Sasfin, SPE, Robinson, Pereira and the Company colluded in fraudulently obtaining the perfection order as more fully set out below;*

*24.2 The Company (with the collusion of Pereira, Robinson, Sasfin and SPE) gave up its rights under the general notarial bond to have Sasfin realise such stock, fixed assets and trademarks at fair market value and to account to and pay over to the Company any excess over the indebtedness of the Company to Sasfin as follows:*

*24.2.1 The Company, Pereira, Robinson Sasfin and SPE colluded to have the Company’s stock, fixed assets and trademarks valued at below their fair market value but at an amount sufficient to discharge only the Company’s liabilities to Sasfin and SPE. This undervaluing is dealt with more fully below;*

*24.2.2 The Company, Pereira, Robinson Sasfin and SPE colluded to procure that the Company’s stock, fixed assets and trademarks were sold and transferred at this contrived value to Jade, and that the proceeds of the sale were sufficient only and were used only to discharge the Company’s liabilities to Sasfin and SPE, including liabilities not secured by the general notarial bond.’<sup>8</sup>*

[9] They pleaded that Sasfin was represented by Mr Roland Sassoon, Mr Howard Brown and Mr Andries Vorster. SPE was represented by Mr Neil Eppel, Mr Shanin Rosen and Mr Roland Sassoon. Under separate headings, the plaintiffs pleaded the application perfecting the GNB, the deliberate undervaluing of Latex’s assets and the calculation of their claim under s 31. They further pleaded a summary of the evidence they intended to

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<sup>8</sup> In para 27, the plaintiffs pleaded the evidence of the collusive conduct which would be led.

lead. No express reference was made to a meeting on 2 March 2016, which formed the lynchpin of the plaintiffs' case at trial.

[10] At trial, the plaintiffs sought orders<sup>9</sup>:

*'[46.1] Setting aside the collusive transaction in terms of s 31 of the Insolvency Act, 24 of 1936 (the Insolvency Act); alternatively*

*[46.2] Setting aside the order granted by this Honourable Court on 26 April 2016 under case No: 2016/11471 (the perfection order) and setting aside the collusive transaction under s31 of the Insolvency Act,*

*[46.3] Payment to the plaintiff by Sasfin of an amount falling in the range of R110 046 341 to R56 761 528, being the value of the rights to property of the Company disposed of under the collusive transaction.*

*46.[4] Alternatively to paragraph 46.3*

*Payment to the plaintiffs by Sasfin, SPE and Pereira jointly and severally, the one paying the others to be absolved of an amount falling in the range from R91 345 460 to R 33 260 647, being the loss caused to the Company by the collusive transaction;*

*[46.5] Ordering Sasfin to make payment of a penalty of:*

*5.1 an amount falling in the range from R91 345 460 to R33 260 647, being the loss caused to the Company by the collusive transaction;*

*5.2 R14 303 077*

*[46.6] Ordering SPE to make payment of a penalty of R4 093 096;*

*[46.7] Ordering the first, second and/or third defendants to forfeit any claims that they may have against the Company in liquidation*

*[46.8] Costs on an attorney-client scale.'*

[11] The Sasfin defendants raised two special pleas. The first, a special plea of prescription, which was not persisted with in argument. The second, a challenge to the constitutionality of the forfeiture provision in s 31 (2) of the Act on the basis that it permits and requires the arbitrary deprivation of property<sup>10</sup>. On the merits, the Sasfin defendants

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<sup>9</sup> During the trial, the plaintiffs amended the figures reflected in paragraphs 46.3 and 46.4 on an uncontested basis.

<sup>10</sup> In the second special plea, the Sasfin defendants sought the stay of the action pending the outcome of an application to declare the section unconstitutional and invalid. Such an application was duly launched. During case management, the parties agreed that a decision was yet to be made whether to separate such issue under R33(4). No such application was however ever brought. Other than its initial statement of defence, no further pleadings were delivered by the Minister and no further steps were taken in respect of the application. The Minister abided the court's decision and presented no argument on the issue.

disputed that there was any collusive transaction or that they were liable under s 31(2) of the Act.

[12] In sum, their pleaded case was that neither Latex nor Jade was a going concern or commercially solvent at the time the GNB was perfected. As an alternative to liquidation, a solution was devised whereby SPE would invest in Jade, Jade would purchase Latex's assets and Sasfin would provide a facility to Jade and give it the liquidity necessary to continue trading. Sasfin was entitled to pursue the perfection of the GNB given that its position was imperiled by Latex's financial position and did so. It was disputed that the perfection of the GNB constituted a fraud on Latex and its creditors. As the sale of Latex's assets was pursuant to a court order, it could not be a disposition under s 2 of the Act. Jade was placed into business rescue during mid May 2016 in accordance with the revised Jade transaction. Latex and Jade were placed in final liquidation during October 2016.

[13] The plaintiffs did not seek any relief against Mr Robinson. The Sasfin defendants had earlier raised an exception to his non-joinder, which was dismissed. Thereafter, the Sasfin defendants joined Mr Robinson as a third party under r 13. In addition, they raised a claim under s162(5) of the Companies Act 2008, to declare Mr Robinson a delinquent director. This was met by a plea of prescription by Mr Robinson. Mr Robinson pleaded that he took various *bona fide* steps to mitigate the impact of the collusive transaction, including the impact on creditors of Latex, which the court should take into account when determining his share, if any, of the loss sustained by Latex as well as any penalties to be paid. On 20 May 2024, before the commencement of oral argument, the Sasfin defendants formally withdrew the delinquency claim by notice, without any tender as to costs.

[14] Mr Pereira disputed that he was party to any collusive transaction as pleaded by the plaintiffs and that he in any way acted unlawfully, fraudulently or wrongfully. He pleaded that all his actions were performed at the insistence of Sasfin and Mr Robinson. At trial, Mr Pereira was self-represented. He led no evidence at trial, but presented heads

of argument at the hearing. Insofar as his heads of argument contained various statements of fact, the plaintiffs objected thereto. Given that Mr Pereira did not testify, the purported statements of fact contained in his heads of argument must be ignored.

[15] Mr Perreira delivered a third party notice joining Mr Robinson under r 13 on a similar basis as the Sasfin defendants. He formally withdrew that notice on 11 April 2024. Mr Pereira and Mr Robinson agreed that each would be liable for his own costs in relation to those third party proceedings.

### *The issues*

[16] In broad terms, the issues that require determination are:

[a] whether the plaintiffs established the collusive transaction contended for and met the requirements of s 31 of the Act against the Sasfin defendants and Mr Pereira;

[b] If the collusive transaction was established, the determination of: (i) the loss suffered by Latex's estate, (ii) what amount constitutes the benefit; and (iii) should forfeiture be ordered;

[c] Related to the forfeiture issue, whether the Sasfin defendants' challenge to the constitutionality of s 31(2) should be upheld and what order should be granted in the circumstances;

[d] If the plaintiffs' claim was successful, whether the Sasfin defendants were entitled to a contribution from Mr Robinson under r 13. If so, what such contribution should be; and

[e] Costs, including various reserved costs orders.



### *The witnesses*

[17] The plaintiffs presented the evidence of nine witnesses. Their primary witness was Mr Robinson, the ‘whistleblower’. Evidence was further presented by Mr Shanin Rosen, an employee of SPE, Mr Keith Hill and Mr Myron Katz, the other shareholders of Latex, and Messrs Willem Bruwer and Tonie Fourie, employees of Latex who were involved with Latex’s stock.

[18] As expert witnesses, the plaintiff called Professor Harvey Wainer regarding accounting issues and a non-distributable reserve (“NDR”) created consequent upon the transfer of Latex’s assets to Jade. Mr Michael Salomon testified regarding the valuation of Latex’ stock and assets. Mr Nick Pemberton, an attorney, testified to the valuation of Latex’s trademarks and intellectual property.<sup>11</sup>

[19] Despite delivering witness statements for various witnesses, including Messrs Neil Eppel, Andries Vorster and Roland Sassoon, none of these witnesses were called to testify. Expert witness summaries were delivered for Mr Schalk Strydom, Mr Jonathan Becker and Mr Eugene Honey. The Sasfin defendants elected to call only Mr Schalk Strydom, their accounting expert. Mr Honey, who valued Latex’s trademarks was not called as a witness, despite being present at the hearing when Mr Pemberton, the plaintiffs’ commensurate expert testified.

[20] Mr Pereira did not testify and closed his case. Mr Robinson had already testified extensively on behalf of the plaintiffs. He did not present any additional evidence and no other witnesses were called on his behalf.

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<sup>11</sup> Although a witness statement was prepared for another expert witness, Mr Doubel, he was not called to testify and such statement is of no moment.

[21] *Stellenbosch Farmers' Winery*<sup>12</sup> sets out the principles pertaining to the evaluation of evidence, and it is unnecessary to repeat them. Although in the present instance, there is little countervailing evidence, the principles apply to the evaluation of a witness's evidence.

[22] Oral testimony should not be considered in isolation. In the assessment of evidence in commercial disputes, including commercial frauds, the courts have recognised that emphasis should generally be placed on the documentary evidence, rather than on the oral testimony of witnesses. In *Armagas*<sup>13</sup>, Lord Justice Goff, explained it thus:

*'Speaking from my own experience, I have found it essential in cases of fraud, when considering the credibility of witnesses, always to test their veracity by reference to the objective facts proved independently of their testimony, in particular by reference to the documents in the case, and also to pay particular regard to their motives and to the overall probabilities. It is frequently very difficult to tell whether a witness is telling the truth or not; and where there is a conflict of evidence such as there was in the present case, reference to the objective facts and documents, to the witnesses; motives, and to the overall probabilities, can be of very great assistance to a judge in ascertaining the truth, I have been driven to the conclusion that the judge did not pay sufficient regard to these matters in making his findings of fact in the present case.'*

[23] Before dealing with the evidence, it is apposite to comment on the evidence of Mr Robinson. Two issues arose: The first; whether Mr Robinson's evidence should be accepted or rejected. The Sasfin defendants submitted that his evidence should be rejected as he was a protean witness whose evidence was patently false. The plaintiffs submitted the contrary and contended that his evidence stood unchallenged, given that the Sasfin defendants did not present evidence from any of their factual witnesses. The second; whether any adverse inference should be drawn against the Sasfin defendants'

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<sup>12</sup> *Stellenbosch Farmers' Winery Group Ltd and Another v Martell et Cie and Others* 2003 (1) SA 11 (SCA) at para [5].

<sup>13</sup> *Armagas Limited v Mundogas SA* 1984 WL 281667 at 33. See also *Edward Christopher Wetten (As liquidator of Mumtaz Properties Limited) v Saeed Ahmed, Shafiq Ahmed, Mumtaz Ahmed, Munir Ahmed, Zafar Ahmed* [2011] EWCA Civ 610, 2011 WL 1151888 paras 14 -16.

failure to call any of their factual witnesses. The latter issue will be dealt with where appropriate.

[24] I agree with the Sasfin defendants that the evidence of Mr Robinson was unsatisfactory for various reasons. First, his allegations of fraud and collusion were raised at a very late stage, well after he had testified at the s 417 enquiry and actively assisted the liquidators in the Katz Hill application and the preparation of the plaintiffs' pleaded case.

[25] Second, Mr Robinson made numerous inconsistent statements on core issues in the litigation, notably his failure to mention the 2 March 2016 meeting anywhere in his previous evidence in the s 417 enquiry. That meeting formed the lynchpin of the plaintiffs' case at trial. It was not referred to in either the Katz Hill application or the plaintiffs' amended statement of claim. That version first emerged in his witness statement prepared for the present proceedings. When confronted with this as being a recent fabrication in cross examination, his response was '*I do not have a comment*'. That issue was not clarified in re-examination. It was thus justifiable for the Sasfin defendants to criticise his evidence because of a variance between the pleaded case and his witness evidence.<sup>14</sup>

[26] Third, Mr Robinson was compelled to admit his dishonesty on various occasions during cross examination. He was afforded the opportunity to deal with the averment in cross examination that his credibility would be impugned and the various discrepancies in his evidence were put to him. When confronted with a portion of his witness statement dealing with his realisation in February 2016 that the Latex assets would be sold at a level sufficient to cover the Sasfin debt and no more, he requested an adjournment to consider the issue. When confronted with his mutating version regarding the events of February

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<sup>14</sup> Seedat v Tuckers Shoe Co 1952 (3) SA 513 TPD.

2016, Mr Robinson conceded that his witness statement was a dishonest portrayal of highly relevant facts.

[27] In cross examination, Mr Robinson conceded that on his own version, he was a fraudster who had deliberately and intentionally set out to defraud Latex's creditors. He was thereafter prepared to carry on the dishonesty by telling creditors there was no scam going on. He further conceded that he was not honest in his interactions with the Latex creditors and that his email of 26 May 2016 was dishonest.

[28] Fourth, it was conceded by Mr Robinson that notwithstanding his dishonesty in dealing with the Latex creditors, he was nonetheless prepared to participate in the benefit of the fraud by taking a share in the litigation in terms of funding agreements concluded with an outside party, Taurus Capital. He only exited from that arrangement when it was pointed out that he had a conflict of interest. Mr Robinson's failure to disclose his involvement in the funding of the present litigation and the fact that he stood to gain financially from it, albeit that he later withdrew from the arrangement, significantly detracts from the independence of his evidence.

[29] Considering all the facts and the relevant principles, Mr Robinson's evidence cannot be accepted at face value and his characterisation as a 'whistleblower' does not erase the difficulties with his evidence. The vacillating and changing nature of Mr Robinson's evidence throughout the history of the litigation and the s 417 enquiry requires that his evidence be measured carefully against the documentary evidence and the probabilities. In my view, Mr Robinson's characterisation of himself as a 'whistleblower' must be regarded with some circumspection, when measured against his conduct. Although the reliability of Mr Robinson's evidence is questionable in various respects, that does not mean that his evidence should be disregarded in totality, as the Sasfin defendants urged me to do. His evidence should be tested against the documentary

evidence, the probabilities and the inferences normally to be drawn from the established facts<sup>15</sup>.

*Relevant background facts resulting in the perfection of the GNB and the events thereafter*

[30] The background facts were not contentious and provide context to the disputes between the parties. As stated, Latex conducted business in the clothing industry. It had three shareholders, Mr Pereira, Mr Hill and Mr Katz. Pursuant to Latex experiencing flat trading conditions, a consignment facility agreement for R12 million was concluded between Latex and Sasfin on 21 May 2015. In terms of the consignment agreement, call options were to be obtained over Messrs Hill and Katz's shares in favour of Mr Robinson and Messrs Pereira and Robinson and SPE respectively. The GNB over Latex's movable assets was *inter alia*, provided as security for the facility during 2014 and 2015 up to an amount of R17 million. An interlink agreement was also concluded in terms of which SPE's shareholder loan to Latex was covered by the GNB.

[31] Mr Robinson became involved with Latex as a turnaround specialist during 2015 at the behest of SPE. Although Latex had a large turnover, it was not making commensurate profits. He began looking for investors in Latex and for potential merger opportunities. He identified an opportunity for Latex to acquire the business of a group of companies referred to as the Delswa Group. During the period September 2015 to January or February 2016 a transaction was pursued for a possible merger of Latex with the Delswa group. Various permutations of the transaction were considered.

[32] The Delswa Group was headed by Delswa (Pty) Ltd, owned by the National Empowerment Fund ('NEF'). Delswa owned two companies: Jaff & Company (Pty) Ltd ('Jaff') which ran a clothing factory and Jade, which operated in the corporate clothing market. The businesses were distressed and insolvent, but a merger with Latex presented

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<sup>15</sup> Income tax case 11547 JDR 0850 (JSpCrt) para 20 relying on ITC 1185, 35 SATC 122.

significant business synergies, such as using Jaff's factory for manufacturing and building Latex's corporate clothing lines on top of Jade's customer base. Delswa and the NEF signed an offer to purchase during October and November 2016. SPE supported the transaction and was, as a shareholder of Latex, in principle prepared to dilute its shareholding in Latex and contribute its pro-rata shareholding of the purchase price for the acquisition. Commercial agreements still had to be structured for the acquisition of the business as the offer to purchase did not stipulate the finer details of the transaction ('the Delswa transaction').

