

THE REPUBLIC OF SOUTH AFRICA



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

Case Number: 6536 / 2024

In the matter between:

CELLUCITY (PROPRIETARY) LIMITED

Applicant

and

SHARLENE PHILLIPSON-GARCIA

First Respondent

BASIC BLUE TRADING 450 (PTY) LTD

Second Respondent

JOHN MICHAEL BARRINGTON

Third Respondent

JENNIFER LOUISA BARRINGTON

Fourth Respondent

CANDICE ASHLEIGH CAMPBELL

Fifth Respondent

OHANA BEAUTY AND WELLNESS (PTY) LTD

Sixth Respondent

LITTLE PHASE (PTY) LTD

Seventh Respondent

ROLLING THUNDER DISTRIBUTORS CC

Eighth Respondent

Coram: Cooper AJ

Heard: 16 October 2025

Delivered: 18 November 2025

Summary: Application for judgment in respect of stolen money and referral to oral evidence in respect of sixth to eighth respondents' possible indebtedness

under *inter alia* section 20(9) of the Companies Act 71 of 2008 and/or section 65 of the Close Corporations Act 69 of 1984.

JUDGMENT

COOPER, AJ:

INTRODUCTION

1. The applicant (represented by Mr Steenkamp) seeks an order (according to a proposed draft order handed up at the hearing of the matter, a copy of which is attached as “A”):
 - 1.1. Directing the first and second respondent to make payment to the applicant in the amount of R50 687 444.81, jointly and severally;
 - 1.2. Directing the first and second respondent to pay the costs of the application on an attorney and client scale, jointly and severally;
 - 1.3. Directing that oral evidence be heard to determine the balance of the issues arising from the application and listed in paragraphs 3.1 to 3.10 of annexure “A” (the “**balance of the issues**”);¹
 - 1.4. Regulating the further conduct of the matter in accordance with the “usual” order when directing that oral evidence be heard on specified issues (see the orders granted in *inter alia* Kalil v Decotex (Pty) Ltd and Another 1988 (1) SA 943 (A) and Kambule v the Master and Others 2007 (3) SA 403 (E) for what I have described as the “usual” order in this regard).
2. The second respondent did not oppose the application. It is common cause that the first respondent was, at all material times, the sole director of the second respondent.
3. The first and sixth to eighth respondents (represented by Mr T I Ferreira), seek the dismissal of the application.

¹ These are the same issues referred to in par 67.3 below.

4. No relief, as finally formulated, is sought against the third to fifth respondents (also represented by Mr Ferreira), who were cited because they may have an interest in the proceedings. The third and fourth respondents, accordingly, did not participate in the proceedings in any material way. The position of the fifth respondent is somewhat different. Relief was initially sought against the fifth respondent however, according to the applicant, this was an error and the notice of motion was subsequently amended (such that, as finally formulated, no relief is sought against the fifth respondent). The effect of the amendment of the notice of motion was to withdraw the application against the fifth respondent – who had already filed a brief answering affidavit pointing out that no case had been made out against her. Despite this, the applicant failed to tender the fifth respondent's costs. The fifth respondent accordingly seeks the costs occasioned by her opposition and obligatory participation in the application.

PARTIES

5. The parties and their citation are largely common cause. As regards the parties, the following is perhaps noteworthy:

- 5.1. The third respondent is the first respondent's son-in-law. At some time subsequent to the events described below (i.e. subsequent to the discovery of the first respondent misappropriating in excess of R70 million² of the applicant's funds), the third respondent acquired a 50% members interest in the eighth respondent from the first respondent. It seems that that this transfer was for no value because the first respondent does not deny (indeed, she did not respond to)³ the allegation in the founding affidavit that “... *it is quite clear that the First Respondent has dissipated the asset acquired with Applicant's money [i.e. the members interest in the eighth respondent] for no value to her family ...*”. It seems, furthermore, that the other 50% members interest in the eighth respondent was transferred by the first respondent to a certain Mr Ian-lee Swart

² The first respondent alleges that she used some of the funds, that she does not dispute misappropriating, to settle debts of the applicant. The first respondent alleges that approximately R9 million of the misappropriated funds were used in this regard (see AA p 118 par 16 to 17 and annexure “SG3” p 246).

³ In motion proceedings if a party fails to admit or deny, or confess and avoid, allegations in the other party's affidavit, the court will, for purposes of the application, accept such allegations as correct - see Moosa and Another v Knox 1949 (3) SA 327 (N) at 331. This is true for many allegations in the founding affidavit, that the first respondent simply does not respond to.

(who I was informed is the first respondent's son)⁴ and that this also occurred after the events described below.

5.2. The fourth respondent is the daughter of the first respondent. At the time of the events described below (i.e. the misappropriation of the applicant's funds), the fourth respondent served as a director and minority shareholder of the sixth respondent.

5.3. The fifth respondent is the niece of first respondent. During the circumstances described below (i.e. the misappropriation of the applicant's funds), the fifth respondent served as a director and minority shareholder of the seventh respondent.

BACKGROUND AND RELEVANT FACTS

6. The applicant employed the first respondent for approximately 16 years, until the first respondent abruptly resigned in July 2024. At the time of her resignation, the first respondent was employed as an assistant to the applicant's finance manager.

