CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 117/24

In the matter between:

CENTAUR MINING SOUTH AFRICA (PTY) LIMITED	Applicant
and	
SIVALUTCHMEE MOODLIAR N.O.	First Respondent
NDUMISO SENZOSENKOSI SIBIYA N.O.	Second Respondent
TRILLIAN CAPITAL PARTNERS (PTY) LIMITED	Third Respondent
TRILLIAN SECURITIES (PTY) LIMITED	Fourth Respondent
TRILLIAN NOMINEES (PTY) LIMITED	Fifth Respondent
TRILLIAN SHARED SERVICES (PTY) LIMITED	Sixth Respondent
TRILLIAN PROPERTY (PTY) LIMITED	Seventh Respondent
TRILLIAN FINANCIAL ADVISORY (PTY) LIMITED	Eighth Respondent
ZARA W (PTY) LIMITED	Ninth Respondent
MASTER OF THE HIGH COURT, PRETORIA	Tenth Respondent
COMPANIES AND INTELLECTUAL PROPERTY COMMISSION	Eleventh Respondent

Neutral citation: *Centaur Mining South Africa (Pty) Ltd v Moodliar N.O. and Others* [2026] ZACC 20

Coram: Mlambo DCJ, Kollapen J, Majiedt J, Mathopo J, Musi AJ, Nicholls AJ, Rogers J, Savage J and Tshiqi J

Judgment: Musi AJ (unanimous)

Heard on: 11 November 2025

Decided on: 18 May 2026

Summary: Companies Act 71 of 2008 — section 20(9) — liquidation — unconscionable abuse — separate juristic personality

Uniform Rules of Court — rule 42(1)(a) — rescission — rule *nisi* — appeal

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ORDER

On appeal from the Supreme Court of Appeal:

1. Leave to appeal is granted.
2. The appeal is upheld in part.
3. The order of the Supreme Court of Appeal is set aside and replaced by the following:

“(a) The appeal is upheld to the extent set out below, with no order as to costs.

(b) Paragraph 2 of the order of the High Court is set aside and replaced with the following:

‘(2) The following order is made:

(a) Trillian Capital Partners (Pty) Ltd [Reg No: 2015/111759/07], Trillian Securities (Pty) Ltd [Reg No: 2015/152852/07], Trillian Nominees (Pty) Ltd [Reg No: 2017/036662/07], Trillian Shared Services (Pty) Ltd [Reg No: 2015/111747/07], Trillian Property (Pty) Ltd [Reg No: 2016/046295/07] and

Trillian Financial Advisory (Pty) Ltd [Reg No: 2014/122082/07] ("the subject companies"):

(i) shall be deemed not to be separate juristic persons in respect of any right, obligation or liability of those companies or of a shareholder of the subject companies;

(ii) in terms of section 20(9)(b) of the Companies Act 71 of 2008, any right, obligation or liability of the subject companies shall be relocated to Trillian Management Consulting (Pty) Ltd ("TMC") (in liquidation).

(b) The costs of this application are costs in the winding-up of TMC in liquidation.'"

4. Each party to pay their own costs.

JUDGMENT

MUSI AJ (Mlambo DCJ, Kollapen J, Majiedt J, Mathopo J, Nicholls AJ, Rogers J, Savage J and Tshiqi J concurring):

Introduction

[1] This is an application for leave to appeal against an order of the Supreme Court of Appeal in which it dismissed the appeal of the applicant, Centaur Mining South Africa (Pty) Ltd (CMSA), against an order of the High Court of South Africa, Gauteng Division, Johannesburg (High Court), in which the High Court dismissed its rescission application.

Parties

[2] The applicant is CMSA. The first and second respondents, Ms Sivalutchmee Moodliar and Mr Ndumiso Senzosenkosi Sibiya are cited in their nominal capacities as the joint liquidators of Trillian Management Consulting (Pty) Ltd in liquidation (TMC). The third to eighth respondents are Trillian Capital Partners (Pty) Ltd (TCP), Trillian Securities (Pty) Ltd (TS), Trillian Nominees (Pty) Ltd (TN), Trillian Shared Services (Pty) Ltd (TSS), Trillian Property (Pty) Ltd (TP) and Trillian Financial Advisory (Pty) Ltd (TFA). I shall refer to the third to eighth respondents collectively as the subject companies or Trillian Companies. The ninth respondent is Zara W (Pty) Ltd (Zara). TCP owns all the shares in TMC and the subject companies or Trillian companies. Zara is TCP's sole shareholder.

[3] The tenth respondent is the Master of the High Court, Pretoria (Master), and the eleventh respondent is the Companies and Intellectual Property Commission (CIPC).

Factual background

[4] The facts are undisputed. The subject companies were incorporated after a failed bid by the Gupta family to acquire Regiments Capital (Pty) Ltd (Regiments) in 2014. The Gupta family, their companies and associates were central to allegations of fraud, corruption and state capture made during the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State.

[5] Regiments operated as a "fund manager" and "strategy advisor" that specialised in public infrastructure programs and projects. It rendered services to state-owned entities (SOEs) like Eskom Holdings SOC Ltd (Eskom) and Transnet SOC Ltd (Transnet). Mr Eric Anthony Wood, the former Chief Executive Officer of Regiments, was the sole director of TMC in liquidation as well as other entities within the subject companies. TCP and TMC are financial advisory firms that conducted businesses like that of Regiments.

[6] During January 2020, the South African Revenue Service (SARS) concluded that Mr Wood was utilising and treating the subject companies that he controlled as an extension of himself. Whilst being responsible for attending to the financial affairs of the subject companies, he failed to submit tax returns timeously or submitted returns that contained incorrect declarations. It became apparent to SARS that Mr Wood would channel funds through the different subject companies and would disguise the original source of the income as well as where the funds would end up. SARS' investigation revealed that Mr Wood received SOE funds into a Trillian company, which funds would then be channelled to various other entities through fictitious invoices purportedly issued by another Trillian company (which, for all intents and purposes, was not trading or conducting any form of business). These invoices were intended to fraudulently misrepresent a legitimate cause to extract funds from a Trillian company and funnel them to beneficiaries linked to entities controlled by the Gupta family.