[33] The sale of business was published in the Government Gazette and Jade's Johannesburg operations moved into Latex's Johannesburg premises during December 2015 to January 2016. The transaction however did not come to fruition as Jade's customers would not retain their contracts with Jade if it was no longer owned by the NEF due to BEE requirements. Concerns were also raised that it might require a 75% shareholders' vote, requiring the cooperation of Messrs Hill and Katz.

[34] The transaction was then restructured. Between the end of January and February 2016, it was decided that Jade should be purchased by a consortium comprising of Mr Pereira, Mr Robinson and SPE and that Jade should acquire Latex's business ('the Jade transaction'). Mr Katz and Mr Hill were not involved. It was not disputed that during these discussions it was mooted by Mr Sassoon that the GNB could be used to transfer Latex's business to Jade. The contentious point was whether this was improper.

[35] From the correspondence it appears that discussion points included a possible offer of compromise with Jade's creditors, whether a new s 34 advertisement was required and the potential business rescue and restructure of Latex. There were certain issues surrounding the shareholding of Mr Katz, which was still registered in the name of the Southern Palace group of companies, albeit that the transaction in terms of which Mr Katz's shareholding was purchased had collapsed.

[36] It was initially mooted that Latex's business would be transferred to Jade at fair market value, whereafter the transaction was restructured so that Latex would sell its assets to Jade ('the revised Jade transaction'). It was not disputed that it was recognised that business rescue or a creditors compromise under Chapter 6 of the Companies Act<sup>16</sup> could be utilised to 'force haircuts' on the creditors. It was also contemplated that a merger could be used to improve the position of Mr Perreira and SPE (and also Mr Robinson, who was going to obtain a shareholding in the new Jade) *vis-a-vis* the other shareholders (Messrs Hill and Katz). Both Jaff and Jade were ultimately placed under supervision and business rescue in order to deal with creditors' claims.

[37] On 10 February 2016, an email from Mr Eppel asserted an estimated value of R40 million for the assets of Latex. That email featured prominently in the debate between the parties as to the value of Latex's assets. The idea at the time was that whatever purchase price shareholders paid for shareholding in Jade was to be recycled back to them through the sale of Latex's assets to Jade and a distribution being made to shareholders. At the time, the thinking was that Latex would sell its assets to Jade at fair value. According to Mr Robinson and the correspondence which passed between Mr Rosen and Mr Eppel on 11 February 2016, the parties around that time realised that their plans could result in the liquidation of Latex, which could cause problems for Jade going forward if Latex's creditors were left unhappy.

[38] Ultimately, a proposal was sent to the NEF dated 12 February 2016 which in relevant part provided: '*2.12 The consortium will procure the sale to Jade of Kit's [Latex's] stock, fixed assets and trade names at fair market value. 2.13 the consortium will provide a turnover warranty to the NEF, that the minimum turnover contribution from Kit business to the merged group will be R200m for the financial year ended 2017....*'. Previous iterations had reflected Latex as the seller.

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<sup>16</sup> 71 of 2008.

[39] On 12 February 2016, Mr Vorster addressed a perfection letter to Latex ('the soft perfection letter'). In relevant part it provided:

*'We hereby invoke our rights in terms of the GNB passed by you in our favour and are thus taking immediate possession of and retaining all your movable assets covered by the GNB, in pledge and shall retain same for as long as we may deem fit. Accordingly a representative and/or duly appointed agent of Sasfin Bank Ltd will be taking control over such assets, which are not to be moved without our written consent being obtained. Kindly acknowledge receipt hereof by signing at the foot hereof and returning same to us, together with your latest schedule of all such movables'.*

[40] Mr Pereira, on behalf of Latex, signed the soft perfection letter consenting to the voluntary surrender of its assets on 2 March 2016, pursuant to Mr Sassoon agreeing to him acquiring a larger shareholding in Jade.

[41] On 5 April 2016, Sasfin launched an application to perfect the GNB. The application was initially removed from the roll for 12 April 2016. An order was granted on 26 April 2016. Pursuant thereto, the assets of Latex were attached by Sasfin. In the background the parties were attempting to finalise the Jade transaction.

[42] On 28 April 2016, Mr Robinson advised Messrs Sassoon, Rosen and Eppel that 'the Jade deal is dead' as the NEF refused to give warranties regarding Jade's liabilities. Consequently, on 5 May 2016, Mr Robinson presented his 'standalone survival scenario' to the Sasfin representatives. It was rejected. The Jade transaction however revived after a meeting with the NEF. On 6 May 2016, a sale of assets agreement was concluded between Sasfin and Jade in terms of which Jade acquired the assets of Latex at a price of R18 700 881.

[43] Jade and Jaff were placed into business rescue shortly thereafter on 13 May 2016. The funding previously approved by Sasfin would be put into the business as post commencement funding. Their creditors were to be compromised and their claims paid



and expunged. Latex on the other hand, lost its employees to Jade with effect from 9 May 2016, whereafter all future trading activities took place in Jade.

[44] The creditors of Latex were unhappy about their lack of payment and the perfection of the GNB. Messrs Katz and Hill, started to rally the creditors in what was described as a 'creditors mutiny'. Many of the creditors who were necessary for Jade's business hampered the operation of its business, either by refusing to supply products or by accepting orders and thereafter appropriating payments to settle Latex's debt. The problems were encapsulated by the head of sales in an email dated 19 May 2016 after Latex's creditors were informed of the perfection thus:

*'Our shelves are empty, we don't have core product to sell, our contracted clients have started sourcing elsewhere due to us not being able to honor the stock holding. We are not able to complete outstanding orders and the orders are being cancelled.'*

[45] Jade also experienced difficulties in implementing the trade facilities provided by Sasfin. There were delays in Jade's abilities to access credit and customers started to hemorrhage. At that stage, Mr Sassoon was prepared to accept that the stock acquired from Latex had a value of R40 million for purposes of Sasfin's covenant calculations.

[46] Later during May 2016, Mr Robinson obtained legal representation from an attorney, Mr Strime, after becoming concerned that the various role players were legally exposed. He attempted to salvage some position for the Latex creditors. Mr Strime represented him and the liquidators at a s 417 enquiry held into the affairs of Latex and in an application launched by Messrs Katz and Hill to set aside the perfection of the GNB application during September 2018.

[47] On 24 May 2016, Mr Robinson addressed an email to Mr Sassoon recording in relevant part:

*'M1 Latex lost the heart of the business when Sasfin perfected and I am okay with everything up to that point however I still have a duty to protect the interest on Latex [sic] or as long as I am the CEO even during its dying moments'. Following creditors making contact with Sasfin in the best interests of creditors and to stop the noise in the market I would like to prepare a presentation to creditors to put them at ease that there is no scam going on that is the best I can do for Latex and then under the circumstances and there is no value in Latex that is being hijacked. In time this will be communicated to the liquidator of Latex to try and preempt any concerted action by creditors.'*

[48] The relationship between Mr Robinson and Mr Sassoon further deteriorated on 27 July 2016 when Mr Robinson voiced his complaints regarding Sasfin's lack of funding of Jade. Mr Robinson was also pursuing various measures requiring Jade to pay Latex for services and the like. Ultimately, Mr Robinson was dismissed during August 2016. Pursuant to the fall out between Sasfin and Mr Robinson, the issues with trade creditors and the problems implementing the trade facilities, Jade was liquidated during October 2016. Latex was wound up by order of court on 24 October 2016 on the ground that it was unable to pay its debts.<sup>17</sup> Against this backdrop I turn to the issues.

#### *Collusive dispositions under s 31 of the Insolvency Act*

[49] The provisions of the Act in relevant part provide:

*'31. Collusive dealings before sequestration*

*(1) After the sequestration of a debtor's estate the Court may set aside any transaction entered into by the debtor before the sequestration, whereby he, in collusion with another person, disposed of property belonging to him in a manner which had the effect of prejudicing his creditors or of preferring one of his creditors above another.*

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<sup>17</sup> The application was presented on 14 September 2016, being the effective date of winding up under s348 of the Companies Act 61 of 1973, which remains applicable under Item 9 of Schedule 5 to the Companies Act 71 of 2008

- (2) *Any person who was a party to such collusive disposition shall be liable to make good any loss thereby caused to the insolvent estate in question and shall pay for the benefit of the estate, by way of penalty, such sum as the Court may adjudge, not exceeding the amount by which he would have benefited by such dealing if it had not been set aside; and if he is a creditor he shall also forfeit his claim against the estate.*
- (3) *Such compensation and penalty may be recovered in any action to set aside the transaction in question.*

32. Proceedings to set aside improper disposition

- (3) *When the Court sets aside any disposition of property under any of the said sections, it shall declare the trustee entitled to recover any property alienated under the said disposition or in default of such property the value thereof at the date of the disposition or at the date on which the disposition is set aside, whichever is the higher.'*

[50] It was undisputed that the plaintiffs bore the onus to prove their claim on a balance of probabilities.<sup>18</sup> To satisfy the jurisdictional requirements of s 31, they must prove that: (i) Latex made a disposition of its fixed assets, stock and trademarks ('the assets'); (ii) the disposition was made in collusion with another person (being the collusive parties averred by the plaintiff); and (iii) the disposition had the effect of prejudicing creditors or preferring one above another.<sup>19</sup> These requirements will be considered in light of the evidence in due course.

*Was there a fraudulent collusive scheme to dispose of Latex's assets?*

[51] It is apposite to first refer to certain general principles. Collusion was defined thus in *Finns Trustees*<sup>20</sup>:

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<sup>18</sup> *Bagus Appellant v Estate Moosa Respondent* 1941 AD 62 at 71; *Jackson v Louw* NO 2019 JDR 0015 (ECG) para 72.

<sup>19</sup> *Jackson v Louw* NO and another [2019] 2 All SA 145 (ECG) par 30.

<sup>20</sup> *Finns Trustees v Prior* 1919EDL 133 at 137.

*'Collusion is a conniving together between two persons...to practice a fraud on the creditors. In other words, was it the intention of the insolvent and the defendant in this case, the one to give and the other to obtain an undue preference for the defendant to the prejudice of the other creditors; that is to say, in common parlance, to do the other creditors out of their rights.'*

[52] As held in *Gert De Jager*<sup>21</sup>, if parties to the collusion know that the debtor is insolvent and also know that the alienation will have the effect of the results referred to in s 31(1) (prejudicing creditors or preferring one above another) it follows that the collusion is fraudulent in respect of the creditors in the sense that the purpose thereof is to sell them short. A person who is sued under s 31 of the Act is taken to have been aware of the effect of the disposition attacked if he knew at the time of the disposition that the position of the insolvent was hopeless.<sup>22</sup>

[53] In order to hold that a party acted in collusion with the insolvent it must be shown that when the transaction took place such party was aware of the fact that the transaction would have the effect of prejudicing the insolvent's creditors or of preferring one of the creditors above another. A person who is sued under s 31 of the Act is taken to have been aware of the effect of the disposition attacked if he knew at the time of the disposition that the position of the insolvent was hopeless.<sup>23</sup>

[54] The plaintiffs' case was not primarily based on direct evidence of the collusive transaction (other than that of Mr Robinson), but substantially relied on documentation and inferential reasoning. It was based on a series of events and conduct attributed to the 'co-conspirators', which they contended constituted an evolution of the 'fraudulent scheme', which culminated in the perfection of the GNB and the sale of Latex's assets to Jade at a deliberately deflated price. No definitive express agreement was pleaded in

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<sup>21</sup> *Gert De Jager (Edms) Bpk v Jones NO en Mc Hardy NO 1964 (3) SA 325 (A) 330H.*

<sup>22</sup> 327F-G *Estate Lala v Mahomed* 1944 A 324 at 331.

<sup>23</sup> *Gert De Jager* 327G-H referring to *Estate Lala v Mahomed* 1944 A 324 at 331.

relation to the utilisation of the GNB as a fraudulent device to sell the Latex assets at an amount sufficient only to meet the Sasfin claim, and, in so doing, to defraud creditors.

[55] Reliance was placed on the Delswa transaction which evolved into the Jade transaction and culminated in an understanding reached between all the alleged colluders at a meeting on 2 March 2016, after which all parties knew that the GNB would be used as the vehicle to transfer Latex's assets to Jade which would be accompanied by a transfer of its business to Jade.<sup>24</sup> As part of this plan, reliance was placed on the NEF proposal dated 12 February and the events which transpired during February 2016, leading up to the 2 March 2016 meeting. According to Mr Robinson, at the so-called whiteboard meeting of 2 March 2016, it became clear to all present at the meeting what the plan was to dispose of Latex's assets at a deliberately deflated value, using the perfection of the GNB as the mechanism to do so.

[56] It was common cause that evidence of a fraudulent disposition should be clear. The plaintiffs argued that it met the necessary threshold, given that 'where it has laid evidence of such a nature before the Court that a reasonable man, in the absence of reasonable explanation, comes to the conclusion that the case has been made out, the plaintiff must be held to have discharged the onus'.<sup>25</sup>

[57] The plaintiffs argued that a series of documents written by Sasfin and SPE employees evidenced the fraud directly and inferentially if the direct evidence of Mr Robinson of intention and purpose alone was not accepted. The plaintiffs further argued that various conclusions could be drawn from the development of the NEF proposal and the dispatch of the perfection letter and that the use of the GNB was patently improper as it was for a collateral purpose.

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<sup>24</sup> The claim was not, however, based on the disposition of the entire business of Latex to Jade.

<sup>25</sup> *McLean Appellant v McLean's Trustee Respondent* 1923 AD 141 at 148.

[58] The Sasfin defendants on the other hand argued that this was not a case for a breach by Sasfin of their duties as bondholder and that even if Sasfin did not sell the Latex assets at a fair price, or did not endeavour to do so, this does not mean it was party to a collusive transaction. The latter contention is correct, but that does not mean that any breach of Sasfin's duties as bondholder is irrelevant. It has relevance in the context of whether such breach constitutes cogent evidence of the collusive transaction contended for, albeit that the plaintiffs' case is not a model of clarity.

[59] The plaintiffs' case on the issue surrounding the transfer of Latex's business or assets was confusing. In various instances, the case seemed to be aimed at the transfer of the entire business of Latex to Jade. In Mr Robinson's words:

*"The drive to undervalue the stock, fixed assets and trademarks was plain to all involved. Everyone knew that M1 Latex's stock, fixed assets and trademarks were not being sold on a 'fire sale' basis, but were in truth being sold as part of the transfer of a business as a whole, and should have been sold and valued on that basis. However, since our objective was to acquire M1 Latex's business at minimal cost, the only valuation that was required was one that covered Sasfin Bank's claims (and later SPE's claims) be covered by the sale – any more than this would redound only to the benefit of M1 Latex's creditors, and not to any of SPE, Mr Pereira or me. In short, the scheme allowed us to hijack the business of M1 Latex at grossly understated values."*

[60] In argument, plaintiffs' counsel however expressly disavowed any reliance on the transfer of Latex's business and their case was confined to the transfer of Latex's assets. The transfer of Latex's business further did not form part of the plaintiffs' cause of action as pleaded.

[61] Conflictingly, the plaintiffs' argued that the revenue warranty in the NEF proposal evidenced a collusive agreement to devalue stock and was indicative of the fact that the conspirators knew they were transferring not only the stock, fixed assets and trademarks of Latex but were simultaneously effectively transferring the whole of the business of Latex, constituting a fraud on creditors. It was argued that if the colluders had a dishonest intention as to this transfer it was probable that they held a similar dishonest intention in

respect of the valuation of the stock etc. That argument however reveals *ex post facto* speculation and improvisation which is not sustainable.