7. The first respondent does not deny having perpetrated a sophisticated scheme over a number of years:

7.1. to misappropriate or steal very significant amounts of money from the applicant; and

7.2. to conceal such theft or misappropriation.

8. The opposing respondents do not dispute that a schedule attached to the founding affidavit is a summary of the amounts stolen or misappropriated by the first respondent from the applicant. It is also undisputed that these amounts (or most of them) were paid into the bank account of the second respondent at the behest of the first respondent (who was also, as mentioned, the sole director and had exclusive control over the second respondent's bank account). Notwithstanding the invitation, the first respondent did not explain the subsequent flow of funds. The request to make a full disclosure was refused, despite allegations that it was the applicant's funds that were the source of the sixth, seventh and eighth respondent's financial needs and for the acquisition of the eighth respondent.

⁴ See also record p 111, p 298 and p 300.

9. The schedule records that R70 024 152.24 was stolen or misappropriated during the period from approximately May 2016 until shortly before the first respondent's resignation in July 2024. The first respondent resigned (via an email in which she tendered her immediate resignation) after she was confronted with unusual and suspicious accounting entries for which she was responsible.
10. Shortly after her resignation from the applicant, the first respondent also resigned as director of the sixth, seventh and eighth respondents.
11. In August 2024, pursuant to the above discovery (i.e. the first respondent's largescale theft), the applicant launched an urgent *ex parte* application for an interim order *inter alia* prohibiting withdrawals from two of the applicant's bank accounts and prohibiting the dissipation or encumbrance of nine immovable properties. At the time of the urgent application the applicant had only discovered theft in the amount of approximately R10.184 million and, in addition to anti-dissipation relief, the applicant sought judgment in this amount (the "**anti-dissipation application**").
12. Prior to the return date, the applicant delivered supplementary papers in support of the anti-dissipation relief (that was sought in respect of assets that likely exceeded, in value, the amount in respect of which judgment was sought of R10.184 million). The applicant informed the court that, pursuant to further investigation, it had discovered that the first respondent had in fact stolen at least R70.024 million. In this regard the applicant said:

"In the premises, the Applicant's damages caused by the First Respondent ... are in fact substantially higher than the R10 184 455.95 indicated in the Rule Nisi. We quite obviously seek judgment at this stage in the aforementioned amount, but we will be instituting further proceedings to claim the balance, as contemplated by para 2.4.3 of the Rule Nisi."

13. On the return day the anti-dissipation relief was granted against the first respondent by Janisch AJ pending the "*outcome of an application ... to be instituted ... for the recovery of any monies, in addition to the amount of R10 184 455.95, misappropriated and/or stolen by the First Respondent ...*". In his comprehensive judgment, Janisch AJ recorded:

"The Applicant intends to launch separate proceedings to claim the difference between the above amount [i.e. R10 184 455.95] and the total of some R70 million

that it contends to have been stolen or misappropriated. That claim is not before me, although I note that the First Respondent has also not denied the allegations on which it will be based.”

14. This then is the application for judgment in respect of the balance of the stolen funds.
15. At the time of the hearing, and in the light of certain carefully crafted denials by the respondent, the applicant had reformulated its relief as set out in paragraph 1 above. In summary, the applicant seeks:
 - 15.1. judgment against the first and second respondent in the amount of R50 687 444.81 i.e. judgment in respect of an amount less than the amount that was stolen;⁵
 - 15.2. a direction that oral evidence be heard in respect of the balance of the issues arising from the application (see par 1.3 above); and
 - 15.3. ancillary procedural relief.
16. The balance of the issues arising from the application, broadly stated, relate to the request for judgment for the balance of the claim of R9 152 524.48 and the potential liability (if any) of the sixth to eighth respondents to the applicant.

DEFENCES / ISSUES

17. As regards the claim for judgment in the amount of R50 687 444.81 against the first and second respondent, the first respondent asserts that the claim is precluded by operation of the principle of *res judicata*, or the “once and for all” rule. The discussion which follows pertains to the defences presented by the first respondent in this regard.
18. The second respondent has not contested these proceedings, therefore the applicant is entitled to judgment in this amount against the second respondent.
19. As regards the request for a referral to oral evidence, the respondents say that the court should refuse to exercise its discretion in favour of the applicant for reasons that will be dealt with below.

⁵ The first respondent alleged that she had used some of the stolen funds to settle debts owing by the applicant.

RES JUDICATA / ONCE AND FOR ALL RULE

20. In Ascendis Animal Health (Pty) Ltd v Merck Sharp Dohme Corporation and Others 2020 (1) SA 327 (CC) at par 70 the Khampepe J⁶ said as follows regarding the principle of *res judicata*:

“In essence, the crux of res judicata is that where a cause of action has been litigated to finality between the same parties on a previous occasion, a subsequent attempt to litigate the same cause of action by one party against the other party should not be allowed. The underlying rationale for this principle is to ensure certainty on matters that have already been decided, promote finality and prevent the abuse of court processes”

21. In National Sorghum Breweries Ltd (t/a Vivo African Breweries) v International Liquor Distributors (Pty) Ltd 2001 (2) SA 232 (SCA) at [2] the Supreme Court of Appeal held that a defence of *res judicata* will succeed if (citations omitted, underlining added):

“... a plaintiff ... is 'demanding the same thing on the same ground' ... or which comes to the same thing, 'on the same cause for the same relief' ... ; or which also comes to the same thing, whether the 'same issue' had been adjudicated upon ...
.”