[7] After its investigation, SARS issued letters of audit findings to TMC. The letters of audit findings were based on a comparative analysis of source documents submitted to SARS by TMC, as well as TMC's bank statements, value-added tax (VAT) schedules, invoices, draft annual financial statements, trial balances, general ledgers and other financial documentation of certain Trillian companies. SARS determined that—

(a) TMC received approximately R595 million on 28 February 2007 from Eskom, which it failed to declare for tax purposes;

(b) the funds so received by TMC were distributed to companies which were reasonably suspected of not conducting legitimate business;

(c) TMC received interest from the Bank of Baroda, an Indian public sector bank headquartered in Vadodara, Gujarat, which it unlawfully failed to declare for tax purposes; and

(d) TMC was indebted to SARS, at that stage, in an amount of R460 970 690.87.

[8] Following these revelations, SARS successfully obtained a preservation order in terms of section 163 of the Tax Administration Act.[1] As a result, Mr Cloete Murray was appointed as the *curator bonis* (guardian of property). In this capacity, Mr Murray instructed a chartered accountant and forensic auditor, Mr Stephen Robinson, to investigate the affairs of TMC and TCP. He provided Mr Murray with his first report on 23 February 2020 and a supplementary report on 24 February 2020, in which he concluded that TMC had received an amount of R595 200 000 from Eskom. It almost immediately disbursed that amount to other Trillian-associated or connected companies, some of which carried on no form of legitimate enterprise. TMC was not managed as a self-standing enterprise, but as part of the greater Trillian group of companies.

[9] Mr Murray then instructed Mr Robinson to also investigate the affairs of certain other Trillian companies and to furnish a report of his findings. Mr Robinson issued his second report on 8 July 2020. The findings made by Mr Robinson were, amongst other things, based on a thorough and comparative analysis of, particularly, but not exclusively, the bank account statements of TMC, TP, TCP, TA and numerous other entities involved in the perpetration of massive fraud of state funds. Mr Robinson found that more than R834 000 000 was paid to the Trillian companies: R595 200 000 by Eskom to TMC, R147 100 000 by Regiments to TA and R76 400 000 by Transnet to TC. It was subsequently ascertained that R5 700 000 was also paid to a Trillian company by South African Express Airways SOC Ltd (SA Express). These monies, in turn, were transferred between the accounts of the various Trillian companies, one company transferring funds to another.

[10] Mr Robinson found that the affairs of TMC and the other Trillian companies were intermingled to the extent that it proved impossible to conduct a proper investigation of the dealings and affairs of TMC without the other Trillian companies. The business of the Trillian companies, according to him, was indistinguishable as they were being managed as one economic entity. He also dealt with the massive fraud that

[1] 28 of 2011.

had been perpetrated by the Trillian companies and the corrupt activities in which they were participants. The monies flowed to TMC and the other Trillian companies in circumstances where they did not render any legitimate services to Eskom, Transnet, SA Express, Regiments or the other entities that paid monies into their bank accounts. Mr Robinson's findings revealed that TMC and the other Trillian companies were not only incorporated or used in a manner that constituted an unconscionable abuse of their juristic personality, but also that the companies conducted business in a fraudulent manner and for fraudulent purposes.

[11] On 18 June 2019, a Full Court of the High Court of South Africa, Gauteng Division, Pretoria (Pretoria High Court) on review set aside various decisions in which Trillian companies were implicated and granted judgment against TMC and TCP to repay Eskom the sum of R595 228 913.29 including interest and costs.[2] TMC applied for leave to appeal against the judgment, which was dismissed on 2 October 2019.

[12] The judgment debt remained unpaid. On 17 January 2020, Eskom launched an application in the Pretoria High Court to enforce the judgment, with liquidation as an alternative prayer if the money was still not paid. SARS was later joined as a co-applicant. In its founding affidavit, Eskom dealt with Mr Wood's answering affidavit in opposition to an application in terms of section 18 of the Superior Courts Act.[3] In it, Mr Wood confirmed that, at that point in time, further litigation had been instituted against the Trillian group of companies by—

(a) Transnet against TAM and others for payment of R93 480 000;
(b) Transnet against TFA, TCA and others for payment of R11 400 000;
(c) Transnet against TCP, TFA and others for payment of R41 040 000; and
(d) Transnet Second Defined Benefit Fund against TCP, TFA, TAM, TMC and Mr Wood for payment of, amongst other things, R179 543 257.21.

[2] *Eskom Holdings SOC Limited v McKinsey and Company Africa (Pty) Ltd*, unreported judgment of the Gauteng High Court, Pretoria, Case No 22877/2018 (18 June 2019)

[3] 10 of 2013.

[13] Transnet established that TMC was factually and commercially insolvent. On 9 March 2020, it was finally wound-up and the Master appointed Mr Murray, Ms Moodliar and Mr Sibiya as joint provisional liquidators of TMC (the liquidators).

Litigation history

High Court

[14] On 25 September 2020, the liquidators initiated motion proceedings in the High Court against TCP, TS, TN, TSS, TP and TFA as the first to sixth respondents. Zara was the seventh respondent. The eighth respondent was the Master and the ninth respondent was the CIPC. The liquidators sought relief in terms of section 20(9) of the Companies Act[4] (2008 Companies Act), which provides:

> "If, on application by an interested person or in any proceedings in which a company is involved, a court finds that the incorporation of the company, any use of the company, 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)."

[15] On 20 October 2020, the High Court granted a provisional order under section 20(9) in the following terms (I substitute the abbreviated company names):

> "2. It is hereby declared that a rule *nisi* in the following terms is granted ('the provisional order'):
>
> a. [TCP], [TS], [TN], [TSS], [TP] and [TFA] ('the subject companies'):

[4] 71 of 2008.

i. are deemed not to be separate juristic persons in respect of any right, obligation or liability of those companies or of a shareholder of the subject companies;

ii. are collapsed into [TMC] and the subject companies and [TMC] henceforth exist as a single entity by ignoring their separate legal existence as contemplated by section 20(9) read with section 22 of the Companies Act 71 of 2008 ('the 2008 Act'); and

iii. the effective date of the commencement of the subject companies' liquidation proceedings is the date upon which TMC was placed in liquidation.

b. The [CIPC] and the [Master] are directed to amend their records to reflect the consolidation of the subject companies, their composite winding up proceedings and such further consequences as they deem fit and / or necessary, in accordance with the orders granted pursuant to this application.

c. The costs of this application are costs in the consolidated winding-up of [TMC] and the subject companies.