[62] It is trite that a court is seized to determine the issues raised in the pleadings and must determine the case on the basis as pleaded.<sup>26</sup> However, pleadings exist for the court and in certain circumstances, the conduct of the parties may be such as to broaden the scope of dispute and issues to be dealt with at trial. In the present context, the question is whether that is such a case, or whether such version is a recent fabrication as submitted by the Sasfin defendants.

[63] There is merit in the Sasfin defendants' submission that the case presented in evidence deviated from the plaintiffs' pleaded case and evolved over time. That included Mr Robinson's role as part of the collusive transaction, specifically in relation to the agreement that evidences the decision to implement the collusive scheme. In evidence, significant importance was placed by Mr Robinson on a meeting held on 2 March 2016 at which Messrs Sassoon, Eppel, Robinson and Pereira were present. According to Mr Robinson, Mr Sassoon explained at the meeting that the intention behind the perfection of the GNB was to use the valuation process to significantly deflate the sale price of Latex's assets so only cover the Sasfin defendants' exposure and the collusive scheme became clear to the parties present. I have already dealt with the evidence of Mr Robinson. The documentary evidence does not support his version regarding the significance of the 2 March 2016 meeting and the events which allegedly transpired thereat. Considering all the relevant facts, it is probable that that version was a recent fabrication, aimed at shoring up difficulties in the plaintiffs' case.

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<sup>26</sup> *Swissborough Diamond Mines (Pty) Ltd and Others v Government of the Republic of South Africa* 1999 (2) SA 279 (T); *Fischer and Another v Ramahlele and Others* 2014 (4) SA 614 (SCA).

*Did the evidence establish the jurisdictional requirements of s 31, including the existence of a fraudulent scheme?*

[64] The plaintiffs' case must be considered in the context of the averments in paragraphs 23 and 24 of the amended statement of claim.

[65] The evidence did not establish that the various role players colluded to intentionally engineer a breach of the consignment agreement to give Sasfin grounds to perfect the GNB, as contended by the plaintiffs. On the probabilities, the evidence established that Latex was indeed in financial difficulty and that the consignment agreement had been breached.

[66] The SPE reviews indicated that between 2013 and 2015, it wrote down the value of its interest in Latex from R19 178 000 to R6 283 000. Mr Rosen testified that for various reasons there was a decrease in the Net Asset Value ('NAV') of the business. Mr Katz, who sold his 25.1% shareholding to Southern Palace in January 2014 for R15 million, was prepared to sell that shareholding to Messrs Robinson and Pereira and SPE for R3 million in May 2015. As stated, Mr Robinson had been brought into the business as a turn-around specialist. The evidence established that during 2015 and 2016, there were difficulties in the collection of debts, especially those of the Angolan debtors, Latex had a flat turnover, cash flow problems and overstocking issues. Those difficulties resulted in the conclusion of the consignment agreement in May 2015 to alleviate Latex's cash flow problems. Both Mr Hill and Mr Fourie confirmed that without financing from Sasfin or Absa, Latex would not have been able to buy new stock.

[67] Latex's January 2016 management accounts reflected that its profits and EBITDA were below budget, both for January and year to date. Its trade creditors had grown to some R35 million, of which some R13.5 million was in excess of 90 days. Latex's trade debtors were some R57 million, of which R21 million were Angolan debtors that could not be collected. R36 million were local debtors of which R13 million was outstanding in excess of 90 days. Sasfin was owed some R11 million and Absa some R33 million. Latex



was struggling to meet certain customer orders, as confirmed by Mr Fourie. During February 2016, the Absa overdraft was in the region of R36 million and local debtors of 90 days and less were about R22 million.

[68] By March 2016, the ABSA facility was drawn down in excess of its limit and was at some R38 million. There was a substantial risk that Absa would reduce its facility by as much as R8 million. During early April 2016, trade creditors started making demands. The plaintiffs' contention that the Absa facility presented a means for Latex to reduce its debt to Sasfin is belied by those common cause facts.

[69] Those facts led Mr Strydom, the accounting expert of the Sasfin defendants, to conclude that Latex would have reached a state of commercial insolvency by 6 May 2016, specifically, if Absa reduced its facility and Latex's trading did not reach certain values. Ultimately, the Absa facility was not reduced. Although there was an increase in trading, the levels postulated by Mr Strydom as being necessary to allow continued and profitable trading, were not achieved. Although it cannot be concluded on the probabilities that Latex was indeed commercially insolvent, the probabilities do support a conclusion that Latex was in substantial financial difficulty.

[70] It cannot be concluded on the probabilities that Sasfin did not have grounds to perfect its security, as averred by the plaintiffs. The probabilities indicate the opposite. Sasfin's written demand of 5 April 2016, upon which reliance was placed in the perfection application, specified various breaches by Latex, entitling Sasfin to perfect its security. As illustrated, Latex was in a parlous financial position. The evidence established that Sasfin was at the time firmly of the view that it was legally entitled to seek perfection of the GNB. That view was not without justification. Mr Rosen confirmed in cross examination that in light of the information available at the time, it was not unreasonable for Mr Sassoon to be of the view that the liquidation of Latex was a distinct possibility.

[71] The plaintiffs' submission that the true reason for the perfection letter was that Sasfin and the other colluders had decided firmly to use the GNB to transfer Latex's

assets to Jade as the soft perfection letter was sent on same day as NEF proposal, does not go far enough to establish a fraudulent scheme. On the probabilities, the documentary evidence did establish that the GNB was identified as a vehicle to transfer Latex's assets. The question remains whether that evidences a fraudulent intention rather than a commercial one, an issue to which I later return.

[72] The actual role of Mr Rosen in the fraudulent scheme mutated during trial. In his witness statements, Mr Robinson made Mr Rosen part of the fraudulent scheme. In his oral evidence however he excluded Mr Rosen. Mr Robinson similarly in cross examination excluded various other individuals, such as Mr Winer, from being parties to the fraudulent scheme, in conflict with his version under oath in his witness statements. Mr Rosen confirmed in evidence that the perfection of the GNB was discussed on various occasions. He was told by Sasfin that the bank was well within its rights to perfect the GNB and SPE and Sasfin proceeded on that basis. He further conceded that it was not an unreasonable conclusion that the liquidation of Latex was a distinct possibility and that objective grounds existed upon which a perfection order could be sought.

[73] Mr Robinson's evidence that he on 1 April 2016 simply scribed what Mr Eppel dictated to him in a letter asking for an extension of the consignment facility from Sasfin, does not accord with the probabilities, given the factual circumstances prevailing at the time. The evidence on a balance of probabilities established that there were concerns that Latex was in breach of its covenant and its overdraft facility with ABSA. Even if it were to be accepted that Latex's financial position was improving during February 2016, being the last month management statements were available, and disregarding the special provisions passed that month, the plaintiffs' contention that the ABSA facility could be utilised to settle the undisputed amount of R7.68 311.74 due to Sasfin on 30 March 2016, is improbable.

[74] The evidence of Mr Hill and Mr Katz that had they known about the perfection application, they could and would have obtained other financing, is speculative, given that no evidence was presented that any alternative funding was available at the time. The

January 2016 management accounts reflected that Latex had suffered a loss of R2 586 000 before tax for the month and a loss of R392 million for the year to date. As at 18 March 2016, Latex owed Sasfin R12 035 489.01. The consignment facility was called up on 5 April 2016.

[75] There was further no evidence to sustain the averment that the parties colluded for Latex to give up its rights under the GNB. The signature of the soft perfection letter by Mr Pereira on 2 March 2016 does not of itself give rise to an inference of collusion. The plaintiff's submission that the perfection was not necessary as Mr Pereira had signed the voluntary perfection letter, lacks merit. It was not a bar to the perfection application.<sup>27</sup> No evidence was presented of when Sasfin actually took possession of the assets. On the probabilities, the facts established that Sasfin was entitled to perfect the GNB. It is trite that where a creditor has an undisputed right to take possession of pledged articles, a court has a limited discretion to refuse an order<sup>28</sup>. It was not suggested in evidence that Latex had any cogent grounds upon which to resist the perfection application.

[76] The perfection application itself was however fraught with difficulties. Sasfin's affidavits, deposed to by Mr Vorster clearly did not disclose all the material facts. It was readily and properly conceded by the Sasfin defendants in argument that there was a failure to make a full, frank and honest presentation to the court. Mr Vorster relied on the demand letter of 5 April 2016 calling for payment of an amount of R12 035 489.01 pertaining to the consignment agreement. It was not disclosed that Mr Pereira had signed the soft perfection letter on 2 March 2016, in terms of which Sasfin had on 12 February 2016 invoked its rights to take possession of all Latex's movable assets and sought a schedule of all movable assets.

[77] It was also not disclosed that it was known to Sasfin that Latex was not going to oppose the perfection application before the application was launched. It was contended

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<sup>27</sup> Simon NO and Others v Mitsui and Co Ltd and Others 1997 (2) SA 475 (W) at 514A.

<sup>28</sup> Contract Forwarding (Pty) Ltd v Chesterfin (Pty) Ltd and Others 2003 (2) SA 253 (SCA) para 10.

in the service affidavit that Mr Pereira on 8 April 2016 advised that Latex did not intend to oppose.

[78] In his supplementary affidavit, Mr Vorster contended that the matter had been removed from the roll to allow various discussions between the parties to see whether the matter could be settled. From the uncontested evidence it appears probable that this version was false and the true reason was to allow time for the Jade transaction to come into fruition. It was further stated by Mr Vorster:

*“The applicant will have regard to the interests of parties who may have a legitimate interest in the assets and who may be creditors of the respondent”.*

[79] From the uncontested evidence it is clear that Sasfin did not do so. By way of example, it did not disclose <sup>29</sup> that there was certain consignment stock of which Puma retained ownership. It remains unclear whether such stock formed part of the stock attached and sold by Sasfin.

[80] Mr Vorster referred to a valuation by Mr Kamp on 31 March 2016 reflecting a forced sale valuation of the stock of R12 429 001, including “obsolete stock”. The cost price of the stock was reflected on the valuation as being R37 018 314.74. That was used to bolster the argument that Latex was in breach of its 300% stock covenant in terms of the agreements concluded between it and Sasfin.

[81] According to the plaintiffs’, that was incorrect in that the consignment agreement provided for the stock covenant to be measured against the cost of the stock less certain deductions regarding slow moving stock and the like. There is merit in that submission.

[82] On these grounds, the perfection order was open to challenge on grounds of misrepresentation and non-disclosure. In 2018, such a challenge was launched by

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<sup>29</sup> As raised by the Sasfin defendants in argument, albeit in another context.

Messrs Katz and Hill who sought the setting aside of the perfection order. That application was opposed by the Sasfin defendants. The papers formed part of the discovered documents. The application was however never pursued to fruition. Instead, the present action proceedings were launched.

[83] Although the definition of 'disposition' in s 2 of the Act expressly excludes dispositions 'in compliance with an order of court', the Supreme Court of Appeal has recognised that there may be instances where a disposition may be set aside where there are circumstances such as fraud and collusion on the part of the creditor in procuring the order.<sup>30</sup> It has also been recognised that a disposition may be set aside, without setting aside the court order.<sup>31</sup>

[84] The plaintiffs did not however rely on the perfection of the GNB in isolation, but pleaded it as part of the collusion to achieve and implement the collusive transaction. As such, it merely constituted a brick in the wall, rather than the whole wall. The issues with the perfection application, do not without more translate into a conclusion that the perfection order should not have been granted at all or that it was obtained as a result of fraud or collusion.

[85] Moreover, any order to set aside the perfection order based on a material misrepresentation or non-disclosure at this juncture would be of academic interest only. Latex's assets were disposed of in May 2016 and were subsequently disposed of in Jade's winding up proceedings. An election was made by the plaintiffs to pursue the present relief. On that basis, it would not be appropriate to set aside the perfection order as sought by the plaintiffs.

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<sup>30</sup> Dabelstein and Others v Lane and Fey NNO 2001 (1) SA 1222 (SCA) par [7]; Loomcraft Fabrics Cc v Nedbank Ltd and Another 1996 (1) SA 812 (A) at 817H, quoting with approval United City Merchants (Investments) Ltd v Royal Bank of Canada and Others [1982] 2 All ER 720 (HL); Mahomed's Estate v Khan 1927 EDL 478.

<sup>31</sup> M and Another v Murray NO and Others 2020 (6) SA 55 (SCA) paras 29-37.

[86] Can it be concluded on the probabilities that Latex's assets were deliberately undervalued and sold below fair market value at an amount only sufficient to discharge Latex's liabilities to the Sasfin defendants as part of the collusive scheme? Central to such conclusion would be evidence of a deliberate devaluation, rather than a commercial evaluation of Latex's position at the time.

[87] The obligations of a creditor such as Sasfin under the GNB are trite. A clause that allows a bondholder to take over the pledged property at a fair price in the event of a default is considered a quasi-conditional sale, which is enforceable<sup>32</sup>; as opposed to an agreement which allows a bondholder to take over a pledged article in the event of default. The latter is an unlawful and void *pactum commissorium*,<sup>33</sup> given that a debtor may find its valuable property being retained by the bondholder in discharge of a paltry debt.<sup>34</sup>

[88] It is well established that a bondholder does not have an unfettered discretion after it takes possession of a debtor's assets or business but must exercise its powers over such assets *arbitrio boni viri*.<sup>35</sup> Put differently, a creditor is obliged to act reasonably and to exercise reasonable judgment and must exercise such powers of their proper purpose.<sup>36</sup> The requisite standard requires at least an 'honest judgment' and not one motivated by 'pure caprice'<sup>37</sup> and requires the power be exercised 'both reasonably and honestly'.<sup>38</sup>

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<sup>32</sup> Graf v Buechel 2003 (4) SA 378 (SCA) para 12.

<sup>33</sup> Bock and Others v Dubororo Investments (Pty) Ltd 2004 (2) SA 242 (SCA) para 12.

<sup>34</sup> Graf supra, para [29]; Bock supra para 9.

<sup>35</sup> NBS Boland Bank Ltd v One Berg River Drive CC and others; Deeb and Another v ABSA Bank Ltd; Friedman v Standard Bank Ltd 1999 (4) SA 928 (SCA) at 937A-937F.

<sup>36</sup> Juglal NO and Another v Shoprite Checkers (Pty) Ltd t/a OK Franchise Division 2004 (5) SA 248 (SCA) paras 26-27 and the authorities cited in para 26.

<sup>37</sup> Dharumpal Transport (Pty) Ltd v Dharumpal 1956 (1) SA 700 (A), applied in respect of the power of a seller to reject a propeorsed guarantor in Blake and Another v Cassim and Another NNO 2008 (5) SA 393 (SCA) paras 22-24.

<sup>38</sup> Mount Amanzi Share Block Ltd v Body Corporate of Windsor Heights Sectional Title Scheme and Others (537/2016) [2017] ZASCA 38 (29 March 2017) para 47.

[89] As highlighted in *Juglal*<sup>39</sup>, a mortgagee acts to all intents and purposes as the agent of the mortgagor in exercising the powers and subject to the duties in law that flow from that relationship. Relevant to the present context is that the realisation of assets is to be exercised in a manner calculated to achieve a realistic price. In the ordinary course, a creditor cannot sell to itself, as the conflict of interest would be self-evident and it would not be motivated to pay a reasonable price.<sup>40</sup> For any self-dealing to be permissible, the parties must have agreed on a mechanism for such price to be fixed by an independent third party.<sup>41</sup> It is further well established that a creditor is bound to act in the interests of the debtor and endeavour to obtain the best price.<sup>42</sup> The price agreed on must be a fair one.<sup>43</sup>

[90] As set out expressly in the GNB, any amount received from the sale in excess of the amount of the bondholder's security must be returned to the debtor.<sup>44</sup> Whilst the plaintiffs' case was not predicated on a breach of the provisions of the GNB, as pointed out by the Sasfin defendants, the question is whether a material deviation from the standard of conduct required gives rise to an inference of a collusive intention as part of the collusive scheme relied on. Such inference must be the most probable in the circumstances.