And then stated that the fundamental question was (underlining added):

“... whether the same issue is involved in the two actions: in other words, is the same thing demanded on the same ground, or ... is the same relief claimed on the same cause, or, to put it more succinctly, has the same issue now before the Court been finally disposed of in the first action?”

22. Similarly, a fundamental question in this matter is whether *“the same issue now before the Court [has] been finally disposed of ...”*.
23. In my view, the answer must be in the negative (as was the case in *National Sorghum Breweries supra*).

⁶ Although the Constitutional Court was divided such that there was no majority judgment, there was no disagreement regarding this principle.

24. The recordal of Janisch AJ that the “*claim [for] the difference between ... [R10 184 455.95] and the total of some R70 million*” stolen from the applicant through separate acts of theft by the first respondent was not before him, demonstrates that the applicant is not “*demanding the same thing on the same ground*”. A court has not “*finally disposed*” of the applicant’s separate claims or causes of action in respect of these amounts.
25. A cause of action was defined by Khampepe J in *Ascendis Animal Health supra* at [50] as “*every fact that needs to be proved in order to support a litigant's right to a judgment*” (with reference to *inter alia* *McKenzie v Farmers’ Co-operative Meat Industries Ltd* 1922 AD 16 at 23 and *Evins v Shield Insurance Co Ltd* 1980 (2) SA 814 (A) at 838D-H).
26. As pointed out by Mr Steenkamp, although an aggregate amount is claimed this does not mean that the claim constitutes a single cause of action. Each sum was stolen through distinct actions of the first respondent and constitutes a separate cause of action. Put differently, until the first respondent steals an amount of money from the applicant (by a specific act of theft at a specific time) there is no cause of action for that theft because “*every fact that needs to be proved in order to support [the applicant’s] right to a judgment*” does not exist.
27. This conclusion (i.e. that the applicant is not relying on the same cause of action for the relief sought in this application and that a court has not “*finally disposed*” of all the applicant’s distinct causes of action) also disposes of the argument that the applicant’s claim in this application is precluded by operation of the “once and for all” rule.
28. In *Mmabasotho Christinah Olesitse N.O. v Minister of Police* (CCT 183/22) [2023] ZACC 35 the Constitutional Court confirmed that where a single event⁷ gives rise to separate causes of action the separate causes of action may be separately claimed and the “once and for all” rule does not apply. The Constitutional Court remarked that the High Court and Supreme Court of Appeal had been “*influenced*” by the similarity of the plaintiff’s particulars of claim (which were in many respects identical), to incorrectly find that the “*two claims [both delictual - one for unlawful arrest and detention and the other for malicious prosecution] should have been brought in a*

⁷ In the current matter counsel for the relevant respondents referred to the first respondent’s single *modus operandi*.

single action". The Constitutional Court restated the legal position as follows (at paras 58, 62 and 63):

"The issue is not whether there are differences in how the two causes of action were pleaded in the respective particulars of claim. It is whether the two actions, as a matter of law, are based on two different causes of action, and whether those causes of action have different elements ... A cause of action is not determined by how a party frames his or her particulars of claim, but by the constitutive elements of a particular cause of action ... it is irrelevant that the [plaintiff] had all the facts on which to formulate both his claims when he instituted the first action. The question is one of principle and law. If the [plaintiff] was, as a matter of law, entitled to bring the two actions separately, he cannot be deprived of that right merely because when he instituted the first action, he had all the facts enabling him to also institute the second action."

29. In conclusion therefore, the first respondent's defence of *res judicata* and the reliance on the "once and for all" rule must, in my view, fail.
30. The applicant is entitled to an order directing the first respondent (jointly and severally with the second respondent) to make payment to the applicant in the amount of R50 687 444.81.

REFERRAL TO ORAL EVIDENCE

31. As regards the applicant's request for a referral to oral evidence for the determination of the balance of the issues (as referred to in par 1.3 above), Rule 6(5)(g) provides as follows:

"Where an application cannot properly be decided on affidavit the court may dismiss the application or make such order as it deems fit with a view to ensuring a just and expeditious decision. In particular, but without affecting the generality of the foregoing, it may direct that oral evidence be heard on specified issues with a view to resolving any dispute of fact and to that end may order any deponent to appear personally or grant leave for such deponent or any other person to be subpoenaed to appear and be examined and cross-examined as a witness or it may refer the matter to trial with appropriate directions as to pleadings or definition of issues, or otherwise."

32. As regards the exercise of the Court's discretion, Corbett JA in Kalil v Decotex (Pty) Ltd & another 1988 (1) SA 943 (A) at 979H held:

"Naturally, in exercising this discretion the Court should be guided to a large extent by the prospects of viva voce evidence tipping the balance in favour of the applicant. Thus, if on the affidavits the probabilities are evenly balanced, the Court would be more inclined to allow the hearing of oral evidence than if the balance were against the applicant. And the more the scales are depressed against the applicant the less likely the Court would be to exercise the discretion in his favour. Indeed, I think that only in rare cases would the Court order the hearing of oral evidence where the preponderance of probabilities on the affidavits favoured the respondent."