3. Any order granted pursuant to this application shall forthwith be published in the Government Gazette and two newspapers published in the Gauteng Province.

4. Any party with an interest in this application and the provisional order is called upon to show cause on a date to be allocated by the registrar of this court, which shall be a date after [10] days from the publication of any order granted pursuant to this application, as to why the provisional order should not be made final.

5. The costs consequent upon this application, up to the date of confirmation or discharge of the provisional order, are reserved pending the final determination of this application, save in the event that this application becomes opposed, in which event the applicants will request that any such opposing party be ordered to pay the costs of this application on the scale as between attorney and client."

[16] The order was confirmed on 20 January 2021. CMSA was not a party to either proceedings. On 4 February 2021, the liquidators instituted an action against CMSA to

set aside and recover alleged dispositions in terms of the Insolvency Act.[5] In their particulars of claim, the liquidators alleged that on 1 September 2016, TSS, represented by Mr Wood, concluded a written loan facility agreement (TSS loan agreement) with CMSA, represented by Mr Daniel McGowan. In terms of the loan agreement, CMSA would extend a loan to TSS of R250 million and TSS would repay the loan, together with interest thereon, on or before 31 August 2017. During the period 7 September 2016 to 19 October 2016, CMSA, in pursuance of the TSS loan agreement, made payments amounting to R202 366 664 to TSS. During the period 22 December 2016 and 27 February 2017, TSS made repayments to CMSA in the aggregate amount of R210 289 901.

[17] On 1 September 2016, TFA, represented by Mr Wood, concluded a written loan facility agreement with CMSA, represented by Mr McGowan, in terms of which CMSA would extend a loan of R150 million to TFA and TFA would repay the loan, together with interest thereon, on or before 31 August 2017 (TFA loan agreement). During the period 7 September 2016 to 19 October 2017, CMSA disbursed R110 913 560 to TFA in pursuance of the TFA loan agreement. During the period 21 December 2016 and 17 February 2017, TFA partly repaid the loan amount by paying R69 956 099 to CMSA.

[18] The liquidators alleged that—

(a) the payments by TSS and TFA unduly preferred CMSA above their other creditors;

(b) at the time of and immediately after making the payments to CMSA, their liabilities exceeded the value of their assets; and

(c) those payments were thus undue preferences in terms of section 30 of the Insolvency Act.[6]

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[5] 24 of 1936.

[6] Section 30(1) of the Insolvency Act provides:

> "If a debtor made a disposition of his property at a time when his liabilities exceeded his assets, with the intention of preferring one of his creditors above another, and his estate is thereafter sequestrated, the court may set aside the disposition."

[19] In the alternative, they alleged that CMSA had colluded and conspired to procure payment by TSS and TFA as loan repayments under circumstances where the payments were not due to CMSA and there was no legal or factual basis for the payments to be made to CMSA by TFA and TSS, thus constituting voidable dispositions in terms of section 29 of the Insolvency Act.[7]

[20] On 3 August 2021, CMSA launched an application to rescind and set aside the section 20(9) order, relying on rule 42(1)(a) of the Uniform Rules of Court (Rules), section 354 of the 1973 Companies Act[8] and the common law. Its primary contention was that section 20(9) does not confer upon a court the power to liquidate a company.

[21] CMSA contended that the liquidators would not have had claims against it in terms of the Insolvency Act had it not been for the section 20(9) order. The power to institute these claims was derived from the purported liquidation orders contained in the section 20(9) order.

[22] CMSA argued that the collapse of multiple companies into one liquidated entity irreparably altered its contractual rights, including its right to repayment from specific companies, namely TSS and TFA. In other words, instead of being governed by its agreements with TSS and TFA, it became subject to a new legal regime applicable to seven entities in liquidation. Accordingly, CMSA submitted that it was prejudicially affected by the section 20(9) order and had standing to seek the rescission or setting aside of the order.

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[7] Section 29(1) of the Insolvency Act provides:

> "Every disposition of his property made by a debtor not more than six months before the sequestration of his estate or, if he is deceased and his estate is insolvent, before his death, which has had the effect of preferring one of his creditors above another, may be set aside by the Court if, immediately after the making of such disposition, the liabilities of the debtor exceeded the value of his assets, unless the person in whose favour the disposition was made proves that the disposition was made in the ordinary course of business, and that it was not intended thereby to prefer one creditor above another."

[8] 61 of 1973.

[23] On 12 September 2022, the High Court dismissed the application.[9] It held that, where justified on the facts, section 20(9) of the 2008 Companies Act empowers a court to grant appropriate relief, including a winding-up order. It also found that CMSA had not shown good cause for rescission and was not entitled to relief under the common law or section 354 of the 1973 Companies Act. The High Court distinguished the judgment of *Barak*,[10] which found that a High Court does not have the power to liquidate a company in terms of section 20(9), on the basis that the application in *Barak* was "to divest Barak of those rights and to vest those rights in the liquidators of Insure so as to ensure that these rights are dissipated and/or watered down".[11] CMSA was granted leave to appeal the judgment and order to the Supreme Court of Appeal. The liquidators did not submit any cross-appeal.

Supreme Court of Appeal

[24] On 28 March 2024, the Supreme Court of Appeal dismissed the appeal.[12] It held that the liquidators were procedurally entitled to the section 20(9) order and CMSA's challenge to its competence amounted to a subsequently disclosed defence. It agreed with the High Court that CMSA had not established a case for relief under the common law or section 354 of the 1973 Companies Act.