[91] From the undisputed documentary evidence and on the probabilities, it can be concluded that both Mr Kamp and Mr Honey were instructed to value Latex's fixed assets, stock and trademarks respectively, on a forced sale basis. Although there was no direct evidence on the issue, this was the basis on which the valuations were done. Neither Mr Kamp nor Mr Honey testified to clarify the position. In evidence, it was raised that Mr

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<sup>39</sup> Para 26.

<sup>40</sup> *Osry v Hirsch, Loubser & Co Ltd* 1922 CPD 657.

<sup>41</sup> *Graf, supra*, *Bock Supra*; *Ex parte Mabunyana* (1903) 20 SC 165 at 168.

<sup>42</sup> *Osry supra* 564.

<sup>43</sup> *Bock supra* paras 6, 9, 31, 32.

<sup>44</sup> *Graf supra* para 29.

Kamp at the section 417 enquiry testified that if he had known the true facts, he would have valued the assets on an *in situ*, and not a forced sale basis.

[92] Mr Kamp's instructions appeared from a series of emails during March 2016. The emails did not state whether Latex was trading or not. He did not inspect the assets physically. He was furnished with a copy of Latex's stock inventory as at 29 February 2016. It was later discovered that this list was obsolete. Mr Fourie offered to provide an 'in stock and transaction report', which would facilitate the performance of a meaningful stock count. At the time, it was envisaged that the Jade transaction was to be completed by the end of March 2016 and there was mention of a proposed perfection application. It appears from the correspondence that it was proposed by a Sasfin representative, Mr Govender, who worked with Mr Vorster, that the audit report giving a value as at 29 February 2016 should be used.

[93] Mr Kamp's final draft of his valuation was circulated on 6 April 2016, the day after the launching of the perfection application. He recorded that although the valuation was for 31 March 2016, he was instructed not to conduct a stock take but to use the stock take on 29 February 2016 as a true reflection of the stock on hand. Everyone circulated on the correspondence would have been aware that irrespective of the basis of valuation, the valuation could not be accurate as to the stock on hand.

[94] The valuation referred to by Mr Vorster in the perfection application, was ultimately not Mr Kamp's final valuation figure. In that calculation a 15% auction value was ascribed to obsolete stock, not the 5% used later. The Kamp valuation relied on was later reduced. In Mr Kamp's final valuation, Latex's fixed assets, being equipment at the head office, were valued at R1 427 400. There was no evidence that Latex's fixed assets at its other locations were ever valued or that all assets were indeed valued. Latex's stock was valued at R11 001 601, comprising of stock of R9 819 992 and obsolete stock of R1 181 609. In the attachment to the valuation, Mr Kamp recorded the cost value of the obsolete stock as R23 632 193,92 and that of the other stock as R37 018 314.74.



[95] The uncontested evidence established that there were changes in Latex' stock composition between 29 February 2016, being the date of the stock lists on which Mr Kamp worked to prepare his valuation and 6 May 2016, when the asset sale agreement was concluded. The differences in stock composition were not addressed, nor were the ongoing trading activities in Latex acknowledged in the valuations.

[96] It was not disputed that the cost value of Latex's stock on 29 February 2016 was R60 650 508.66; whereas the cost value as at 5 May was R67 279 281.25. The ongoing trading activities in the interim, were not accounted for. It was further undisputed that over the period 1 March to 5 May 2016, Latex generated revenue from the sale of stock of R34 457 188, having a cost value R23 384 204 and generating a gross profit of R11 072 983.

[97] On the probabilities it must be concluded that Latex's stock and fixed assets were undervalued, irrespective of whether a market value or forced sale valuation was the correct standard to apply. That is so because not all Latex's assets which were attached and sold by Sasfin to Jade pursuant to the perfection order, were valued.

[98] In the case of Mr Honey, it was not disputed that he had been instructed to value Latex's trademarks on the basis that Latex's 'doors were closed'. Although Mr Honey did not testify, this is reflected in the experts' joint minutes. Mr Honey was approached for a valuation of the trademarks on 19 February 2016. From the correspondence it appears that Mr Honey sent a standard trademark questionnaire to Mr Vorster for completion and requested a full understanding of the business plan, turnovers, growth, expansion and the like going forward as well as a meeting with a senior official of Latex to gain understanding of the products, markets, services, risks and the like. Two draft reports were produced on 19 April 2016, In his email accompanying the first, sent at 08h51, Mr Honey advised:

*'We have spent some time on the valuation and have in fact in the meantime also prepared a very rough summary valuation report, despite the fact that we have received very little of the*

*information requested, which would be valuable to take into considering when preparing the valuation report. By way of example, we enclose a rough draft (annexure A which reflects a valuation of approximately R9.9million. The valuation is reached by using a royalty rate of 1% which is reasonable, together with a discount factor, which indicates risk at 18% which is very high and a growth rate of 0%. A growth rate of 0% over the entire 10 year period is somewhat unrealistic and must seemingly be at odds with the plans of the purchasers we would be more inclined to have a 0% growth rate for the first 5 years and then to include, a growth rate of, for example 5% for the next 5 year period. This does however result in higher valuations. It is possible to lower the royalty rate slightly to, for example 0.8%, which will reduce the valuation. A rough draft of a further Annexure A is also attached.'*

[99] The attached draft valuations reflected the trademarks at R9 927 958 and R7 942 366 respectively. Pursuant to a telephonic consultation with Mr Vorster, Mr Honey circulated a draft valuation along the lines as discussed telephonically, utilising a royalty rate of 0.5 % which Mr Honey described as 'somewhat low, but may be justifiable in the current non profitable circumstances and financial difficulties of the Kit group'. That valuation of R6 419 213, was the valuation ultimately utilised. That figure was lower and, when considered with Mr Honey's reduced valuation, after the 'panel beating', matched Latex's indebtedness to Sasfin and SPE exactly.

[100] It was undisputed that Jade was the only potential purchaser of Latex's assets. No cogent evidence was presented of any attempt by Sasfin to sell Latex's assets to any other purchaser at a higher value. The existence of the Non Distributable Reserve (NDR) supports the probability that the assets were undervalued. It corroborates that the Jade transaction would require Jade to reflect a non-distributable reserve consequential upon the sale of Latex's assets to it by Sasfin, to reflect the revaluation of the assets to their true value where they were acquired at an amount below fair value. The evidence of Prof Wainer, which was aimed at the NDR and its treatment from an accounting perspective, cannot be criticised.

[101] The origin of the R40 million however appears to have been a thumb suck number proposed by Mr Robinson, rather than any accurate valuation. The evidence established that SPE motivated for the Jade transaction based on the NDR, which value would be used to determine whether it had adequate security for the proposed funding. The existing NDR on Jade's balance sheet was explained by Mr Harris of Latex in an email to the Sasfin defendants on 3 April 2016, thus: 'assumed Jade will pay R20m for Kit stock and get revalued to R40m (in Kits books at cost of aprox R70M'. Although the evidence points to the probability that the Latex assets were undervalued, it does not establish any probability that the true market value of the assets was R40 million, as argued by the plaintiffs.

[102] The ultimate selling price of the Latex assets in terms of the sale agreement, was a reduced figure which did not match the valuations. The discrepancy of R147 000 was not explained by the Sasfin defendants. The manipulation of the Sasfin document pertaining to the Kamp valuation and the difference of R147 000 was not explained. I agree with the plaintiffs that this is not a matter of speculation. Similarly, the unintelligible calculation which supported Mr Honey's valuation of the trade marks, was not explained. On the evidence and the probabilities, I am satisfied that it was established as probabilities that the Kamp valuation of the stock and fixed assets was deficient and that the Honey valuation was manipulated.

[103] The existence of these anomalies renders some credence to the plaintiffs' contention that the undervaluation of the assets of Latex was deliberate. The evidence casts doubt on whether Mr Kamp's valuation, irrespective of its basis, can be considered fair and independent. The same applies to the valuation of Mr Honey. That does not however of itself equate to any probability that the valuation was fraudulent and ultimately does not avail the plaintiffs in establishing their chosen cause of action.

[104] On the probabilities it can further be concluded that the Latex assets were undervalued. The GNB in its terms obliged Sasfin to act in a certain way and to value the assets fairly. At the very least that means that all the assets should have been valued.

[105] It is further probable that there was a correlation between the valuations provided by Messrs Kamp and Honey, the sale price under the sale agreement and Latex's exposure to Sasfin and SPE. On 7 April 2016, in correspondence between various representatives of Sasfin and SPE, and pursuant to an email from a Mr May, Mr Rosin reminded Sasfin that SPE's exposure of R 4 093 096.33, being its shareholder's loan, should also be settled. Pursuant to further correspondence, the first draft of the sale agreement was circulated by Mr Eppel, reflecting a purchase price of R17 million, taking that exposure into account.

[106] The evidence further established that there were some concerns regarding the valuation coming in at the exposure of the Sasfin defendants. Mr Rosen found it *'exceptionally peculiar that the stock then gets sold for the exact exposure that Sasfin had'*, although he conceded *'I cannot state to you that that is dishonest'*. In the email correspondence, Mr Sassoon stated: *'I don't think its suspicious as we are selling at the sworn valuation'*, a proposition Mr Robinson agreed to at the time. Mr Robinson's drive to reduce valuations was to *'keep the sale figure as low as possible so that we minimized Jade's debt'*.

[107] The Sasfin defendants submitted that on their part there was a *bona fide* belief that the fair market value of the assets was the value obtained from Messrs Kamp and Honey. Considering the manipulation of those valuations, such inference cannot reasonably be drawn. Certainly from a Jade funding perspective it was in Sasfin's interest to keep the value as low as possible to reduce debt in Jade. The same applies to SPE. Little regard was given to the impact of that on Latex or its creditors. On the probabilities it must be concluded that the valuations and selling price of the Latex assets was manipulated to meet the exposure of the Sasfin defendants, even if they believed a forced sale valuation to be the correct basis.

[108] Sasfin from inception sought a valuation on a forced sale basis. In argument, it was contended that this was appropriate given that Latex was not a going concern. The plaintiffs on the other hand, contended that the asset valuations should have been done

on a market value basis as Latex was actively trading and was purchasing and selling stock until such time as its assets were sold and transferred to Jade on 6 May 2016.

[109] Mr Strydom testified that Latex was technically solvent at 29 Feb 2016, but that to remain commercially solvent it needed to generate a substantial cashflow from trading activities alternatively from shareholders or financiers and it was crucial that the Absa facilities remained in place. Although considered in hindsight, his evidence that if Absa withdrew its facilities, Latex would be commercially insolvent and would have to generate sales of at least R19.8 million to break even cannot be rejected as improbable, considering all the facts. It also cannot be rejected as improbable that at sales below R19.8 million, Latex would be unable to generate additional cash flow and arguably would not have access to further funding, and may well have ended up in business rescue or liquidation.

[110] Although Latex was still actively trading, its financial problems could justify a view that it should not being classified on a going concern basis. The Sasfin defendants' contention that they *bona fide* considered an auction or forced sale value to be the fair market value, cannot be rejected as improbable. The evidence regarding Latex's financial circumstances at the time, the contents of the presentation to Sasfin's CIC on 25 April 2016 and the risk of liquidation render support for such view. In those circumstances, it cannot be concluded that it was unreasonable, much less fraudulent for the Sasfin defendants to have valued the Latex assets on a forced sale basis.

[111] The plaintiffs appreciated that, if Latex's assets were valued at a fair value, this would still result in prejudice to Latex's creditors since it would still be liquidated, but that this would not be a fraud.<sup>45</sup>

[112] No evidence was presented as to what a fair forced sale value of the Latex assets would have been. Thus, whilst I have concluded that the Latex assets were undervalued

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<sup>45</sup> Plaintiffs heads of argument para 337.2.

and valued at a level matching the exposure of the Sasfin defendants, it is not possible to make any further findings on that issue. It is further not possible to consider the extent of the undervaluation and whether that would give rise to an inference of fraud.

[113] The evidence established that the relevant parties contemplated Latex's insolvency and that Latex disposed of its assets pursuant to the perfection of the GNB. The evidence further established that such disposition had the effect of prejudicing Latex's creditors or at the very least of preferring the Sasfin defendants above Latex's other creditors (to the extent that the assets were not sold at a proper value).<sup>46</sup>

[114] The crucial question which remains, is whether the plaintiffs established fraud; thus whether a fraudulent intention or collusion was established.

[115] It is trite that fraud must be proved on a balance of probabilities but will not be lightly inferred.<sup>47</sup> In accordance with general principles, if an inference of an innocent motive as opposed to an improper one can be drawn this should be done.<sup>48</sup>

[116] The foundational requirement of a claim under s 31 is a collusive agreement. As held in *Meyer* <sup>49</sup>, collusion means, in the context of s 31, an agreement which has a fraudulent object and not merely an agreement which has the effect that one creditor is favoured over another. <sup>50</sup> It is an essential requisite for the plaintiffs to prove an agreement that has a dishonest or fraudulent purpose. Without such antecedent agreement, s 31 does not apply.<sup>51</sup>

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<sup>46</sup> Jackson v Louw NO and another [2019] 2 All SA 145 (ECG) para 30.

<sup>47</sup> Loomcraft Fabrics Cc v Nedbank Ltd and Another 1996 (1) SA 812 (A) at 817G.

<sup>48</sup> Jackson par 72, relying on Zulman JA in Cooper and another NNO v Merchant Trade Finance Ltd 2000 (3) SA 1009 (SCA) para 12..

<sup>49</sup> Meyer NO v Transvaalse Lewende Hawe Koöperasie Bpk 1982 4 SA 746A at .771A-D

<sup>50</sup> Van Zyl NO and Others v Bester NO and Others Western Cape High Court case no 25983/10.

<sup>51</sup> Gert de Jager supra, Aon supra; Strydom and Another NNO v Snowball Wealth (Pty) Ltd 2002 (5) SA 438 (SCA) para 32.

[117] The questions of two minds concurring and an intention to defraud is a question of fact, and must be decided by the evidence. It involves a subjective assessment of the parties' actions. It must be shown as a fact that the debtor intended to make the disposition with a fraudulent purpose.<sup>52</sup>

[118] As held by the Supreme Court of Appeal in *Cooper*<sup>53</sup>, albeit in the context of s 29 of the Act in relation to the intention to prefer:

*'It is essential and indeed fundamental to any decision as to whether there has been an intention to prefer to examine and weigh up all of the relevant facts which prevailed at the time that the disposition was made in order to determine what, on a balance of probabilities, was the dominant, operative or effectual intention in substance and in truth of the debtor for making the disposition....In seeking to establish whether the requisite intention was present in the debtor's mind at the time of making the disposition the test is a subjective one. The Court is required to determine a question of fact. ...The mere fact that the effect of the transaction is to prefer one creditor above another does not necessarily mean that there has been a voidable preference....Something additional is required to impeach the transaction. That additional requirement is the intention to prefer on the part of the debtor. ... Whilst contemplation of insolvency or inevitable insolvency is generally speaking necessary before an intention to prefer can be inferred it by no means follows axiomatically that the presence of such a state of mind, in itself, proves such an intention since other factors may nevertheless negate such inference. Even if it can be said that sequestration was substantially inevitable, evidence of a more probable inference to the contrary that shows, for example that the debtor's dominant intention in making the disposition was not to prefer the creditor in question but to achieve some other purpose would not entitle the Court to draw the inference of an intention to prefer...If there was no application of mind by the debtor to the question whether in fact he was actually conferring a preference it can hardly be said that he had an intention to do so. There is no room for treating as an intention to prefer a culpable or reckless disregard of the possibility that the disposition might have the effect of preferring one creditor above another.*

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<sup>52</sup> Ibid para 74

<sup>53</sup> *Cooper and Another NNO v Merchant Trade Finance Ltd* 2000 (3) SA 1009 (SCA) judgment of Zulman JA relevant extracts from paras 5-11.