33. Even in the absence of a genuine factual dispute (in the sense that the facts alleged by the respondent cannot be disputed on the papers – for example, if the facts alleged by the respondent cannot be directly disputed because they fall peculiarly within his or her knowledge), a referral for oral evidence may be directed where there are *"reasonable grounds for doubting the correctness"* of the allegations in the answering affidavit. In other words, *"reasonable grounds for doubting the correctness"* of the relevant allegations in the answering affidavit, is a factor to take into consideration in exercising the discretion afforded in terms of Rule 6(5)(g)). In Manuel v Sahara Computers (Pty) Ltd and Another 2020 (2) SA 269 (GP) at [4] to [5] and [89] to [90] (an application by Mr Trevor Manuel for access to documents in terms of the Promotion of Access to Information Act) it was stated as follows (underlining added):

"In the answering affidavits the respondents ... contend that the documents sought by Manuel do not exist, and that if they exist, which is denied, they are not in their possession ... Manuel accordingly sought alternative relief. He conceded that, for the court to order access, would not be appropriate ... It was submitted that he cannot show decisively that the documents are in the respondents' possession. However, he submits that the responses are evasive, and lack candour. He thus claims that the court should order that the application be referred to oral evidence ...

This subrule does not only apply where there is a true dispute of fact on the papers. It also applies in circumstances where one party casts doubt on the

relevant allegations of another. Although not contradicted by direct evidence, those averments are thus in dispute, and 'cannot properly be decided on affidavit' in terms of the subrule ...

[I]f this court finds that the respondents' assertions were either made in error, or are false, notwithstanding the absence of a true dispute of fact, 'viva voce evidence should be ordered if there are reasonable grounds for doubting the correctness of the allegations concerned'. Moreover, where facts are within the peculiar knowledge of one party - that is an additional consideration requiring a court to carefully scrutinise those allegations.”

34. In summary therefore, the Court exercises a (wide)⁸ discretion when considering whether to direct that oral evidence be heard in respect of specified issues. Factors to examine in exercising such discretion include the probabilities as they appear on the papers, the existence of reasonable grounds to question the veracity of the first respondent's answering affidavit, and any additional considerations or “*feature that might be relevant*”.
35. The request for the referral to oral evidence relates to the balance of the issues (as referred to in par 1.3 above). These issues were dealt with in the heads of argument filed on behalf of the respective parties and at the hearing under two broad headings, namely the issues relating (i) to the reduced claim and (ii) to the potential liability of the sixth, seventh and eighth respondents.
36. The question is whether, in terms Rule 6(5)(g), the Court should direct that oral evidence be heard on these issues.

⁸ Lombaard v Droprop CC and Others 2010 (5) SA 1 (SCA) at par 25. Cf Repas v Repas (A151/2022) [2023] ZAWCHC 24, where Binns-Ward J at [39] stated: “It is not altogether clear to me that a court faced with deciding an appropriate order in terms of rule 6(5)(g) has a choice of the relatively unfettered nature that characterises well recognised truly discretionary decisions such as in matters of sentencing, general damages and costs etc. A court has to have regard to a number of disparate and incommensurable features in coming to an appropriate decision in terms of rule 6(5)(g): (i) the foreseeability of the dispute, (ii) the degree of blameworthiness, if any, in the circumstances of the given case of the applicant having proceeded in the face of a foreseeable dispute, (iii) the nature and ambit of the dispute in question, (iv) its amenability to convenient determination by a reference to oral evidence on defined issues, as distinct from in action proceedings to be commenced de novo, (v) the probabilities as they appear on the papers (if those are against the applicant, the court will be less inclined to send the dispute for oral evidence) (vi) the interests of justice, and (vii) the effect of any other feature that might be relevant in the circumstances of the given case.” For more general comments, see *Erasmus Superior Court Practice Commentary to Rule 6(5)(g)* at p 6-34 to 6-47.

(i) Reduced claim

37. The first respondent asserts that of the approximately R70 million she stole from the applicant, R9 128 524.48 was used to settle the applicant's creditors and therefore "*the quantum of the loss suffered by Applicant could accordingly not logically be what [the applicant] alleges ...*".⁹ The first respondent attached a schedule to her answering affidavit, and alleged that it "*tabulates payments*" to the applicant's creditors.
38. The allegation that payments in the precise amount of R9 128 524.48 have been made to the applicant's creditors contradicts the (undisputed and therefore admitted) schedule attached to the applicant's founding affidavit which *inter alia* reflects that an amount in excess of R70 million was stolen from applicant. I was unable to reconcile these schedules (albeit that even the schedule of the applicant appears to suggest that some payments have been made to the applicant's creditors).
39. The applicant points out that this defence was introduced for the first time in the answering affidavit during these proceedings, despite being urged to provide a comprehensive disclosure on this aspect at the time the applicant submitted the supplementary affidavit in the anti-dissipation application.
40. In my view, it is fit to hear oral evidence in respect of this issue. There are reasonable grounds for doubting the version¹⁰ disclosed for the first time in the answering affidavit and this dispute of fact was not reasonably foreseeable by the applicant.
41. The extent of the theft, the first respondent's efforts to conceal that theft, her failure to fully and transparently address the allegations (or respond to the invitation for a full disclosure) in the founding affidavit, as well as her failure to fully and transparently address similar allegations in the applicant's supplementary affidavit in the anti-dissipation application, all support a referral to oral evidence.
42. Finally, oral evidence should ensure a just and expeditious resolution of this relatively narrow issue.