[25] It held that CMSA's case rested squarely on rule 42(1)(a). In this regard, it held that CMSA's subsequently disclosed defence, based on its interpretation of section 20(9) of the 2008 Companies Act, cannot transform the validly obtained judgment into an erroneously sought or granted judgment. Additionally, it held that the rescission application was a disguised appeal and that CMSA did not have a right to appeal against the section 20(9) final order. It further found that the winding-up process

[9] *Centaur Mining South Africa (Pty) Ltd v Murray N.O.* 2023 (1) SA 499 (GJ).

[10] *Barak Fund SPC Ltd v Insure Group Managers Limited*, unreported judgment of the High Court of, Johannesburg, Case No 2021/43053 (12 July 2022).

[11] Id at para 54.

[12] *Centaur Mining South Africa (Pty) Ltd v Cloete Murray N.O.* [2024] ZASCA 34.

was at an advanced stage and that the progress of the winding-up was a weighty consideration in deciding whether to grant a rescission application.

In this Court

Applicant's submissions

[26] CMSA applied for leave to appeal to this Court. Its central submission, consistent throughout, remains that section 20(9) of the 2008 Companies Act does not empower a court to liquidate a company. It submits that the section is concerned with the unconscionable abuse of juristic personality and the relocation of specific rights, obligations or liabilities; it has nothing to do with winding-up at all. Winding-up serves an entirely different purpose, which is to bring the existence of a company to an end through a structured process in which its assets are realised, liabilities settled and any residue distributed. It creates a *concursus creditorum* (coming together of creditors) and ensures that claims are dealt with in accordance with the statutory framework. It affects the status of the company and is not concerned with disregarding the company's separate personality or with the relocation of its rights, obligations or liabilities.

[27] CMSA argues that the power to grant a liquidation order derives from three statutory sources: sections 79 to 81 of the 2008 Companies Act for solvent companies; section 347 of the 1973 Companies Act for insolvent companies; and sections 130(5)(c)(i) and 131(4)(b) of the 2008 Companies Act for financially distressed companies with no reasonable prospects of rescue. It submits that section 20(9) does not confer a primary power to liquidate a company and that there is no basis for implying an ancillary power in section 20(9) to liquidate a company.

The liquidators' submissions

[28] The liquidators agree that an order under section 20(9) has the effect of relocating some or all of a company's rights, obligations or liabilities to someone else. They therefore agree with CMSA that the High Court could properly relocate all the rights, obligations and liabilities of the subject companies to, and have them vest in,

TMC in liquidation. They, however, contend that this is not the only effect that an order under section 20(9) will or may have.

[29] They pin their case to a single proposition: where a court declares, under section 20(9)(a), that a target company which is not in liquidation (like the subject companies) is deemed not to be a juristic person separate and distinct from, but rather part of, another company that is in liquidation, the court does not bring about the liquidation of the target company as a distinct legal person. What the court does is declare that the target company always formed part of the other company that is in liquidation.

[30] Accordingly, when the ruse of a simulated corporate distinction is erased through section 20(9), and the truth emerges, the fact is that, but for the relevant target company having been incorporated, used or its affairs conducted in a manner that constitutes an unconscionable abuse of the juristic personality of the company as a separate entity, it was always in truth and in fact part of the liquidated company. This, by implication, entails that, in truth and in fact—

(a) the employees of the target company were always the employees of the company in liquidation;

(b) the creditors of the target company were always the creditors of the company in liquidation;

(c) the target company and the company in liquidation were always the same taxpayer; and

(d) the estate of the target company and the estate of the company in liquidation were always one and the same estate and ought to be administered as such by the Master.

[31] The liquidators assert that, in any event, a court has the power to order the liquidation of a company in terms of section 20(9). They contend that a winding-up order is competent under section 20(9), not because the section expressly provides for it, or because such a power can be implied, or because it is not expressly prohibited.

They submit that upon a proper interpretation of section 20(9) as a whole, the words "any order" within the meaning of section 20(9)(b) mean exactly what those words say in plain and simple language: "any order" includes an order placing the target company in liquidation.

Directions

[32] This Court issued directions to the parties requesting them to file written submissions on the following questions:

> "(a) Is it competent for the High Court, by way of section 20(9) of the Companies Act 71 of 2008, to bring about the liquidation of a company even though the procedures laid down in the Companies Act for the liquidation of a company have not been followed?
>
> (b) If such an order is beyond the power of the High Court, is the fact that the High Court made an incompetent order a ground of rescission?
>
> (c) If this is not a ground of rescission, what remedy does a person who is negatively affected by such an order have? In particular, is it open to such a person to appeal the order, having regard to *Pitelli v Everton Gardens Projects CC* [2010] ZASCA 35; 2010 (5) SA 171 (SCA)?"

Issues

[33] The issues to be determined in this matter are—

(a) jurisdiction and leave to appeal;

(b) CMSA's standing;

(c) leave to file a replying affidavit;

(d) an analysis of the High Court's order;

(e) whether rule 42 of the Rules is applicable; and

(f) the scope of section 20(9) of the 2008 Companies Act.

Jurisdiction and leave to appeal

[34] In terms of section 167(3)(b)(i) and (ii) of the Constitution, this Court may decide constitutional matters, and any other matter, if the Court grants leave to appeal on the grounds that the matter raises an arguable point of law of public importance which ought to be considered by it.

[35] The liquidators assert that the High Court and the Supreme Court of Appeal, respectively, dismissed CMSA's rescission application and appeal on the basis that CMSA did not, amongst other things, make out a case for the relief it sought in terms of rule 42, which self-evidently does not raise a constitutional matter nor an arguable point of law of public importance which ought to be considered by this Court. Furthermore, this Court has comprehensively pronounced on the proper application of rule 42 in *Zuma*.[13]

[36] CMSA contends that the central issue is whether the High Court acted within its powers when it granted the section 20(9) order. In addition, it submits that there are two conflicting judgments on whether a court has the power to liquidate a company in terms of section 20(9). In *Barak*,[14] it was held that a court does not have such power, whereas in this matter, it was held that a court indeed has such power. The Supreme Court of Appeal, however, did not pertinently resolve the conflict. CMSA submits that the matter, therefore, also raises an arguable point of law of general public importance that warrants this Court's attention.