*An actual intention is required – not simply the fact that objectively viewed the debtor ought to have realised that a preference would occur if the disposition is made...* [Emphasis added].

The intention to prefer must thus be the paramount, dominant or substantial object of the debtor.<sup>54</sup>

[119] In drawing inferences, the process is explained thus by the Supreme Court of Appeal in *Delacy*<sup>55</sup>:

*'The process of inferential reasoning calls for an evaluation of all the evidence and not merely selective parts. The inference that is sought to be drawn must be 'consistent' with all the proved facts; if it is not then the inference cannot be drawn and it must be 'more natural' or plausible conclusion amongst several conceivable ones when measured against the probabilities.'*

[120] Adopting these principles, there is in my view no room for an inference of collusive fraudulent conduct on the part of the representatives of the Sasfin defendants, Mr Pereira and Mr Robinson (despite his evidence to the contrary), for the reasons that follow.

[121] Mr Rosen's version in his witness statement and evidence in chief was:

*"Sasfin Bank had the power to sell M1 Latex's assets by perfecting its GNB over those assets. The assets could be (and would be) valued at a fire sale basis, and at an amount sufficient to cover Sasfin Bank's exposure to M1 Latex (and later also SPE's exposure to M1 Latex). Sasfin Bank could then sell the assets to new Jade at this deflated valuation. In this way, new Jade could procure the whole of M1 Latex's business but pay only for the assets that were subject to the Sasfin Bank general notarial bond, and do so at a significantly discounted price. ...*

*:*

*From a SPE point of view, the transaction would entail only paying the value for M1 Latex's assets as determined by Sasfin Bank, which was to value the M1 Latex assets at a forced sale value, being at a discount to the asset's market value. In fact, those assets were worth significantly more, and the same assets were going to be immediately revalued upwards in Jade....*

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<sup>54</sup> Para 16.

<sup>55</sup> *South African Post Office v Delacy and Another* 3009 (5) SA 256 (SCA) para 35.



[122] In cross examination, Mr Rosen however expressly disavowed that any dishonesty had occurred either on his part or on the part of the other parties involved. He testified that he considered the negotiations regarding and the structure of the Jade transaction as entirely commercial. His concession was damaging to the plaintiffs' case, eroding the collusive agreement and intention contended for by Mr Robinson. Mr Robinson in evidence expressly excluded Mr Rosen from any fraudulent conduct.

[123] The plaintiffs' submission that Mr Rosen was testifying against the interests of a former employer in order to counter the concessions he made in cross examination, does not pass muster as he had left Sasfin's employ during 2018, some six years before the trial. He consulted and provided detailed witness statements. Ultimately, those were at variance with the concessions he made under oath during cross examination.

[124] I agree with the submission of the Sasfin defendants that there was no evidence that Latex, an essential party to the collusive transaction, had the dishonest intention ascribed to it by Mr Robinson and that no evidence was presented that Mr Pereira was involved in collusion. Ultimately, it was not established that there was a meeting of the minds regarding a fraudulent intention to defraud creditors in which Latex was a party.

[125] Although Mr Robinson prevaricated, on his own version his primary objective was not to defraud Latex's creditors but to build the biggest clothing business in South Africa. On his version, he was driven by the desire to reduce the purchase price of the Latex assets in order to keep the financial exposure of Jade as low as possible. His view was that even if the Latex creditors were not paid, they would benefit from the larger and new Jade and ultimately recoup their losses. It was an essential part of his vision that the Latex creditors would continue to supply the reconstituted Jade. That view was shared by Mr Rosen. It was imperative for the success of the reconstituted Jade that at least the supplier creditors cooperate and continue to supply Jade.

[126] Mr Pereira played no role in the negotiations, apart from signing the soft perfection letter on 2 March 2016. He did not actively participate in the email correspondence generated in February 2016, which passed mainly between Messrs Robinson, Sassoon, Eppel and Rosen. Mr Robinson conducted most of the negotiations on behalf of Latex. Mr Pereira's primary focus was to ensure he was not exposed to Absa as surety for Latex's facilities. The evidence did not establish that his dominant motive was to prejudice the Latex creditors. The evidence further did not establish that Mr Pereira's conduct could be attributed to Mr Robinson and vice versa.

[127] Although Mr Pereira and Mr Robinson were in charge of Latex, they were furthering their own interests, as proposed shareholders in the reconstituted Jade entity, rather than acting as Latex or on its behalf. Both Mr Robinson and Mr Pereira were hoping for a shareholding in the reconstituted Jade, which would benefit if the Latex assets were acquired at the lowest possible price. Similarly, it was not proved that the defrauding of creditors was the predominant intention of either Sasfin or SPE, whose respective objectives were to further their own commercial interests. Sasfin wanted payment of its exposure. SPE wanted to do damage control regarding its investment in Latex and similarly wanted to cover its exposure. The evidence thus revealed that every party had differing intentions when the Latex assets were sold to Jade.

[128] From the documentary evidence and the evidence of Mr Robinson, both in the s 417 enquiry and in the trial, it appears that he and Mr Sassoon on various issues held opposing views. Mr Robinson described Mr Sassoon as 'a totalitarian leader to whom everyone had to bow'. He wanted to 'collapse' Jade into Latex, whilst Mr Sassoon favoured the reversed transaction, which ultimately materialised. On his version, Mr Robinson wanted Jade to purchase the Latex business as a going concern, which Mr Sassoon refused. Mr Sassoon also did not favour the survival standalone plan proposed by Mr Robinson during May 2016. When it came to perfecting the GNB, according to Mr Robinson 'Mr Sassoon had a plan that none of us knew about and it was important for him to have security over the heart of a good business'. Given the diametrically opposed views of Mr Robinson and Mr Sassoon, there could be no collusion between them at that

level and it was not the colluding parties' common primary intention to defraud the Latex creditors.

[129] Collusion is an agreement between two or more parties that has a fraudulent purpose and is a conniving together of the insolvent and another to practice a fraud on Latex's other creditors. It is not collusion where it appears that the parties were acting independently of one another, the one to secure and the other to give an undue preference<sup>56</sup> or they don't share the same purpose or desire the same outcome.<sup>57</sup>

[130] In applying the principles in *Cooper* to the present case, the dominant intention on the part of each of the 'conspirators' must be to defraud creditors. A conspectus of the evidence established that the dominant intention of each of the role players was not only different, but also focused on other primary intentions, rather than the intention to defraud Latex's creditors. It was not established that any of the role players had the deliberate defrauding of Latex creditors as primary intention, much less as a common intention. It can further not be concluded that the respective parties had primarily intended to harm the creditors of Latex rather than seeking to protect their respective commercial interests.

[131] Our courts have held that there is nothing inherently commercially or morally objectionable to a sale at a discounted price in context of the Insolvency Act.<sup>58</sup> Ultimately the sale of Latex's assets at an undervalued figure, was aimed at serving the respective commercial interests of the various parties.

[132] On the probabilities, the plaintiffs did not establish that the dominant intention of the various role players was to defraud Latex's creditors. It established that the focus and dominant intention of all the role players was to pursue the financial success of the reconstituted Jade business and in so doing to further their own respective commercial

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<sup>56</sup> Aon South Africa (Pty) Ltd v Van den Heever NO and Another 2018 (6) SA 38 (SCA) para 19 and the authorities cited therein, para 28.

<sup>57</sup> Mars' The Law of Insolvency in South Africa, Chapter 13.3.5 (10th edition), p300.

<sup>58</sup> Strydom para 32.

interests. That they were ruthless in that pursuit and a hard bargain was driven, is clear. It is also clear that the respective parties had a reckless disregard for the fate of the Latex creditors and Latex's other shareholders, Mr Katz and Mr Hill. That is however not enough to satisfy the test.<sup>59</sup>

[133] Collusion, as a fraud, requires the 'clearest evidence' or 'clear and satisfactory' or 'clear and convincing' evidence.<sup>60</sup> In my view, the evidence presented falls short of the mark. The plaintiffs' failure to establish a collusive agreement with a dominant fraudulent intention to prejudice the Latex creditors, is fatal to their claim.

#### *Adverse inference*

[134] A further issue requires consideration. The plaintiffs contended that an adverse inference should be drawn against the Sasfin defendants for their failure to call any factual witnesses and that their case effectively stood uncontested. Reliance was placed on *Galante*<sup>61</sup> in arguing that the Sasfin defendants' decision not to call the available factual witnesses, would ordinarily give rise to the inference that the evidence that such witness could give would be to the detriment of the party's case.

[135] The Sasfin defendants countered the argument by contending that it was not incumbent on them to call any factual witnesses, given that the plaintiffs had not made out a *prima facie* case and it was not necessary to present evidence as the case presented did not call for an explanation. It was submitted that a failure to testify by a party who is available and whose actions lie at the core of the dispute is a factor to take into account, but in doing so regard must be had to the strength or otherwise of the case a party has to meet. A case founded on pure speculation and inferential reasoning cannot convert it into a *prima facie* case. Reliance was placed on *De Souza*<sup>62</sup>, wherein Wallis

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<sup>59</sup> Cooper *supra* as quoted in para 118.

<sup>60</sup> Gates v Gates 1939 AD 150 at 155; Motswai v Road Accident Fund 2014 (6) SA 536 (SCA) para 46.

<sup>61</sup> Galante v Dickson 1950 (2) SA 460 (SCA) at 465.

<sup>62</sup> Technology Corporate Management (Pty) Ltd and Others v De Souza and Another (613/2017) ZASCA 29 (26 March 2024) paras 192-194.

AJA cautioned as follows regarding whether an adverse inference was justified on a party closing its case without calling any evidence. *"However, whether that justified an adverse inference being drawn, either generally or on a specific issue, depended on the particular circumstances of the litigation*<sup>63</sup>.

[136] Any failure to call any witness of fact is part of the inferential process which must be viewed in the context of the case as a whole. It is apposite to refer to *Koukoudis*<sup>64</sup>: wherein the Supreme Court of Appeal held:

*"...Failure to testify by a party who is available and whose actions lie at the core of the dispute is, of course, a factor to be taken into account, but in doing so, regard must be had to the strength or otherwise of the case that party has to meet. Whilst less evidence may well suffice to establish a prima facie case where the issue at stake is peculiarly within the knowledge of the opposing party as is here the case, that cannot convert a case founded on pure speculation and faulty inferential reasoning into a prima facie case."*

[137] Given the deficiencies in the plaintiffs' case particularised in this judgment and applying the relevant principles, there is no justification to draw any adverse inference against the representatives of the Sasfin defendants although the evidence of Mr Vorster and Mr Honey could have clarified many of the questions which remain. Ultimately, the plaintiffs' case was based on speculation and faulty inferential reasoning in various respects.

[138] The plaintiffs expressly elected to pursue only a remedy under s 31 of the Act, and did not rely on any of the other provisions of the Act with less stringent requirements. The

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<sup>63</sup> Relying on *Titus v Shield Insurance Co Ltd* 1980 (3) SA 119 (AD) at 133E.

The closure of a party's case did not mean that a court had to accept the witnesses evidence uncritically and at face value. They had to be weighed in the light of the documentary evidence and the general probabilities (par 193).

<sup>64</sup> *Koukoudis and Another v Abrina 1772 (Pty) Ltd and Another* 2016 (5) SA 352 (SCA) para 49.

remedies under s 31 yields the largest financial gain in the litigation, a fact of which the funders must be well aware.

### *Conclusion on liability*

[139] I conclude that the plaintiffs have failed to established on a balance of probabilities that there was a fraudulent scheme or any collusive agreement. Ultimately, the plaintiffs' case on the issue was based on speculation and inferential reasoning not properly supported by the primary facts or the probabilities.<sup>65</sup> They fell short of the mark to prove fraud. It follows that the plaintiffs have failed to establish the jurisdictional requirements of s 31. The action must thus fail on this basis alone.

[140] Although this conclusion is dispositive of the plaintiffs' claim, I am mindful of the trite obligation of a court of first instance to determine all the issues raised before it and thus turn to consider the remaining issues.

### *Remedies under s 31 and the expert evidence presented*

[141] Under s 31 of the Act, there are three categories of appropriate measures. First, the transgressor must make good the loss due to its conduct. If return of the property is not possible, its value must be returned less any amount already credited to the insolvent in respect of the property received under the impugned transaction.<sup>66</sup> Second, the transgressor must pay a penalty not exceeding the benefit received by it; designed to ensure disgorgement of benefits, taking into consideration the benefits actually received. That penalty is payable for the benefit of the insolvent estate<sup>67</sup>. The quantum lies within the discretion of a court but may not exceed the value of the benefit which would have accrued to the person had the disposition not been set aside. Third, provision is made for

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<sup>65</sup> Delacay supra.

<sup>66</sup> Louw NO and Another v Sobabini CC and Others (3532/13) [2015] ZAECHGHC 153 (28 January 2015) para 76, Endorsed in Cohen v Absa Bank Ltd (1280/2021) [2024] ZASCA 16 (9 February 2024) para 29.

<sup>67</sup> Cohen para 27.

the forfeiture of the claim of the transgressor against the insolvent estate if the transgressor is a creditor. A court has no discretion in this regard.<sup>68</sup> An interpretative analysis of s 31 was undertaken in *Cohen*.<sup>69</sup> There, however, no direct constitutional challenge was raised to the forfeiture provision.

[142] Under s 32 (3), the trustee will be entitled:

*‘to recover any property alienated under the said disposition or in default of such property the value thereof at the date of the disposition or at the date on which the disposition is set aside, whichever is the higher.’*

[143] For the plaintiffs, Mr Salomon testified regarding the realisable value of the stock. Mr Pemberton was called to testify in relation to the realisable value of the trademarks. Their case was based on what the fair value of Latex’s stock, fixed assets and trademarks (collectively referred to as “the assets”) would have been.<sup>70</sup>

[144] The Sasfin defendants called Mr Strydom who approached the valuations prepared by Messrs Salomon and Pemberton from an accounting perspective. On his own version, he was not a valuation expert. Mr Kamp and Mr Honey, who prepared the valuations which were used pursuant to the perfection order, were not called as witnesses.

[145] On a factual level, Latex’s records, including those on its SAPS system, which, *inter alia*, regulated stock, were available. Mr Hill and Fourie confirmed that a significant portion of Latex’s stock was slow moving and obsolete. Mr Salomon confirmed the existence of such stock. Stock older than 6 months was considered obsolete. Certain stock in the clearance and exception warehouses had been unsold for more than 18 months and could not be sold. There were size curve issues and branded stock for

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<sup>68</sup> Louw NO paras 77 and 78.

<sup>69</sup> Fn 127 *supra*.

<sup>70</sup> Heads of argument para 553.

customers that had changed. It was undisputed that when the stock was sold to Jade, it had a book value of some R67.2 million on 5 May 2016. By the time Jade was wound up in October, stock of R44.3 million remained unsold with only R22.9 million having been sold. The parties agreed on a schedule reflecting the actual sales of the stock on hand as at 29 February and 5 May 2016.<sup>71</sup>

### *The basis of the valuations*

[146] The approach adopted by both Messrs Salomon and Pemberton was to offer a range of valuations which it was contended provided the court with ‘*an appropriate context within which to assess what the most reasonable value would be to place on the assets*’. It was submitted that the valuation of property ‘*is not an exact science. It is an enquiry relating to a subject abounding in uncertainties, where there is more than ordinary guesswork and where it would be very unfair to require an exact exposition of reasons for the conclusions arrived at*’.<sup>72</sup> The plaintiffs argued that ‘*a range of valuations provides the court with an appropriate context within which to assess what, as a matter of judicial finding, based on the evidence and expert opinion, is the most reasonable value to place on the stock, fixed assets and trademarks as a matter of probability.*’<sup>73</sup>

[147] After certain amendments, the plaintiffs relied on losses reflected in a table attached to the amended statement of claim, particularising upper and lower limits of the losses contended for.