(ii) Claims against the sixth, seventh and eighth respondents

⁹ Record p 118 par 16-17.

¹⁰ "Version" is perhaps an overstatement – the answering affidavit contains a paragraph or two and a one-page schedule; there is no attempt to make a full and transparent disclosure.

43. In summary, the applicant:

43.1. alleges that the sixth, seventh and eighth respondents are the “*First Respondent’s alter ego*”, they are “*vehicles through which the First Respondent laundered ... stolen funds*” and “*all the transactions ... with these entities were simulated*”; and, in the circumstances,

43.2. seeks an order *inter alia* declaring that the “*Sixth, Seventh and Eighth Respondents are deemed not to be juristic persons ...*” and that they (effectively)¹¹ be held liable to the applicant.

44. From a factual perspective, it is undisputed that:

44.1. the first respondent was a director and shareholder of the sixth and seventh respondents and a member of the eighth respondent at the time of the theft, which commenced in 2016 (according to the undisputed schedule attached to the founding affidavit);

44.2. at approximately the time the theft was discovered the first respondent resigned as a director of the sixth and seventh respondents and transferred half her members interest to her son-in-law, the third respondent (and, it would seem, the other half was transferred to her son);

44.3. the first respondent provided funding to both the sixth and seventh respondents (incorporated in 2018 and 2017 respectively);

44.4. the first respondent’s daughter and niece were (and remain) directors and employees of the sixth and seventh respondents;

44.5. according to the sixth respondent’s draft financial statements, the first respondent provided the sixth respondent with an unsecured, interest free loan of R6 916 446;

44.6. according to the seventh respondent’s draft financial statements, the first respondent provided the seventh respondent with an unsecured, interest free loan of R2 071 320;

¹¹ The applicant suggests that this effective liability can be achieved by disregarding the respective corporate veils and either declaring directly that the sixth to eighth respondents are liable to the applicant, or that their assets be deemed to be the assets of the first respondent (in which case they will be effectively or commercially liable to the applicant to the extent the first respondent is unable to pay the judgment debt).

44.7. the first respondent earned a gross monthly salary of R20 000 per month when she was initially employed on 1 August 2008;

44.8. the first respondent earned a gross monthly salary of R41 500 per month at the time her employment was terminated in July 2024; and

44.9. during 2023 or early-2024 (prior to the termination of the first respondent's employment) the first respondent acquired the members interest in the eighth respondent.¹²

45. On the basis of *inter alia* these allegations and the fact that the first respondent would not *"have been able to fund these entities on the salary that she earned"* or, for that matter, acquire the members interest in (and stock of) the eighth respondent for in excess of R6.2 million with her monthly earnings, the applicant alleges that:

45.1. the loans to the sixth and seventh respondents have *"all the hallmarks of ... simulated transaction[s] designed to launder the misappropriated funds"*;

45.2. the applicant's misappropriated money has been *"laundered"* through the sixth and seventh respondents;

45.3. the financial affairs of the first respondent are *"linked"* to the sixth and seventh respondents;

45.4. the *"other Respondents"* were aware that the *"funds advanced to them (directly or indirectly) were the proceeds of crime"* and they were *"knowing participants in the First Respondent's unlawful activities and assisted her to effectively launder these monies"*;

45.5. in respect of the eighth respondent, the first respondent has *"dissipated her shares and loan account (acquired with the Applicant's money)"* for no value *"to thwart"* the applicant's claim and the eighth respondent was a *"knowing participant in this"*;

45.6. the first respondent's conduct shows *"a pattern of dissipating and/or laundering funds stolen from the Applicant to these legal entities (controlled by her close family members ...) for the purpose of thwarting our claim"*; and

¹² It seems that the first payments of the purchase price occurred in December 2023 – record p 318.

45.7. the sixth to eighth respondents are *“nothing but the First Respondent’s alter ego, with the First Respondent being their controlling mind, designed as vehicles through which the First Respondent laundered stolen funds”* and *“all the transactions entered with these entities were simulated”*.

46. These allegations or conclusions are contested. In the answering affidavit the first respondent says, in summary, that:

46.1. she utilized funds received from her late father (as inheritance, donations and a loan), her husband, *“other companies in which [she] hold[s] interests”* and profits from the eighth respondent to fund her business interests and acquire the members interest and trading stock of the eighth respondent; and

46.2. the sixth to eighth respondents are all legitimate businesses.

47. In respect of the first respondent’s loans to the sixth and seventh respondent and her acquisition of the eighth respondent, I have been unable to determine with certainty the precise amount that the first respondent attributes to “other” sources (i.e. the sources of funds that are not from the applicant). In my view it is not unfair to conclude that this is not accidental¹³ - there are, accordingly, reasonable grounds for doubting these allegations.

48. In my view it cannot seriously be disputed (given the undisputed facts) that:

48.1. a significant portion (if not most) of the funds utilized by the first respondent to fund the sixth and seventh respondent (i.e. a total of approximately R9 million) and to acquire the eighth respondent and its stock (in the amount of approximately R6.2 million) were stolen from the applicant (in particular this is evident from the first respondent’s relatively modest monthly disposable after-tax earnings when compared to these amounts); and

48.2. these entities have served to employ and enrich the first respondent’s close family members (including the third to fifth respondents).