[37] In *Afrocentrics*,[15] this Court held that the proper exercise of a court's "powers impacts the efficacy of courts, the administration of justice and the rights of litigants to have justiciable disputes decided" and therefore raises constitutional issues that engage

[13] *Zuma v Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector Including Organs of State* [2021] ZACC 28; 2021 (11) BCLR 1263 (CC) at paras 51-70.

[14] *Barak* above n 10.

[15] *Afrocentrics Projects and Services (Pty) Ltd t/a Innovative Distribution v State Information Technology Agency (SITA) SOC Ltd* [2023] ZACC 2; 2023 (4) BCLR 361 (CC) at paras 24-5.

this Court's jurisdiction. A court may not issue orders that it is not empowered to grant. Our constitutional jurisdiction is engaged. The application bears reasonable prospects of success and it would be in the interest of justice to grant leave. Leave to appeal is granted.

CMSA's standing

[38] Rule 42(1)(a) of the Rules provides that–

> "[t]he court may, in addition to any other powers it may have, *mero motu* [(of its own accord)] or upon the application of any party affected, rescind or vary an order or judgment erroneously sought or erroneously granted in the absence of any party affected thereby."

[39] The liquidators contend that CMSA did not have standing to apply for the rescission of the High Court's order. They correctly point out that CMSA must prove that it has standing. They submit that CMSA failed to show that it had standing and that the allegations made by the liquidators in their particulars of claim do not constitute evidence. Moreover, the liquidators alleged, in the particulars of claim, that the loan agreements were products of fraud and contrived. They submit that CMSA did not dispute their version and therefore CMSA cannot be an affected party. In addition, if CMSA is truly a creditor of TFA, then it became a creditor of the consolidated Trillian entity and it remains open to it to pursue its claims and rights in the winding up of the subject companies.

[40] CMSA asserts that it has standing because it is a creditor of TFA[16] and is directly and materially prejudiced by the section 20(9) order. CMSA points out that the liquidators alleged in their particulars of claim that CMSA advanced funds to TFA and TSS in terms of written loan agreements. They relied on those loan agreements to

[16] The rescission application alleged that TFA made only partial repayment. A similar allegation was not made in respect of TSS, so presumably the repayments made by that entity to CMSA were regarded by the latter as constituting repayment in full.

impugn the repayments as voidable dispositions. It is therefore illogical for them now to allege that there were no loan agreements.

[41] CMSA contends that it requested the High Court to strike out inadmissible allegations of fraud made by the liquidators. The High Court did not oblige but instead relied on those allegations to conclude that CMSA lacked standing.

[42] It is trite that to establish standing under rule 42(1)(a) of the Rules, an applicant must show a direct and substantial interest in the judgment or order that the applicant wishes to have varied or rescinded.[17] The interest must be a legal interest in the subject matter of the proceedings that could be prejudicially affected by the order in that action or application.[18] The interest must not be too remote; it must be actual, not abstract or academic, and it must be a current interest and not a hypothetical interest.[19]

[43] The High Court found that CMSA participated in fraudulent conduct, was therefore not a true creditor of TFA and TSS and could not have been lawfully affected by the section 20(9) order. It held that CMSA had no standing. It, however, held that a rescission application based on lack of jurisdiction is *sui generis* (unique) and does not fall under the requirements of the Rules relating to rescission generally, and the High Court considered the application on this basis.

[44] The Supreme Court of Appeal did not expressly deal with the issue of standing. It found, by implication, that CMSA had standing under rule 42 and dismissed the appeal on the merits and not for want of standing.

[45] CMSA expressly pleaded that it advanced R110 913 560 to TFA in terms of a written loan agreement. TFA only repaid R69 956 099, which left a capital debt of

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[17] *De Villiers v Trustees of the Time Being of the GJN Trust* [2018] ZASCA 80; 2019 (1) SA 120 (SCA) at para 22.

[18] Id.

[19] *Four Wheel Drive Accessory Distributors CC v Rattan N.O.* [2018] ZASCA 124; 2019 (3) SA 451 (SCA) at para 7.

R40 956 461, excluding the accrued interest. It is a creditor of TFA for the balance of the loan amount. The order deeming TFA not to be a separate juristic person in respect of any right, obligation or liability has the effect that CMSA cannot enforce its rights in terms of the loan agreement. It is prejudiced because it cannot claim the balance of the loan from TFA. At best, it may have a claim against TMC because TFA had been collapsed into TMC. If it were to pursue such a claim, it would have to do so as an unsecured creditor. Because there is a *concursus creditorum*, it would only be able to recover a dividend, if there is one, after the administration costs, secured creditors and preferent creditors have been paid.

[46] In addition, because of the section 20(9) order, CMSA must now face a new creditor: the liquidators of TMC in liquidation, who have instituted claims against it in terms of the Insolvency Act. These claims did not exist before the section 20(9) order was made, because TFA and TSS retained their separate juristic personalities as well as their assets and liabilities. The liquidators did not file a cross-appeal against the Supreme Court of Appeal's implicit finding that CMSA had standing and its resultant order dismissing the appeal instead of removing it from the roll. In my view, CMSA has a current, direct and substantial legal interest and it is prejudicially affected by the section 20(9) order.

Leave to file a replying affidavit

[47] CMSA applies for leave to file a replying affidavit. Rule 19 of this Court's Rules does not make provision for the filing of a replying affidavit, and a party is therefore not entitled, as of right, to do so. The application is unopposed. The issues dealt with in the intended replying affidavit are mostly legal arguments already canvassed by both parties in the papers. It does not add value and CMSA, during its oral submissions, did not argue that the application should be granted. It is not in the interests of justice to admit the intended replying affidavit. Leave to file the replying affidavit is accordingly refused.