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<sup>71</sup> Exhibit Z.

<sup>72</sup> Heads of argument para 555-557.

<sup>73</sup> Heads of argument para 555.



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## UPPER LIMITS

| ASSETS                   |   |                          |
|--------------------------|---|--------------------------|
| Stock                    | R | 80,000,000               |
| Equipment                | R | 8,434,669                |
| Trademarks               | R | 21,611,672               |
| Total                    | R | 110,046,341              |
| Less                     |   |                          |
| Amounts Credited         | R | 18,700,881 <sup>74</sup> |
| Loss suffered by company | R | 91,345,460               |

## LOWER LIMITS

| ASSETS                               |   |            |
|--------------------------------------|---|------------|
| Stock                                | R | 35,200,000 |
| Equipment                            | R | 8,434,669  |
| Trademarks                           | R | 8,326,859  |
| Total                                | R | 51,961,528 |
| Less                                 |   |            |
| Amounts Credited                     | R | 18,700,881 |
| Alternative loss suffered by company | R | 33,260,647 |

[148] In argument, the plaintiffs did not persist with the high valuations. It was submitted that it should be found that the loss suffered by Latex in consequence of the collusive transaction was: *'(i) For the stock: R67 279 281.25,<sup>75</sup> alternatively, R47 499 199.16<sup>76</sup> further alternatively R40 000 000.<sup>77</sup> (ii) For the trademarks: R21 611 672,<sup>78</sup> alternatively, R9 871 247,<sup>79</sup> alternatively R8 326 859.<sup>80</sup> (iii) For the fixed assets R8 698 734.24.'*

<sup>74</sup> The figure debited by Sasfin Bank against what Jade purchased pursuant to the sale of assets agreement, excluding VAT.

<sup>75</sup> Being the cost price of the stock.

<sup>76</sup> Being the value of the stock captured by Mr Fourie as at 13 April 2016, and within the same general range as the Sasfin Field surveys.

<sup>77</sup> Being the value of the stock recognized in the April 2016 memorandum to the CIC, and recording an NDR of R20 million.

<sup>78</sup> Mr Pemberton's medium value.

<sup>79</sup> Being a figure derived using Mr Honey's assumptions before the manipulations.

<sup>80</sup> Mr Pemberton's low value.

[149] It is trite that, in the context of a breach of duty, in cases where it is difficult to assess damages with certainty or precision, a wrongdoer will not be relieved of the necessity to pay damages. In those circumstances a court may have to do the best it can with insufficient material and may have to form conclusions on matters on which there is no evidence and to make allowance for contingencies even to an extent of making a pure guess<sup>81</sup>. That however depends on the context of the case, where, objectively speaking, it is difficult to assess damages considering the nature of the damages involved.

[150] The plaintiffs' approach relied heavily on *De Klerk*.<sup>82</sup> It was contended that sufficient evidence was presented to enable a court to reasonably find that damages were sustained and, where damages could not be assessed with certainty, a court must come to the plaintiffs' assistance if a party has led the best evidence pertaining to the quantum of its damages.

[151] In my view, *De Klerk* is distinguishable and in any event the principles enunciated therein do not avail the plaintiffs. In *De Klerk*, the appellant had claimed damages arising out of an alleged fraudulent misrepresentation which had caused him to make a poor investment. His case was that had he invested funds in another investment he would have been better off. In calculating damages, a measure of speculation was required. That is however not the context of the present case, which concerns the market value or reasonable selling price (on the plaintiff's case) of Latex's assets disposed of to Jade pursuant to the perfection of the GNB on 6 May 2016. The documentary records pertaining to the Latex assets were readily available and formed part of the substantial discovery made by the plaintiffs the matter, which should have formed the basis of the damages calculation, to assess the damages with a measure of certainty. The plaintiffs were constrained to lead the best evidence available.

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<sup>81</sup> *Esso Standard SA (Pty) Ltd v Katz* 1981 (1) SA 964 (A)supra 969H-970D.

<sup>82</sup> *De Klerk v Absa Bank Ltd* 2003 (4) SA 315 SCA.

[152] It is trite that a plaintiff will be non-suited where he has not adduced all the evidence reasonably available to him at the trial to allow the court to assess the quantum of damages. In such circumstances a court is not bound to award damages.<sup>83</sup>

[153] In my view, the plaintiffs were required to prove at what price the Latex assets should reasonably have been sold on 6 May 2016 if they had not been devalued as part of the fraudulent scheme contended for. It required a comparison of the patrimony of Latex's estate prior to the collusive transaction and after it.<sup>84</sup> Put differently, to establish the effect on Latex's patrimony, and thus the loss the estate suffered, the plaintiff had to establish the market value of the property when the delict occurred.<sup>85</sup>

[154] The approach adopted by the plaintiffs was not based on a comparison of Latex's financial position before and after the sale of assets. The valuations by the Sasfin defendants' expert, Mr Strydom, also did not do so. Instead, Mr Salomon viewed the market value of the assets from the perspective of an 'optimal inventory construct'. Mr Salomon's valuation was given on the basis of what selling price the reconstituted Jade could achieve selling the stock to its normal customers in Jade's ordinary course of business over a period (of 5 months) with Jade being fully funded. The valuation was performed on a going concern basis without any consideration of Latex's financial position. The only evidence of what a willing notional purchaser would pay to purchase the entire body of stock at a specific point in time, with full knowledge of the advantages and disadvantages was Mr Salomon's averment that he could have persuaded Kevro to acquire the stock if it was accompanied by customer contracts. In sum his evidence on the issue was that a willing buyer, fully informed, would not have purchased the stock unless it could guarantee the contracts came along with the stock, as the value lay in the contracts.

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<sup>83</sup> Ezzo supra at 969H-970H.

<sup>84</sup> Philip Robinson Motors (Pty) Ltd v NM Dad (Pty) Ltd 1975 (2) SA 420 (A) at 428F; Home Talk Developments (Pty) Ltd and others v Ekurhuleni Metropolitan Municipality 2018 (1) SA 391 (SCA) para 93.

<sup>85</sup> Monumental Art Co v Kenston Pharmacy (Pty) Ltd 1976 (2) SA 111 (C) 118G.

[155] The Sasfin defendants' expert, Mr Strydom performed a reasonableness test and valued the stock on a going concern basis using IFRIS from an accounting perspective at R35.2 million as at 29 February 2016 and R36.7 million as at 29 February 2016. He did not perform a valuation but rather an exercise based on the accounting treatment of stock in a going concern entity. Mr Salomon on the other hand, in his expert report of 26 April 2024 valued the stock at R73.4 million as at 29 February 2016, R80 million as at 5 May 2016 and R49.8 million as at 29 February 2016 using IFRIS. Neither approached their valuations from the perspective of a willing and informed buyer purchasing Latex's stock in a once off transaction on the date of the disposition. Instead, their focus was on what a fully funded Jade could achieve by selling the stock to its purchasers in the normal course of business. That does not give an appropriate context in which to determine the market value of the Latex stock.

[156] There was no material dispute between the parties as to the cost price of the stock. Mr Salomon's version was that the SAP system showed a value of R67 178 445, whereas the defendant's expert, Mr Strydom, stated that value to be R67 053 539. The evidence established that the stock realised R41.4 million in Jade (whilst it was in business rescue and trading in distressed circumstances. However, cost does not necessarily equate to market value. *'The cost of a thing at an indeterminate time and without evidence of the circumstances in which the cost was incurred so as to show a relationship between that cost and market value, is not prima facie evidence of the market value of the thing, either at the time of its acquisition or at the time of its subsequent damage or destruction'*.<sup>86</sup> No evidence was led to illustrate such relationship. In the circumstances, I am not persuaded that the cost price of the stock constitutes any proof of its market value.

[157] The Sasfin defendants' expert, Mr Strydom performed a reasonableness test and valued the stock on a going concern basis using IFRIS from an accounting perspective at R35.2 million as at 29 February 2016 and R36.7 million as at 29 February 2016. He did not perform a valuation but rather an exercise based on the accounting treatment of

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<sup>86</sup> Monumental Art supra at 119G.

stock in a going concern. Mr Salomon on the other hand, in his expert report of 26 April 2024 valued the stock at R73.4 million as at 29 February 2016, R80 million as at 5 May 2016 and R49.8 million as at 29 February 2016 using IFRIS. Neither approached their valuations from the perspective of a willing and informed buyer purchasing Latex's stock in a once off transaction on the date of the disposition. Instead, their focus was on what a fully funded Jade could achieve by selling the stock to its purchasers in the normal course of business. That does not give an appropriate context in which to determine the market value of the Latex stock. The evidence of Mr Strydom does not avail the plaintiffs in establishing their loss. His evidence was not aimed at that issue, but rather at controverting the evidence of the plaintiffs' experts. Even if that evidence is accepted, it does not establish the loss suffered by Latex. The high water mark of the evidence presented may well support an inference that the assets were probably sold below their fair value. However, absent any evidence regarding the actual value of the assets, it is not reasonable to draw any definitive inference that the book value constituted their fair value.

[158] I am not persuaded that either Mr Salomon's valuation or Mr Strydom's valuation based on IFRIS assists the plaintiffs in proving the market value of the stock or the fixed assets. Market value is *'the full and fair price or sum which such property would be likely to realise if brought to voluntary sale and sold upon the usual terms and conditions, the price which a willing vendor might reasonably expect to obtain for it from a willing purchaser, and what it will fetch or what could be obtained for it. It is indeed a temporary value because of its tendency to fluctuate in the market and is usually determined as at a particular point in time'*.<sup>87</sup>

[159] It is convenient to deal with a peripheral issue which arose in the context of Mr Strydom's evidence at this juncture. The submission that paragraph 6 of Mr Strydom's first report fell to be struck as hearsay, does not bear scrutiny. Ultimately, the existence of Latex's debt under the consignment agreement was conceded by Mr Robinson in

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<sup>87</sup> Venter v Volkskas 1973 (3) SA 175 (T) at 180A.

evidence and in the s 417 enquiry and was common cause. The figures also appeared in the February 2016 management reports. The remaining figures in the paragraph do not contribute to the relevant issues.

[160] Mr Pemberton, who valued the trademarks, approached it from the perspective of determining the market value of the trademarks by estimating the price that the rights would realise in a notional sale between a willing buyer and a willing seller. In argument, the plaintiffs contended that Mr Pemberton's medium value of R21 611 672 should be accepted as the fair value of the trademarks. It was argued that in the alternative, if the court did not agree but preferred any variables that would result in a lower valuation, a value should be selected between Mr Pemberton's medium value of R21 611 672 and his low valuation figure of R8 326 859. It was submitted that anywhere within this spectrum constituted a reasonable valuation figure, cogent and supported by the evidence.

[161] In their heads of argument, the plaintiffs also sought to place reliance on the valuation of Latex's trademarks by Mr Honey. Yet a further calculation was provided containing various rates and periods, from which the court was requested to determine the most probable and reasonable variables and calculate the corresponding value. Mr Honey was however not called as a witness and as such no consideration can and should be given to his witness statement. Those submissions however left it to the court to speculate as to the loss and to unilaterally decide on a figure and disregards the onus on the plaintiffs to prove their loss on a balance of probabilities.

[162] Ultimately, the court was bombarded with a wide range of alternatives proposed by experts who were not willing to commit to any specific figures. The court was asked 'to apply such contingencies as to it may seem reasonable', in circumstances where a court self-evidently does not have the necessary expertise to make a properly informed decision. Such a shotgun approach, specifically where the plaintiffs have employed experts and such experts are themselves ambivalent regarding the basis of the valuations, is of little assistance and must be deprecated.

[163] From the plaintiffs' perspective the valuation was a moving target which changed in the various iterations of the pleadings. Even in argument, new calculations were raised and the plaintiffs did not pin their colours to a mast but argued for a range of figures, which was left to the court to determine as what would be reasonable.

[164] These issues support a conclusion that the plaintiffs did not prove the market value of the Latex assets on a balance of probabilities. There are however even more fundamental issues with the case presented by the plaintiffs.

### *Requirements of expert evidence*

[165] It is trite that before expert evidence can be accepted a court must be satisfied that the opinion has a logical basis and that the expert has reached a defensible conclusion.<sup>88</sup> The relevant principles pertaining to the nature and purpose of expert evidence are summarised by Vally J in *Twine*<sup>89</sup>, and it is not necessary to repeat all of them.

[166] Germane to the current enquiry are the following: First, expert evidence should only be introduced if it is relevant and reliable. Otherwise it is inadmissible. Second, experts should state all the facts and assumptions upon which they base their opinions and they should avoid basing their opinions on conjecture or speculation for doing so. Third, the factual basis of the reports must be cogent and based on proper knowledge, where a report is based on incomplete knowledge, or unreliable facts, it is of little value.<sup>90</sup> The opinions must be verifiable and capable of being tested. Fourth, expert witnesses should provide independent assistance to the court by way of objective and unbiased opinion in relation to matters within their expertise. Expert witnesses are not advocates

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<sup>88</sup> Michael and another v Linksfeld Park Clinic (Pty) Ltd and another 2001 (3) SA 1188 (SCA). Harrington NO v Transnet Ltd t/a Metrorail 2010 (2) SA 479 (SCA) para 57, wherein it was held:

'Importantly, expert evidence is only as sound as the factual evidence on which it is based. The less fixed (or more variable) the assumptions and the fewer hard facts available to the expert, the greater scope for alternative conclusions'.

<sup>89</sup> *Twine v Naidoo* 2007 JDR 1732 para [18] and the cases cited therein. Also see *Price Waterhouse Coopers Inc v National Potato Co-operative Ltd* [2015] 2 All SA 403 (SCA) par 97.

<sup>90</sup> *Sasol Chemical Industries Ltd and Another v Competition Commission* 2015 (5) SA 471 (CAC) paras 179-180.

for any party and their independence should not be relinquished. *‘Expert evidence presented to the Court should be, and should be seen to be, the independent product of the expert uninfluenced as to form or content by the exigencies of the litigation’*. A court must actively weigh the cogency of the evidence in the contextual matrix of the case with which it is seized.<sup>91</sup>

[167] The reliability of the experts’ evidence must be measured against these principles. I deal first with Mr Salomon. Mr Salomon’s reports contained various errors, which he conceded. Even when such errors were pointed out, he did not attempt to correct all of them. He did not pay careful attention to validate the correctness of his own reports, and simply contended that his errors were not really of consequence.

[168] In cross examination, Mr Salomon conceded that he did not consider all the available information. He consulted with Mr Robinson and Mr Hill, who was in charge of inventory management prior to the employment of Mr Robinson. Mr Hill had left Latex during 2015 and he was not aware of all the relevant facts as they existed during 2016. Both Mr Robinson and Mr Hill were involved in the funding arrangement of the present litigation, drawing into question their objectivity. Mr Salomon did not comprehensively consult with Latex’s former employees to get a proper understanding of the stock or Latex’s situation at the relevant time. In cross examination he was constrained to concede that he had not properly researched and analysed the available data to the best of his ability. From the evidence it appeared that there were various other sources of information and other factors which he should have considered.

[169] Mr Salomon gave various iterations of his report. His first report was prepared without access to the SAPS system which pertained to Latex’s stock. In cross examination, he conceded various errors in his valuation. As such it cannot safely be relied upon. The second valuations in his April 2024 report reflected a stock value of R73.4 million as at 29 February 2016. He considered the sales data from 29 February

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<sup>91</sup> S v M 1991 (1) SACR 91 (T) at 100.



and 5 May 2016 to cessation of trading (in the reconstituted Jade) as a starting point. The valuation was predicated on the basis that the company was a fully functional going concern which could replenish stock and thus generate an income of R88 million. The evidence established that this was not the case and Latex was experiencing cash flow issues. The valuation based on the reconstituted Jade's trading ability similarly did not take into account the factual position and was based on a hypothesis.