¹³ See record p 125 par 45, where no amounts or details are provided. Whilst amounts are provided elsewhere in the answering affidavit it is impossible to determine the precise amount attributable to “other” sources (for example, it is not known precisely how much of the eighth respondent’s profits were allegedly used to acquire its trading stock – particularly since it seems that the full amount payable to acquire the trading stock was not paid, see record p 112).

49. The applicant's heads of argument¹⁴ assert that if it is determined that *“these entities were nothing but the First Respondent’s alter ego and used as mere vehicles through which the First Respondent laundered the stolen funds”* then this would implicate section 20(9) of the Companies Act 71 of 2008 (the **“Companies Act”**) and, consequently, devoid of their distinct *“juristic personality,* the sixth to eighth respondents would (effectively)¹⁵ be liable to the applicant.

50. Section 20(9) of the Companies Act provides that (underlining added):

“If ... a court finds that the incorporation ..., any use ..., or any act by or on behalf of the company, constitutes an unconscionable abuse of the juristic personality of the company as a separate entity, the court may -

(a) declare that the company is to be deemed not to be a juristic person in respect of any right, obligation or liability of the company or of a shareholder of the company or, in the case of a non-profit company, a member of the company, or of another person specified in the declaration; and

(b) make any further order the court considers appropriate to give effect to a declaration contemplated in paragraph (a).”

51. Section 65 of the Close Corporations Act 69 of 1984 (the **“Close Corporations Act”**; relevant for the eighth respondent) is, for purposes of this application, couched in virtually identical terms and provides as follows:¹⁶

“Whenever a Court ... in any proceedings in which a corporation is involved, finds that the incorporation of, or any act by or on behalf of, or any use of, that corporation, constitutes a gross abuse of the juristic personality of the corporation as a separate entity, the Court may declare that the corporation is to be deemed not to be a juristic person in respect of such rights, obligations or liabilities of the corporation, or of such member or members thereof, or of such other person or persons, as are specified in the declaration, and the Court may give such further order or orders as it may deem fit in order to give effect to such declaration.”

¹⁴ Whilst section 20(9) of the Companies Act and section 69 of the Close Corporations Act were not expressly mentioned in the founding affidavit, the allegations therein quite clearly fall within the ambit of those sections (see, for example, record p 17 par 59), as does the relief sought in the amended notice of motion (record p 2 par 3).

¹⁵ As mentioned, the applicant seeks an order setting aside the separate juristic personalities of the sixth to eighth respondents and declaring that their assets be deemed to be the assets of the first respondent (par 3.2 and 3.3 of the draft order, annexure “A”).

¹⁶ For purposes of this application the phrases “unconscionable abuse” and “gross abuse” are used interchangeably. Nothing turns on this nomenclature. *Crous v Wynberg Boys High School and Others* 2025 JDR 3180 (SCA) at par 16.

52. What constitutes an “*unconscionable abuse*” of juristic personality? In *Ex parte Gore and Others NNO* 2013 (3) SA 382 (WCC)¹⁷ at [34] Binns-Ward J stated (underlining added):

“The term 'unconscionable abuse of the juristic personality of a company' postulates conduct, in relation to the formation and use of companies, diverse enough to cover all the descriptive terms like 'sham', 'device', 'stratagem' and the like used in that connection in the earlier cases, and — as the current case illustrates — conceivably much more. The provision brings about that a remedy can be provided whenever the illegitimate use of the concept of juristic personality adversely affects a third party in a way that reasonably should not be countenanced. Having regard to the established predisposition against categorisation in this area of the law and the elusiveness of a convincing definition of the pertinent common-law principles, it seems that it would be appropriate to regard s 20(9) of the Companies Act as supplemental to the common law, rather than substitutive. The unqualified availability of the remedy in terms of the statutory provision also militates against an approach that it should be granted only in the absence of any alternative remedy.”

53. More recently the Supreme Court of Appeal in *City Capital SA Property Holdings Ltd v Chavonnes Badenhorst St Clair Cooper and Others* 2018 (4) SA 71 (SCA) at [28] to [30] held as follows regarding the meaning of “*unconscionable abuse*” (underlining added):

“The term 'unconscionable abuse' is not defined in the 2008 Act and must therefore be given its ordinary meaning.

The meaning of 'unconscionable' in the Oxford English Dictionary includes, 'Showing no regard for conscience . . . unreasonably excessive . . . egregious, blatant . . . unscrupulous.' It is in my view undesirable to attempt to lay down any definition of 'unconscionable abuse'. It suffices to say that the unconscionable abuse of the juristic personality of a company within the meaning of s 20(9) of the 2008 Act includes the use of, or an act by, a company to commit fraud; or for a dishonest or improper purpose; or where the company is used as a device or facade to conceal the true facts.

¹⁷ Endorsed in *Butcher Shop and Grill CC v Trustees for the Time Being of the Bymyam Trust* 2023 (5) SA 68 (SCA) at par 60.

Thus, where the controllers of various companies within a group use those companies for a dishonest or improper purpose, and in that process treat the group in a way that draws no distinction between the separate juristic personality of the members of the group, as happened in this case, this would constitute an unconscionable abuse of the juristic personalities of the constituent members, justifying an order in terms of s 20(9) of the 2008 Act. This is not new. In Ritz Hotel this court referred to English authority in which Lord Denning MR observed that, as regards piercing the corporate veil, there was a general tendency to ignore the separate legal entities of various companies within a group and to look instead at the economic entity of the whole group, especially where a parent company owns and controls the subsidiaries.”