Analysis of the High Court's order

[48] In *Finishing Touch 163*,[20] the test for interpretation of a court order was stated thus:

> "The starting point is to determine the manifest purpose of the order. In interpreting a judgment or order, the court's intention is to be ascertained primarily from the language of the judgment or order in accordance with the usual, well-known rules relating to the interpretation of documents."[21]

[49] Paragraph 2(a)(ii) of the High Court's order states that TMC and the subject companies shall exist as a single entity by ignoring their separate legal existence as contemplated by section 20(9) read with section 22 of the 2008 Companies Act and Chapter 14 of the 1973 Companies Act. Chapter 14 extensively governs the winding-up of insolvent companies. The reference to Chapter 14 indicates that the High Court had the winding-up of the subject companies in mind.

[50] Paragraph 2(a)(iii) of the order unequivocally states that the effective date of the commencement of the subject companies' liquidation proceedings is the date upon which TMC was placed in liquidation. There were no applications for the winding-up of the subject companies. In terms of section 348 of the 1973 Companies Act, the winding-up of a company shall be deemed to commence at the time of the presentation to the court of the winding-up application. To overcome the legislative hurdle, the High Court pragmatically set a commencement date.

[51] Paragraph 2(b) directed the Master and the CIPC to, amongst other things, amend their records to reflect the "consolidation of the subject companies and their composite winding-up process". This is another indication that the High Court contemplated the winding-up of the subject companies. In paragraph 2(c), the High Court ordered that

[20] *Finishing Touch 163 (Pty) Ltd v BHP Billiton Energy Coal South Africa Ltd* [2012] ZASCA 49; 2013 (2) SA 204 (SCA).

[21] Id at para 13.

the costs of the application should be costs in the consolidated winding-up of TMC and the subject companies.

[52] I therefore disagree with the liquidators' submission that the High Court did not liquidate the subject companies. The liquidators' alternative argument that section 20(9) empowers a court to order the liquidation of a company will be dealt with later in this judgment.

Is rule 42(1)(a) of the Rules applicable?

[53] It is common cause that CMSA was not aware of the rule *nisi* and the final section 20(9) order as it was not cited as a party. The summons, in the action of the liquidators against CMSA, was served at its previous address and it was also not aware that the liquidators had issued summons against it. It learned of the action, the section 20(9) application and the order for the first time after the liquidators launched an application for default judgment in the action. CMSA requested copies of the section 20(9) application and the order from the liquidators, which they provided.

[54] The liquidators contend that rule 42(1)(a) is not applicable because the section 20(9) order is a final order preceded by a duly-circulated rule *nisi*. They assert that the order was not erroneously granted because the High Court had the power to make the order. They submit that CMSA's application for rescission is a disguised appeal.

[55] CMSA states that rule 42(1)(a) provides that a court may rescind an order erroneously sought or granted in the absence of any party affected thereby. The purpose of the rule is to expeditiously correct an obviously wrong judgment or order.[22] Furthermore, it submits that if a court grants an order that it is not empowered to grant, the order is erroneously granted and is wrong.[23]

[22] *Promedia Drukkers and Uitgewers (Edms) Bpk v Kaimowitz* 1996 (4) SA 411 (C) at 417B-I.

[23] *City of Johannesburg v Changing Tides 74 (Pty) Ltd* [2012] ZASCA 116; 2012 (6) SA 294 (SCA); 2012 (11) BCLR 1206 (SCA).

[56] When a court exceeds the bounds of its legal competence by making an order it has no power to grant, the resulting order may be a legal nullity, notwithstanding its formal appearance. In *Motala*,[24] the Supreme Court of Appeal held that an order made without authority is a nullity.[25] Being a nullity, a pronouncement to that effect is unnecessary, does not have to be set aside by a court of equal status and a court may refuse to enforce it.[26]

[57] In *Tasima*,[27] the majority in this Court extensively analysed and criticised *Motala* and concluded that *Motala* should not be relied upon for the view that court orders made in contravention of a statutory prohibition are invalid and therefore have no consequence.[28] The majority held that the general rule is that orders that do not concern constitutional invalidity have force from the moment they are issued.[29] In light of section 165(5) of the Constitution, which states that an order or decision issued by a court binds all persons to whom and organs of state to which it applies, a court order is binding, irrespective of whether it is valid or not, until set aside.[30] The majority further held that judicial orders wrongly issued are not nullities.[31] They exist in fact and may have legal consequences.[32] Furthermore, the majority distinguished a court's role from that of the parties and stated:

[24] *Master of the High Court Northern Gauteng High Court, Pretoria v Motala N.O.* [2011] ZASCA 238; 2012 (3) SA 325 (SCA).

[25] Id at para 14.

[26] Id.

[27] *Department of Transport v Tasima (Pty) Limited* [2016] ZACC 39; 2017 (1) BCLR 1 (CC); 2017 (2) SA 622 (CC).

[28] Id at para 188.

[29] Id at para 180.

[30] Id.

[31] Id at para 182.

[32] Id.

> "It is the *court* that, once invalidity is proven, can overturn the decision. The party does the proving, not the disregarding. Parties cannot usurp the court's role in making legal determinations."[33] (Emphasis in original.)

[58] In *Ndabeni*,[34] this Court agreed with the majority in *Tasima*.[35] It held:

> "Court orders are effective only when their enforcement is assured. Once court orders are disobeyed without consequence, and enforcement is compromised, the impotence of the courts and the judicial authority must surely follow. Effective enforcement to protect the Constitution earns trust and respect for the courts. This reciprocity between the courts and the public is needed to encourage compliance, and, progressively, common constitutional purpose."[36] (Footnotes omitted.)

[59] It is clear that a party negatively affected by an invalid court order may not ignore the order; such a party must apply to have it set aside. May an affected party do so in terms of rule 42(1)(a)?

[60] In *Bakoven*,[37] the High Court held that rule 42(1)(a) is a procedural step designed to correct expeditiously an obviously wrong judgment or order.[38] It further held:

> "An order or judgment is 'erroneously granted' when the court commits an 'error' in the sense of a 'mistake in a matter of law (or fact) appearing on the proceedings of a Court of record' (*The Shorter Oxford Dictionary*). It follows that a Court in deciding whether a judgment was 'erroneously granted' is, like a Court of appeal, confined to the record of proceedings. In contradistinction to relief in terms of Rule 31(2)(b) or under the common law, the applicant need not show 'good cause' in the sense of an explanation of his default and a *bona fide* [(genuine)] defence."[39]

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[33] Id at para 91.