[170] Mr Salomon's methodology was to value contract stock at full selling price on the assumption that such stock could be put to contract customers at full selling price as such customers would have put options in their supply agreements. The put option pertained to a clause in the customer agreements which would oblige a customer to buy all the stock held by Latex for it if, for example, a customer wished to cancel its agreement with Latex. The issue is also important in the context of whether the customer contracts would accompany the stock. However, no independent verification was done as to whether such put options existed in all the Latex contracts. Mr Salomon simply relied on 'his team's' advices that all the contracts had put options. No evidence was presented to prove this fact or clarify the issue. His report did not specify which customers had put options in their contracts and no data was provided as to what stock that pertained to. It was conceded by Mr Salomon that his valuation would be incorrect without knowing whether or not the respective contracts had put options.

[171] It would not be appropriate to apply the methodology that the stock may have been sold in a one off sale on the basis that as part of the sale, Latex's customers were going with the stock, as proposed by Mr Salomon. This again illustrates the confused nature of the plaintiffs' case regarding whether it was only the Latex assets which were being transferred, or its entire business. As stated, during argument, plaintiff's counsel expressly disavowed any reliance on the transfer of Latex's entire business.

[172] The other alternative proposed, being to determine what the stock would have been worth on a clearance basis, as proposed in Mr Salomon's first report was similarly unreliable. That report was based on the stock being sold with the knowledge that the

purchaser would be getting the customers and the contracts and his evidence that he would have persuaded Kevro to purchase R68 million worth of stock. It was centrally predicated on the notion that the customers would accompany the stock. Whilst the plaintiffs argued that the loss had to be considered notionally in context with the contracts moving with the stock, that was not their pleaded case and no reliable evidence was presented on which it can be concluded as a probability that the customer contracts would accompany the stock. The foundational notion of Mr Salomon's report is in my view speculative, even if that is what the parties may have hoped for. In similar vein to the notion that the essential creditors would simply continue supplying Jade in order to make up any losses suffered in Latex, no rational cogent evidence supporting such conclusion was presented in evidence. On his own evidence, whilst there were discussions at the time regarding a possible acquisition of the Latex business, that did not come to fruition. Ultimately Kevro was not interested in acquiring the stock. Mr Salomon's opinion on this issue appears contrived and self-serving, thereby drawing into question his objectivity.

[173] Mr Salomon's evidence regarding the valuation of the non-contract stock was also unsatisfactory. The remaining stock was valued at a low value (assuming a one to three months clearing period) and a high value (with a four to six months clearing period). According to Mr Salomon there would be a systematic drop in pricing the quicker the stock needed to be sold. During cross examination, Mr Salomon's evidence however changed on numerous occasions. Initially the valuation was on company trading as a going concern, then a company looking to clear its stock on the basis 'there would be urgency to go and clear the inventory' and later a company that could sell stock over an extended period on the basis 'there will be time, so there would be at least a month or two months to go'. Ultimately his evidence was that his valuation was based on his ability to trade with the stock as an efficient operator and was not based on that of an operational business, such as Jade. That resulted in such evidence being unreliable and confusing as to the exact basis of the valuation. In cross examination, Mr Salomon conceded that he did not take into account the circumstances under which Latex was trading. He also conceded that his valuation did not take into account that certain stock was owned by Sasfin

pursuant to the reservation of ownership under the consignment agreement and owned by Puma pursuant to another consignment agreement.

[174] In respect of stock that sold, Mr Salomon considered what percentage of each item of stock had been sold. He grouped these items into various categories; (i) 1%-29%; (ii) 30%-79%; (iii) 80-99%; and (iv) 100% sold. In each category Mr Salomon calculated an average gross profit margin for each category. He then valued the remaining items in the category, being the remaining 99%-71%, 71%-21%, 20%-1% and 0% at a selling price, by applying the average gross profit margin to the cost price of the items. His opinion was that he was entitled to do so because a single sale indicated that there was a 'credible market out there that would buy these items at a certain price'. Those valuations were similarly vague and confusing and lacked logical consistency. The various 'buckets' seem to have been arbitrarily chosen. It was conceded that if different buckets were used or the gross profit calculated on each respective item, it would have a material impact on his valuation. Again there were unrectified errors in the calculations.

[175] For stock that did not sell at all, Mr Salomon used the valuation methodology utilised in his first report. He divided the stock into five categories: commoditized, contract, generic and specialised stock and fabric. In cross examination, Mr Salomon conceded that his grouping of the sales into his chosen categories was incorrect and had not been updated in his report. He further conceded that his categories had been arbitrarily chosen without any rational reason supporting those choices. He further conceded that if he had chosen a different categorisation or had calculated the gross profit on each line item, it could have a material impact on this valuation.

[176] Considering all these deficiencies, I am not persuaded that any reliance can safely be placed on Mr Salomon's evidence. Measured against the principles set out earlier, Mr Salomon's valuations were ultimately unreliable and did not present cogent proof on a balance of probabilities as to what the market value of the Latex stock was. I am fortified in this view by the plaintiffs' approach adopted in argument that it was left to the court to determine what such reasonable value was. If the plaintiffs' own experts could not come

to a specific value, it is unclear how a court can be expected, without resorting to utter speculation and conjecture to determine such amount.

[177] I turn to Mr Pemberton, on whose evidence the plaintiffs relied regarding the loss in respect of the trademarks. He produced three reports, providing a valuation as at 19 April 2016, using the relief from royalty valuation which was the same approach adopted by Mr Honey in the original valuation done at the time of the perfection. He defined the approach as *'the situation where the intellectual property rights are licensed, and not owned by the proprietor of the intellectual property rights and calculates the value of the intellectual property rights by considering the present value of future estimated, or notional royalty payments.'*

[178] According to Mr Pemberton it was the most suitable method to apply *'when determining the value of intellectual property which is in use and is currently generating an income'*. It should be applied *'if sufficient and accurate information pertaining to the historical income-generating trends of the relevant intellectual property is available.'*

[179] That valuation model took into account: (i) the expected useful life term of the trademarks, (ii) the future economic benefit of the trademarks being a function of the notional royalty rate multiplied by the estimated future revenue over the terms of the trademarks; (iii) the tax rate of the company and (iv) the applicable present value discount rate.

[180] In his report, Mr Pemberton provided high, medium and low scenarios with certain variables in each scenario. In each of his three reports, Mr Pemberton adjusted the growth and discount rates, without any cogent motivation why this was done. In evidence, a table was produced by Mr Pemberton in which he selected 'appropriate' variables in each scenario and compared it to Mr Honey's final report, upon which the Latex sale of assets agreement was based. His table provided:

| <b>KIT GROUP TRADEMARKS</b> |                                           |                  |                     |                   |
|-----------------------------|-------------------------------------------|------------------|---------------------|-------------------|
| <b>Variable</b>             | <b>Adams Report</b>                       | <b>Low Value</b> | <b>Medium Value</b> | <b>High Value</b> |
| Term                        | 10 years                                  | 10 years         | 15 years            | 20 years          |
| Turnover increase           | 0% first five years<br>5% next five years | 0%               | 4%                  | 10.6%             |
| Royalty                     | 0.5%                                      | 1%               | 1.5%                | 2%                |
| Discount rate               | 18%                                       | 18%              | 14%                 | 10%               |
| Valuation                   | R6 419 213                                | R8 326 859       | R21 611 672         | R78 508 929       |

[181] Mr Pemberton's valuations were based on certain assumptions: (a) With respect to the baseline revenue: (i) In the case of Mr Honey's valuation, Latex's starting annual revenue was assumed to be R259 774 496. Mr Honey appears to have taken this figure from Latex's 2015 audited financial statements. (ii) In the case of Mr Pemberton's valuation, Latex's starting annual revenue was fixed at R257 340 000, which Latex's revenue annualised for 2016 over the months of March 2015 to January 2016 since it was not clear that M1 Latex's February management accounts were ever made available to Mr Honey. (iii) Both Mr Pemberton and Mr Honey used a tax rate of 28%, which was

uncontroversial. (iv) Mr Honey used a 10 year term as used by Mr Pemberton in his low valuation. The plaintiffs suggested that a period of 15 years was reasonable for a business like Latex that existed for 25 years. (v) A turnover growth rate 0% for low, 4% for medium and 10.6% for high was used. In evidence, Mr Pemberton conceded that the 10.6% growth was unrealistic. Mr Honey used 0% for 5 years and 5% for the 5 years thereafter.

[182] Mr Pemberton valued the trademarks in his 'medium valuation' at R21 611 672 and R8 326 859 on his 'low valuation'. In evidence, Mr Pemberton supported the medium valuation, reflecting a 4% growth rate. He adopted as royalty rates, a low rate of 2%, a medium rate of 3% and a high rate of 5%. The plaintiffs did not persist in argument with contending for the high valuation.

[183] Mr Pemberton's evidence also falls short of the mark when measured against the relevant principles already referred to. The evidence established that he did not consider all the relevant information. He considered only Latex's February 2015 financial statements and did not interview any of Latex's employees or directors and had no information pertaining to Latex's trading activities during 2016. That notwithstanding, Mr Pemberton attributed a growth rate to Latex's turnover and a period over which the trademarks could be gainfully employed.

[184] He did not consult with any of Latex's employees or representatives and only had regard to Mr Robinson's witness statements and Latex's financial statements, which was his "main area of concern". He did not however disclose in his report that he had relied on those documents. His report was thus heavily informed by the contents of Mr Robinson's witness statements, specifically in relation to the growth rate to be applied and the remaining useful life of the trademarks. That may well call into question his objectivity.

[185] Mr Pemberton further relied on the proposed turn around measures and the steps taken by management up to the point of the valuation date to justify his opinion on the remaining useful life of the trademarks and the applicable growth rate, without any proper investigation as to what that entailed. He further conceded that he did not consider Latex's

trading conditions or the state of the clothing industry at the time and without considering whether Latex would be able to afford the royalty fees which his reports proposed. In cross examination he conceded that in order to project the growth of a company he would require knowledge of Latex and its trading conditions and he would need to know the financial position of Latex in order to assess the risk factor in relation to a discount rate.

[186] He further accepted that in order to determine a royalty rate an important factor would be to consider the affordability of the royalty payments to Latex and averred that a determination of the royalty rate was what a notional buyer would pay for the trademarks. Mr Pemberton conceded that he did not have such information, but relied on metrics and figures given for the USA market, without any investigation as to their accuracy and relevance to the South African market.

[187] Ultimately, Mr Pemberton conceded that it would have 'been a good idea' to get that information. Seen cumulatively those concessions cast grave doubt on the reliability of his valuation. Mr Pemberton's averment that he had sufficient information, albeit not the best information to support his valuation, rings hollow, specifically as the very basis of the relief from royalty method was to determine the value of intellectual property which was in use and was currently generating an income.

[188] Mr Pemberton also made various casing errors in his report, only some of which were ultimately rectified. He conceded in cross examination that the relief from royalty approach should only be applied 'if sufficient and accurate information pertaining to the historical income generating trends of the relevant intellectual property was available'. In light of his concession that he did not have sufficient information regarding Latex's historical trading, his persistence in evidence that he did have sufficient information, does not pass muster and affects both his credibility and the reliability of his evidence.

[189] Mr Pemberton further in cross examination conceded that his error in the calculation of the compounded annual growth rate of 10.6%, based on a comparison of Latex's turnover to the turnover of the Latex group. This had been pointed out by Mr

Strydom. Despite this he defended such growth rate as possible over a period of 15 years, notwithstanding that Latex had a negative growth rate. That figure was patently incorrect and both Latex and Jade were placed into final winding up by October 2016.

[190] Mr Pemberton further unilaterally valued what he styled 'auxiliary intellectual property' without having been instructed to do so. It did not appear that Mr Pemberton investigated whether such property existed, or what the nature and extent of such property was. In his report, he attributed the same value as he had attributed to the trademarks to such auxiliary. He conceded in cross examination that he would only have been able to value auxiliary intellectual property if he had done a due diligence and that he did not have enough information for the valuation. Hence he simply doubled the amount of the trademark valuation.

[191] In argument, the plaintiffs abandoned any reliance on the 'auxiliary property valuation'. Such concession was correctly made. Significantly, the plaintiff's pleaded case never referred to any 'auxiliary intellectual property'. The valuation stated that it both in relation to the trademarks and the auxiliary intellectual property fairly set out what a willing buyer and willing seller would pay for these items.

[192] The sole source of Mr Pemberton's information was the liquidators, Mr Robinson's statements and some contact with representatives of the funders. He did not engage with any of the employees or director of Latex to establish whether any auxiliary intellectual property existed. This casts a grave question mark over the reliability and independence of Mr Pemberton's valuation and evidence. One is left with the impression that Mr Pemberton attempted to bolster the value of the trademarks and thus, the plaintiffs claim, without any justifiable or rational basis to do so. The criticism levied by the Sasfin defendants that his evidence was not objective or rationally justified and ultimately he was an advocate for the plaintiff, has merit.

[193] Considering all the facts, the evidence of Mr Pemberton must be rejected as unreliable and filled with deficiencies. It must be concluded that no cogent and reliable



evidence was placed before the court regarding the market value of the trade marks to establish any loss.

[194] Regarding Latex's fixed assets, limited evidence was led. It was common cause that in terms of the sale agreement between Sasfin and Jade, those assets were sold for R1 427 000, including all assets reflecting on Latex's asset register. Although the sale agreement reflected that all Latex's movable assets were sold, no particularity of such assets was provided. It does not appear that any proper comprehensive valuation of all the fixed assets was ever undertaken by Mr Honey. That cannot be placed at the plaintiffs' door, but does not detract from the plaintiffs' onus to prove its case.

[195] The only evidence presented was the book value of Latex's fixed assets in an amount of R8 698 734.24 in its books of account. No particularity was provided as to what those assets comprised of. According to Latex's financial statements for the year February 2016, property, plant and equipment was valued at R10.2 million. That however included leasehold improvements. In support of such valuation, reliance was placed on a memorandum dated 1 April 2016, emanating from Latex's Mr Harris, explaining the proposed NDR provision for the fixed assets in Jade. In the alternative it was argued that if Mr Harris' figures were applied, the assets would be worth R7.5 million, based on a revaluation by R2.5 million in Jade's books of account.

[196] However, it remains unclear what the actual value of those assets were at the relevant time or precisely what the revaluation related to. Insufficient cogent evidence was led as to the value of the fixed assets. On the probabilities, it cannot be concluded that the plaintiff has established the fair value of the said assets or what loss Latex suffered in relation thereto.

[197] It follows that the plaintiffs failed to establish the amount of its loss in respect of the fixed assets, stock and trademarks. The claim falls to be dismissed on this basis too. If no loss was established, the issues pertaining to the penalty and forfeiture do not arise. I shall deal with them nonetheless.

[198] In relation to the penalty and forfeiture, the plaintiff's submissions were ultimately very brief. It was submitted that Sasfin Bank received two benefits: the discharge of its claims against Latex and the right to dispose of Latex's stock, fixed assets and trademarks into an entity of its choice. Sasfin was benefitted to: (i) the value of the discharge of its claim against Latex (R14 303 007); plus (ii) the value of the excess value in the Latex assets not accounted for back to Latex (being whatever the court determines the value of those to be less the figure of R18 700 881). It was submitted that SPE's benefit was to have its claim against Latex discharged in full in the amount of R4 093 096. It was submitted that those benefits would also be recoverable following the forfeiture of their claims against Latex, but that the order that the plaintiffs sought took that into account and such repayment was only sought under the penalty so there was no double counting. It was argued that there was no basis to reduce those penalties against the Sasfin defendants considering that they are financial institutions who were seeking to abuse the court system.

[199] The plaintiffs contended that the benefit was the same as the loss. In argument, reliance was placed on restitutionary damages, disgorgement damages and unjust enrichment. However, none of those concepts arise in the present context. Although they raise interesting academic arguments it is not for present purposes necessary to discuss or engage them.