54. As regards the relief a court may grant if section 20(9) is implicated, Binns-Ward J in Ex parte Gore and Others NNO 2013 (3) SA 382 (WCC) at [34] held as follows:

“... the subsection affords the court the very widest of powers to grant consequential relief. An order made in terms of para (b) will always have the effect, however, of fixing the right, obligation or liability in issue of the company somewhere else.”

55. The applicant essentially says:

55.1. that the first respondent has fraudulently used the sixth to eighth respondents to shield herself from the applicant’s claim (i.e. to shield herself from the consequences of her theft);

55.2. that the first respondent has done so:

55.2.1. by transferring the applicant’s money to the sixth and seventh respondent and simulating loans to them; and

55.2.2. by using the applicant’s money to acquire the members interest (and possible loan claim)¹⁸ in the eighth respondent whilst knowing that she was using the applicant’s funds;

¹⁸ The first respondent admits acquiring the members interest in the eighth respondent but denies that she acquired any loan account of the erstwhile member. In support of this denial the first respondent attaches what is described as the “*deed of sale*”. The document, however, is unsigned, undated and refers, in clause 1, to an earlier agreement entitled “*Sale of a Going Concern*”. It is accordingly unclear whether this document truly reflects the terms of the acquisition of the members interest in the eighth respondent. The

55.3. that the first respondent has effectively “converted” the applicant’s money into loan claims against the sixth and seventh respondents and a members interest (and possible loan claim)¹⁹ in the eighth respondent to deliberately “thwart” its claims.

56. In the context of this matter, where the first respondent was able to control the sixth and seventh respondent, I have little difficulty with the proposition that the making of loans or the transfer of money to those entities may constitute the “use of” those entities for the purposes of section 20(9) of the Companies Act. I do, however (as urged by Mr Ferreira), have some reservations regarding whether the first respondent’s acquisition of the eighth respondent’s members interest (and possible loan claim)²⁰ could constitute the “use of” the eighth respondent.
57. This reservation, however, is allayed somewhat by the wide ambit of section 65 of the Close Corporations Act.²¹ In addition, the admitted facts (i.e. theft of some R70 million and a sophisticated scheme of concealment) further supports the conclusion that, in a wide sense, the sixth to eighth respondents may have been used in a manner that constitutes an “unconscionable abuse of the juristic personality” of these companies and close corporation.
58. If the first respondent’s conduct (i.e. use of the sixth to eighth respondents) constitutes an unconscionable abuse of their juristic personalities and their separate personalities are disregarded, the applicant may well establish that, for instance, the assets of those entities should be deemed to be the assets of the first respondent – and, consequently, that those entities are effectively liable to the applicant in some amount.
59. Similar relief was sought in Van Zyl and Another NNO v Kaye NO and Others 2014 (4) SA 452 (WCC).²² Despite that the requirements of section 20(9) were not met, the court entertained and considered the application of the trustees of the insolvent estate of Mr Kaye for *inter alia* an order that the separate juristic personality of a

document is conspicuously silent about the erstwhile member’s loan account, if any. The eighth respondent’s financial statements however, oddly, include note disclosure relating to the “new” members loan accounts but these are recorded as nil (record p 308, note 8). I say “oddly” because, if it is correct that there were no loan accounts, the note disclosure is entirely unnecessary. The note disclosure is also obviously incorrect in respect of the year ended 2023 – since it is common cause that at that time the “new” members (described as “J M Barrington” and “I R Swart” were not members of the eighth respondent.

¹⁹ See fn 18 *supra*.

²⁰ See fn 18 *supra*.

²¹ The use of the word “any” as a prefix to “use” is *inter alia* suggestive of the wide import of these sections.

²² See par 31 to 33.

company be disregarded and that the immovable property of that company be treated as an asset in the insolvent estate of Mr Kaye. The effect of such an order, if granted, would have been that the company would be liable for the debts of its director, Mr Kaye.

60. I am tasked with determining whether to direct the hearing of oral evidence in respect of the sixth to eighth respondents' potential liability to the applicant. I am not tasked with conclusively determining the validity of the applicant's potential cause(s) of action against the sixth to eighth respondents. Indeed, as alluded to above (see par 56 above), I have some reservations regarding the potential liability of the eighth respondent and the extent of any liability of the sixth and seventh respondents.
61. Once again, given the peculiar circumstances of this matter, there are reasonable grounds for doubting that the sixth to eighth respondents are entirely legitimate businesses and for doubting the first respondent's denials that:
 - 61.1. she fraudulently used the sixth to eighth respondents to shield herself from the applicant's claims; and
 - 61.2. that there has been an "*unconscionable abuse*" (as contemplated in section 20(9) of the Companies Act or section 65 of the Close Corporations Act) of the separate juristic personalities of these entities.
62. In addition, the extent of the theft, the first respondent's steps to conceal that theft and her failure to fully and transparently address the allegations (or respond to the invitation for a full disclosure) in the founding affidavit, all support a referral to oral evidence.
63. In my view it would, accordingly, be fit to refer the balance of the issues to oral evidence.
64. I have expressed my reservations in respect of the potential liability of the eighth respondent. I have also said that I have no such difficulty in respect of the sixth and seventh respondents. That oral evidence will be heard in respect of similar or overlapping facts relating to the sixth and seventh respondents is an additional factor which inclines me to direct that oral evidence be heard also in respect of the eighth respondent.