[34] *Municipal Manager, OR Tambo District Municipality v Ndabeni* [2022] ZACC 3; 2023; 2022 (10) BCLR 1254 (CC); 2023 (4) SA 421 (CC).

[35] Id at para 24.

[36] Id at para 26.

[37] *Bakoven Ltd v G J Howes (Pty) Ltd* 1992 (2) SA 466 (E); [1992] 3 All SA 465 (E).

[38] Id at 471E-F.

[39] Id at 471F-G.

[61] In *Mutebwa*,[40] the High Court correctly disagreed with the holding in *Bakoven* that a court considering a rule 42(1)(a) application is confined to the record, and said the following:

> "There is nothing in the language used in the Rule which indicates that the error must appear on the record of the proceedings before the power conferred could be exercised. The contention that the Rule is confined to cases where the error appears on the record cannot, in my opinion, be correct. Such an interpretation places an unwarranted limitation on the scope of the Rule. Decided cases show that relief may be granted under this Rule if: (i) the Court which made the order lacked competence to do so; (ii) at the time the order was made the Court was unaware of facts which, if then known to it, would have precluded the granting of the order; or (iii) there was an irregularity in the proceedings."[41]

[62] In *Pitelli*,[42] the applicant filed both an application for leave to appeal and an application for rescission.[43] The Supreme Court of Appeal held that for an order to be appealable it must, *inter alia*, be final in effect.[44] It should therefore not be susceptible to being revisited by the court that granted it.[45]

[63] Importantly, the Supreme Court of Appeal held that "an order is not final for the purposes of an appeal merely because it takes effect, unless it is set aside".[46] It is only final when the proceedings in the court of first instance are complete, and that court cannot revisit the order.[47] An order taken in the absence of a party is ordinarily not

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[40] *Mutebwa v Mutebwa* [2001] 1 All SA 83 (Tk); 2001 (2) SA 193 (TkH).

[41] Id at para 22. See also *Lodhi 2 Properties Investments CC v Bondev Developments (Pty) Ltd* [2007] ZASCA 85; 2007 (6) SA 87 (SCA) at para 24.

[42] *Pitelli v Everton Gardens Projects CC* [2010] ZASCA 35; [2010] 4 All SA 357 (SCA); 2010 (5) SA 171 (SCA).

[43] Id at para 19.

[44] Id at para 20.

[45] Id.

[46] Id at para 27.

[47] Id.

appealable because it is capable of being rescinded by the court that granted it.[48] This, the Court held, leads to the ineluctable "conclusion that an order that is taken in the absence of a party is ordinarily not appealable".[49]

[64] In *Lee*,[50] the High Court mentioned, on the strength of *Pitelli*, a functional and a policy consideration against allowing a defaulting party to appeal rather than apply for rescission. Functionally, it held that "the very concept of appealing against an order granted in default of appearance is incompatible with an appreciation of a court of appeal's true function: to reconsider cases that have been fully argued at first instance".[51] The Court correctly found that a court of appeal that is asked to reconsider a default judgment will always be faced with the choice of deciding a case as a court of first and last instance, or "remitting the case to the court a quo to be decided again, which is exactly what the effect of a successful rescission application would have been".[52]

[65] As a matter of policy, it said, "[a] court of appeal ought generally only to intervene when the proceedings in the court below are complete. For so long as the court a quo can, in principle, alter or reconsider its order, an aggrieved party's remedy lies there".[53] I agree.

[66] In *Moyana*,[54] the High Court held that parties may waive or perempt their right to apply for rescission, and that act would render the judgment final and appealable. In

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[48] Id; it was said:

> "In some cases an order that is granted in the absence of a party *might be rescindable under rule 42(1)(a)*, and if it is not covered by that rule . . . *it is in any event capable of being rescinded under the common law*." (Emphasis added.)

[49] Id.

[50] *Lee v Road Accident Fund* 2024 (1) SA 183 (GJ).

[51] Id at para 13.

[52] Id.

[53] Id at para 14.

[54] *Moyana v Body Corporate of Cottonwood*, unreported judgment of the Gauteng High Court, Johannesburg, Case No A3068/16 (17 February 2017) at para 15.

Pitelli, the Supreme Court of Appeal found that the appealability of an order must be dependent on the nature of the order and not upon what the litigant chooses to make of it.[55] *Moyana* held that this view in *Pitelli* was *obiter* (stated in passing) and countered that it is not a matter of a party determining appealability so much as allowing a party the choice of different available remedies (rescission or appeal).[56] Neither waiver nor peremption arises in this case and it is therefore not necessary to determine this issue.

[67] The liquidators submitted that *Pitelli* is distinguishable. They contend that the section 20(9) order was preceded by a rule *nisi* that was published in the Government Gazette and two newspapers, and that this rendered it final and *res judicata* (a matter judged) as between them and the debtors and creditors of the subject companies. Therefore, they assert, the section 20(9) order should have been appealed.

[68] They rely on *Janse van Rensburg*[57] for their proposition. However, their reliance is misplaced. In *Janse van Rensburg*, the joint liquidators of an illegal pyramid investment scheme applied for orders consolidating the winding-up of certain entities that were part of the scheme (first application). In a second application, the joint liquidators applied, amongst other things, for an order that all contracts concluded between the investment scheme and investors in the scheme were illegal and null and void. Confirmation of both orders was preceded by the nationwide publication of a rule *nisi* which was intended to serve as notice to all investors in the scheme. The so-called "investors' representative" initially contested several aspects of the rule *nisi* but abandoned his opposition before its confirmation. The order was not appealed and the Supreme Court of Appeal held that it became binding on all investors.

[55] *Pitelli* above n 42 at para 31.

[56] *Moyana* above n 54 at paras 14-15.

[57] *Janse van Rensburg N.O. v Steyn* [2011] ZASCA 71; 2012 (3) SA 72 (SCA).