[200] What enquiry must be entertained is the plaintiffs' submission that the Latex assets were sold at a deflated forced sale value and should have been sold at market value at the time of the alleged collusive transaction. It was not disputed that Jade did not pay Sasfin for the assets purchased under the asset sale agreement. The Sasfin defendants submitted that Sasfin accordingly did not receive any benefit from the sale. The plaintiffs countered the argument by contending that the benefit had to be considered at the moment the asset was placed under the power of Sasfin to allocate as it pleased or sell at a price it elected, because it acquired an asset which had a market value far in excess of what it paid. It is not necessary to enter into that debate as the plaintiffs did not prove the market value of the assets.

[201] For purposes of calculating the penalty, the plaintiffs applied the same amount as the loss, being the value of the loss of the Latex assets and the indebtedness under the consignment agreement in respect of Sasfin and the value of the shareholders loan in respect of SPE. Does that equate to the benefit accruing to those parties if the collusive dealings had not been set aside? Penalty provisions look at actual rather than notional benefit and the loss to an insolvent estate cannot simply be equated with the benefit to the collusive party.<sup>92</sup> Stated differently, the value of the Latex assets, and thus the loss to its estate, cannot simply be equated to the benefit received by Sasfin and SPE.

[202] On the facts, it was not disputed that Sasfin and SPE did not receive the purchase price of the assets from Jade, which was not financially able to do so without funding. Latex's indebtedness to Sasfin and SPE may have been notionally discharged, but there was no actual discharge as neither received any money. Their claims against Latex were exchanged with claims against Jade. SPE did not acquire any shareholding in Jade, which was wound up. Although a notional benefit could be the discharge of Latex's liabilities to the Sasfin defendants, no payment was made. Even if the tables pertaining to Sasfin's alleged losses in its funding of Jade and Jaff were to be struck out, as the plaintiffs contended, that does not avail the plaintiffs. Insufficient evidence was led regarding the actual benefit to make any determination of such value. The plaintiffs further failed to make out any proper case for the imposition of a penalty as it did not on a balance of probabilities establish any benefit.

*The constitutional challenge to s 31(2) of the Act and the forfeiture provision therein.*

[203] The Sasin defendants raised a frontal challenge to the constitutionality of the proviso to s 31(2) and contended that s 31(2) is constitutionally invalid to the extent that it fails to afford a court a discretion to order forfeiture, either whole or in part, which constitutes an arbitrary deprivation of property as envisaged in s 25(1) of the Constitution. As an alternative to a declaration of constitutional invalidity, they seek a reading down of

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<sup>92</sup> Garth NO/Ass Trading CC v Socratous [2009] JOL 24175 (Tk).

s 31(2) in that the word “shall” be interpreted as “may” in relation to the forfeiture provision. Mr Pereira, the Minister and Mr Robinson abided the court’s decision. Although the plaintiffs presented oral argument on the issue, they too abided the court’s decision.

[204] The plaintiffs challenged the relief as overly broad. That was accepted by the Sasfin defendants. An amendment was sought to attenuate the ambit of the relief sought in relation to s 31 (2) being that only to the extent that the portion of s31(2) which provides ‘*he shall also forfeit his claim*’, be declared inconsistent with the Constitution and invalid and that in the interim, the provision be read that a court may order that he shall forfeit his claim against the estate in whole or in part.’ I am persuaded that the amendment should be granted.

[205] Adv Steinberg SC, who presented submissions on the issue presented an eloquent and persuasive argument on the issue, based, *inter alia*, on the analogies <sup>93</sup> with *Opperman* <sup>94</sup> and the forfeiture provision in s 50(1) of the Prevention of Organised Crime Act and citing the authority of *Prophet*.<sup>95</sup> The Constitutional Court interpreted s 50 (1) of POCA to allow for and require the exercise of judicial discretion in the form of a proportionality exercise and held that ‘*an unrestrained application of [the section] may violate constitutional rights, in particular the protection against arbitrary deprivation of property particularly within the meaning of section 25(1) of the Constitution, which requires that ‘no law may permit arbitrary deprivation of property’*. The Constitutional Court thus read down section 50 (1) by interpreting “shall” to mean “may” and as requiring a proportionality exercise in order to render it constitutionally compliant. The same approach was followed in *Van den Burg* <sup>96</sup> and *Mohunram*.<sup>97</sup>

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<sup>93</sup> See *Shoprite Checkers (Pty) Ltd v Member of the Executive Council for Economic Development Environmental Affairs and Tourism, Eastern Cape and Others* (CCT 216/2014) [2015] ZACC 23; 2015 (6) SA 125 (CC) para 63.

<sup>94</sup> *National Credit Regulator v Opperman and Others* (CCT 34/12) [2012] ZACC 29; 2013 (2) SA 1 (CC).

<sup>95</sup> *Prophet v National Director of Public Prosecutions* (CCT 56/05) [2006] ZACC 17.

<sup>96</sup> *Van den Burg and Another v National Director of Public Prosecutions* (CCT 75/11) [2012] ZACC 12.

<sup>97</sup> *Mohunram and Another v National Director of Public Prosecutions and ANoter* (Law Review Project as Amicus Curiae (CCT 19/06) [2007] ZACC 4.

[206] The Minister, who was specifically joined to the action to deal with the constitutional issue raised, did not actively participate in the trial and no legal representatives appeared at the hearing. After the application was launched by the Sasfin defendants pertaining to the declaration of constitutional invalidity, a preliminary affidavit was filed by the Minister, which inter alia, reserved his right to deliver a further affidavit. No further steps were ever taken. It was only after this court indicated that the oral argument on the issue could not proceed in the absence of the Minister, that his attorney of record appeared and indicated that the Minister abided the court's decision. No argument was presented by the Minister and no heads of argument on the issue were ever delivered.

[207] As emphasised by the Constitutional Court in *Khosa*<sup>98</sup>, any challenge to legislation is important and the State bears an obligation to place all relevant facts before court. No such facts have been advanced by the Minister, which could have a material bearing on the issue. In these proceedings, the issue has not been debated fully and only a one sided view has been advanced. For this reason, I am not persuaded that this important issue should be determined in the present proceedings. It will clearly have a substantial impact, not only on the parties to this litigation, but also on the liquidation industry as a whole.

[208] Given the conclusions I have reached the issue does not add or detract from the conclusion that the plaintiffs' claim must fail. In the present context, any decision on that issue on the present facts, would be of academic interest only. I conclude that the determination of the constitutionality of the forfeiture provision in s 31(2) should best be left for determination on another occasion, when the issue has been fully ventilated by the relevant parties.

*Are the Sasfin defendants entitled to a contribution from the third party, Mr Robinson?*

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<sup>98</sup> *Khosa and Others v Minister of Social Development* 2004 (6) SA 505 (CC) para 19 referring to *Dawood v Minister of Home Affairs and Others*; *Shalabi and Another v Minister of Home Affairs and Others*; *Thomas v Minister of Home Affairs and Others* (CCT35/99) [2000] ZACC 8; 2000 (3) SA 936 (CC).

[209] Given that I have concluded that the plaintiffs' claim must fail, the only relevance of this issue pertains to a consideration of costs. As the issue was fully debated, it is apposite to shortly deal with the merits.

[210] The Sasfin defendants joined Mr Robinson as a third party under r 13 on 29 July 2021. Their case was that his liability arose as a joint wrongdoer to the collusive transaction, if it were to be found that the Sasfin defendants were party to the collusive transaction averred by the plaintiffs. The third party notice raised two grounds on which the notice is based. First, that the Sasfin defendants' claim a contribution from Mr Robinson on the grounds set out in the annexure. Second, that there is a question or issue in the action substantially the same as a question or issue which has arisen or will arise between the Sasfin defendants and the third party, and that this issue should properly be determined not only as between the parties to the action but also as between such parties and the third party.

[211] The third party notice further advanced a claim for delinquency against Mr Robinson under s 162(5) of the Companies Act<sup>99</sup>, which was withdrawn on 20 May 2024. No tender of costs was made. In light of the withdrawal it is not necessary to determine such claim or Mr Robinson's special plea of prescription thereto.

[212] In response to the third party notice, Mr Robinson pleaded that the steps *bona fide* taken by him to mitigate the impact of the collusive transaction should be taken into account in calculating his share of the loss and penalties. Those steps, following the perfection of the GNB were: (i) attempting to negotiate in good faith an arrangement in terms of which Latex would share in the profits of Jade, (ii) procuring a financial expert to develop a plan which would allow Latex to continue to operate; (iii) presenting such turnaround plan to Mr Eppel and Mr Sassoon who dismissed the plan outright and elected to place Jade in business rescue; (iv) securing the appointment of independent liquidators and co-operating fully with them acting in the best interests of the general body of

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<sup>99</sup> 71 of 2008.

creditors; (v) co-operating fully with the insurer of many of Latex's creditors; and (vi) assisting them in the investigation of Latex's affairs.

[213] Two issues were raised. The first, the Sasfin defendant's *locus standi* to claim a contribution and seek an order in respect of liability from him under s 31. The second, if so, nonetheless, whether the Sasfin defendants were entitled to claim a contribution from the third party in the event that the Sasfin defendants were themselves guilty of dishonest, collusive conduct within the meaning of s 31.

[214] In *Cohen*<sup>100</sup> the Supreme Court of Appeal held that a surety does not have *locus standi* to invoke one of the remedies in s31(2). It held that '*if the liquidator (or a creditor in the liquidator's name) did not take proceedings to set aside a collusive disposition, the disposition remains valid, and neither the liquidator nor anyone else has recourse to the remedies outlined in s 31 (2)*'.<sup>101</sup>

[215] On this basis the Sasfin defendants lacked the requisite *locus standi* under r 13 to institute an action against Mr Robinson for the relief claimed either by the plaintiffs or by the Sasfin defendants themselves against him. Even if the *locus standi* issue could have been raised by way of exception, as submitted by the Sasfin defendants, that would only have an impact on costs and does not debar Mr Robinson from raising the issue at trial. Given that the delinquency claim was only abandoned during the course of the trial proceedings, the *locus standi* issue would not have been dispositive of the issues raised in the third party notice. As such, the exception argument ultimately has no real impact on the costs.

[216] Regarding the claim for a contribution based on Mr Robinson's participation in the alleged collusive scheme, I agree with Mr Robinson that those averments do not sustain a legal basis for the Sasfin defendants to make a claim against him for a contribution, nor

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<sup>100</sup> Paras 21 -32.

<sup>101</sup> Para 32.

was such basis in law pleaded. A right of indemnity arises only from contract, express or implied, or by statute, or where it is implied by law.<sup>102</sup> A party who invokes r 13 must illustrate that there is such a right to an indemnity in respect of or a contribution towards the plaintiffs' claim. The common law recognises a right of contribution claimed between joint wrongdoers, unless there was deliberate malfeasance that triggered the *ex dolo malo* or *ex turpi causam* maxim.<sup>103</sup>

[217] The Sasfin defendants, relying on *Afrisure* <sup>104</sup> submitted that the principle should be relaxed in instances such as the present and that public policy militated decisively against application of the *pari delictum* rule. I do not agree. Considering all the facts, I am not persuaded that the Sasfin defendants would have a claim at common law against the third party if the collusive transaction was established and the Sasfin defendants themselves found to be guilty of turpitudinous conduct. No reliance was placed on the Apportionment of Damages Act by the Sasfin defendants and it is not necessary to consider it.

[218] Considering all the relevant factors, I am not persuaded that the Sasfin defendants' claim would have been successful or that there is any basis to deviate from the normal principle that costs follow the result.

### Costs

[219] Both the plaintiffs and the Sasfin defendants sought adverse costs orders against the other on the scale as between attorney and client. The third defendant sought an

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<sup>102</sup> *Eimco (SA) (SA) (Pty) Ltd v P Mattioda's Construction Co (SA) (Pty) Ltd* 1967 (1) SA 326(N), followed in *Dodd v Estate Cloete* 1971 (1) SA 376 (E).

<sup>103</sup> *Pickitup Johannesburg SOC Ltd v Nair (Maharaj and Others, Third Parties/Excipients* 2019 (5) SA 540 (GJ) para 41; *Sasfin Bank Ltd v Amoiils* (unreported) (1120/2019) ZAGPJHC 237 (30 September 2020) paras 17-24.

<sup>104</sup> *Afrisure and another v Watson and Another* [2009] 1 All SA 1 (SCA).



adverse costs order against the plaintiffs and the third party a costs order against the first and second defendants. In support of punitive costs orders, the plaintiffs argued that a commercial fraud would justify such an order and that the conduct of the Sasfin defendants and Mr Pereira in relation to the litigation was deplorable. The Sasfin defendants in turn submitted that a punitive costs order was warranted against the plaintiffs given the reckless allegations of fraud made against Sasfin and its representatives and their attorney, Mr Winer.

[220] Considering all the facts, I am not persuaded that any punitive costs orders on the scale as between attorney and client should be granted. There is no reason to deviate from the principle that costs follow the result. Given the complexities in the matter, the employment of two counsel was warranted and cost should be awarded on scale C.

[221] It follows that the plaintiffs must be liable for the costs of the Sasfin defendants and Mr Pereira. Although Mr Pereira was not legally represented at the trial, he was legally represented at earlier stages of the litigation.

[222] For reasons already provided, the Sasfin defendants must be held liable for the costs of the third party claims against Mr Robinson. I am not persuaded by the submission that Mr Robinson should be deprived of his costs as he did not incur any expenses in the matter and it was not necessary for him to obtain separate legal representation. His conduct in relation to the matter already has grave consequences which should not be compounded by a further costs order. The Sasfin defendants belatedly withdrew their delinquency claim against Mr Robinson and their other third party claim was doomed to failure, justifying the granting of an adverse costs order against them.

[223] There are outstanding cost orders in various applications, including; (i) the stay application which was never pursued by the Sasfin defendants; and (ii) the application for the postponement of the trial during February 2023, which were reserved. The plaintiffs submitted that the Sasfin defendants should be liable for the costs of the stay application and no order should be granted regarding the postponement as it was clear from the

subsequent events that the Sasfin defendants were not prepared for trial. The Sasfin defendants sought the costs of the postponement, contending the opposite. In relation to the other interlocutory applications, the appropriate parties made costs tenders which were accepted and thus do not need to be addressed.

[224] In relation to the stay application, the Sasfin defendants should be held liable for the costs, given that the application was never pursued. Considering all the facts, it appears clear that none of the parties were ready to proceed to trial during 2023 and each of the parties should be liable for their own costs pertaining to the postponement.

[225] In the result, the following order is granted:

[1] The first and second defendants' amendment dated 31 May 2024 is granted;

[2] The plaintiffs' claim is dismissed with costs including the costs of two counsel, where so employed, the costs of senior counsel on scale C and junior counsel on scale B;

[3] The first and second defendant's claim against the third party is dismissed with costs, such costs to be payable jointly and severally, the one paying the other to be absolved, including the costs of two counsel, where so employed, the costs of senior counsel on scale C and the costs of junior counsel on scale B;

[4] Each party is directed to be liable for their/its/his costs in respect of the postponement of the trial in February 2023;

[5] The first and second defendants are directed to pay the costs of the stay application jointly and severally, the one paying, the other to be absolved, including the costs of two counsel where so employed, the costs of senior counsel on scale C and the costs of junior counsel on scale B.

  

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**EF DIPPENAAR**  
**JUDGE OF THE HIGH COURT**  
**JOHANNESBURG**

**HEARING****DATES OF HEARING**

:15, 16, 17, 18, 19, 22, 25 and 26 April  
and 2, 6, 8, 9 May 2024  
Heads of argument 24 May 2024  
Oral argument: 30 and 31 May 2024

**DATE OF JUDGMENT**

: 31 December 2024

**APPEARANCES****PLAINTIFF'S COUNSEL**

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: Adv D. Watson

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**THIRD DEFENDANT**

: In person

**COUNSEL FOR THIRD PARTY**

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