COSTS

65. As dealt with by Janisch AJ in his judgment under case number 17191/2024 (i.e. in the anti-dissipation application, at par 66 to 70), a court in the exercise of its discretion may award costs on a punitive scale if the circumstances which gave rise to the application warrant it. As stated by Janisch AJ, the first respondent has “*essentially admitted fraud and self-enrichment on a significant scale, to the detriment of the Applicant*”. In addition, in this matter, the defences of *res judicata* and the “once and for all” rule were in my view entirely without merit. I am therefore satisfied that costs on a punitive scale are warranted.
66. As regards the costs of the opposition of the fifth respondent, the fifth respondent is entitled to her costs. These costs cannot be significant. The fifth respondent deposed to a two-page affidavit (three if the cover page is included). Whilst it is regrettable that the applicant did not tender her costs at the time, I do not believe that the applicant’s conduct or the circumstances of the matter warrant costs on a punitive scale against the applicant in this regard.

CONCLUSION

67. In the circumstances the following order is granted:
- 67.1. Judgment is granted against the First and Second Respondent, jointly and severally, the one paying the other to be absolved in the amount of **R50,687,444.81**, together with interest thereon calculated at the prescribed rate of interest from date of service of the application to date of final payment.
- 67.2. The First and Second Respondents, jointly and severally, are to pay the costs of this application up to date of hearing, on a scale as between attorney and client, on scale C.
- 67.3. The balance of the issues are referred to oral evidence to be heard on **4 November 2026** (or such other date as may be agreed between the parties and arranged with the Registrar) which are to include the following (the “**oral evidence issues**”):
- 67.3.1. Whether the monies paid to, or for the Sixth, Seventh and/or Eighth Respondents were with the purpose of the First Respondent avoiding

liability to the Applicant and/or for the purpose of laundering and/or concealing it.

- 67.3.2. Whether the use of the Sixth, Seventh and/or Eighth Respondents constitutes an unconscionable abuse of their juristic personalities as separate entities, as contemplated by section 20(9) of the Companies Act 71 of 2008 or section 65 of the Close Corporation Act 69 of 1984 (and/or in terms of the common law) and whether their separate juristic personalities should be disregarded and their assets be deemed to be the assets of the First Respondent.
- 67.3.3. Whether the Sixth, Seventh and/or Eighth Respondents should be viewed as the First Respondent's *alter ego* and/or a sham and whether their assets are to be deemed to be the assets of the First Respondent.
- 67.3.4. Whether the Sixth, Seventh and/or Eighth Respondents directly or indirectly received monies that were stolen from the Applicant and, if so, the quantum of the monies.
- 67.3.5. Whether the loans made to the Sixth and Seventh Respondents were legitimate loans, or whether they were simulated transactions.
- 67.3.6. Whether the funds used to purchase the First Respondent's erstwhile member's interest in the Eighth Respondent were directly or indirectly the funds stolen from the Applicant.
- 67.3.7. Whether the Sixth, Seventh and/or Eighth Respondents were knowing participants in the theft and/or receipt of the stolen monies.
- 67.3.8. Whether the Sixth, Seventh and/or Eighth Respondents should be jointly and severally liable with the First Respondent for all her obligations to the Applicant, alternatively for what amount(s) the Sixth, Seventh and/or Eighth Respondents should be liable.
- 67.3.9. Whether the quantum of the judgment against the First and Second Respondent should be increased by R9,152,524.48 and whether the Sixth, Seventh and Eighth Respondents should be jointly and severally liable for it as well.

67.3.10. Who should be liable for the costs of application jointly and severally with the First and Second Respondents and the scale of the costs order.

67.4. In determining the oral evidence issues (as referred to above):

67.4.1. The Court is entitled to have conjunctive regard to the oral evidence and the affidavits already delivered.

67.4.2. Save in the case of any of the witnesses who have deposed to affidavits under the above case number, neither party shall be entitled to call any person as a witness unless it has served on the other party at least fourteen days before the date scheduled for the hearing, a statement by such person wherein the evidence to be given in chief by such person is set out; or the Court, at the hearing, permits such person to be called despite the fact that no such statement has been so served in respect of this person's evidence.

67.4.3. Either party may subpoena any person to give evidence at the hearing, whether such person has consented to furnish a statement or not.

67.4.4. The fact that a party has served a statement or has subpoenaed a witness, shall not oblige such party to call the witness concerned.

67.4.5. On or before **13 February 2026**, each of the parties shall make discovery on oath, of all documents relating to the issues referred to above, which documents are in the possession or under control of such party.

67.4.6. Discovery shall otherwise be made in accordance with Rule 35 of the Uniform Rules of Court and the provisions of that rule with regard to the inspection and production of documents discovered shall be operative.

68. The applicant is to pay the fifth respondent's costs on a party and party scale, on scale A.

Appearances for the Applicant

Counsel: Adv JP Steenkamp

Attorney: Heidi van der Meulen (per Ms Heidi van der Meulen)

Appearances for the First and Third to Eighth Respondents

Counsel: Adv T I (Inus) Ferreira

Attorney: Andre Kirsten (per Mr Andre Kirsten)