[69] There was proper court-sanctioned service in the first application without any opposition. The Court, in essence, found with reference to *Insamcor*[58] that the investors' failure to react to the rule *nisi* gave rise to deemed consent.[59] The acquiescence is deemed in order to "facilitate proof of matters which might otherwise be difficult to prove in a Court of Law".[60] In *Gold*,[61] the Court stated the principle thus: "The practice is well established that proof of consent is inferred from failure to object after the issue of a rule *nisi* served in a manner and on the persons ordered by the Court."[62]

[70] The affected persons in this case were therefore prima facie (on the face of it) assumed to have been properly served and therefore to have consented to the order until sufficient evidence was adduced to displace such assumption. CMSA's case has always been that the provisional and final orders did not come to its notice until the liquidators gave it copies of these orders. This is undisputed. CMSA therefore displaced the prima facie proof with undisputed evidence and reasons for its absence. There was no wilful absence. The orders were granted in CMSA's absence.

[71] *Janse van Rensburg* did not deal with the principles relating to appealability of orders. The Supreme Court of Appeal simply mentioned, in passing, that the order was not subsequently challenged by way of an appeal. It did not expressly state that all orders preceded by a rule *nisi*, which was published nationwide, must be appealed and may not be rescinded.

[72] Rather, *Janse van Rensburg* reinforced the principle that orders are presumed to be correctly made, whether they were or not. It did not purport to change the position as espoused in *Pitelli* nor did it overrule *Pitelli*. It is therefore unsurprising that

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[58] *Insamcor (Pty) Ltd v Dorbyl Light & General Engineering (Pty) Ltd; Dorbyl Light & General Engineering (Pty) Ltd v Insamcor (Pty) Ltd* [2007] ZASCA 6; 2007 (4) SA 467 (SCA).

[59] *Janse van Rensburg* above n 57 at para 15 and id at para 29.

[60] *R v Haffejee* 1945 AD 345 at 352-3.

[61] *Ex parte Gold* 1956 (2) SA 642 (T); [1956] 3 All SA (T).

[62] Id at 649E.

Janse van Rensburg did not refer to *Pitelli* at all. It is not the publication of the rule *nisi* that made the order binding, but the fact that the rule *nisi* was confirmed, unopposed, in circumstances where the investors were deemed to be aware of the rule *nisi*. The order in the second application was also binding, subject to an investor successfully challenging it on the grounds of lack of knowledge or being misled. By way of analogy, CMSA's case is precisely that it had lacked knowledge of the orders.

[73] The order in the present case was erroneously sought and granted because there were irregularities in the proceedings. In terms of section 346(4A) of the 1973 Companies Act, a copy of a liquidation application must be furnished to every registered trade union that, as far as the applicant can reasonably ascertain, represents any of the employees of the company, and to the employees in the prescribed manner. It must also be furnished to SARS. The applicant must further, before or during the hearing, file an affidavit by the person who furnished a copy of the application which sets out the manner in which the application was furnished.

[74] There is no indication in these papers that there was compliance with section 346(4A). In *EB Steam*,[63] the Supreme Court of Appeal, correctly, held that the requirement that the papers be furnished to the persons specified in the section is peremptory.[64]

[75] In my view, CMSA has successfully proved that it was absent when the order was made and that there were irregularities in the proceedings. The liquidators were not procedurally entitled to the order in the form in which it was granted. The section 20(9) order was granted in default of appearance and is a default judgment. The proceedings remained incomplete in the High Court, regardless of the binding order. The order could, therefore, be rescinded in terms of rule 42(1)(a).

[63] *EB Steam Co (Pty) Ltd v Eskom Holdings SOC Ltd* [2013] ZASCA 167; [2014] 1 All SA 294 (SCA); 2015 (2) SA 526 (SCA).

[64] Id at para 23.

Analysis of separate legal personality

[76] The separate legal personality of a company is the very foundation on which company law rests.[65] This principle is linked to the renowned United Kingdom case of *Salomon*,[66] which is celebrated as the case that firmly established separate corporate personality and simultaneously represents an early attempt to pierce the corporate veil.[67]

[77] In *Salomon*, Lord Halsbury LC said that—

> "once the company is legally incorporated it must be treated like any other independent person with its rights and liabilities appropriate to itself, and that the motives of those who took part in the promotion of the company are absolutely irrelevant in discussing what those rights and liabilities are."[68]

[78] In *Dadoo*,[69] the Court held that "[t]his conception of the existence of a company as a separate entity distinct from its shareholders is no merely artificial and technical thing. It is a matter of substance."[70] With this background, I now turn to consider the interpretation of section 20(9).

Interpretation of section 20(9)

General principles of interpretation

[79] In terms of section 39(2) of the Constitution, when interpreting any legislation, a court must promote the spirit, purport and objects of the Bill of Rights. When interpreting a document, including a statute, the starting point is the text itself. Words must be given their ordinary grammatical meaning unless doing so would result in absurdity; if the words are clear and unambiguous, their grammatical meaning must be

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[65] Cassim "Piercing the Veil under Section 20(9) of the Companies Act 71 of 2008: A New Direction" (2014) 26 *South African Mercantile Law Journal* 307 at 307.

[66] *Salomon v Salomon & Co Ltd* [1896] UKHL 1; [1897] AC 22.

[67] *VTB Capital plc v Nutritek International Corp* [2013] UKSC 5 (*VTB*) at para 122.

[68] *Salomon* above n 66 at 30.

[69] *Dadoo Ltd v Krugersdorp Municipal Council* 1920 AD 530.

[70] Id at 550.

adhered to. The court must also have regard to the context in which the words appear and the text itself should not be viewed in isolation. The text is almost always influenced by its context. In interpreting an Act, a construction that promotes the purpose or object underlying the Act, including the mischief it seeks to address, should be preferred above a construction that will not do so.[71]

[80] Interpretation is a unitary exercise: the text, context and the purpose should be considered simultaneously.[72] All statutes must be construed consistently with the Constitution; where reasonably possible, legislative provisions should be interpreted to preserve their constitutional validity.[73]

Interpreting section 20(9)

[81] Section 5(1) of the 2008 Companies Act provides that the Act must be applied and interpreted in a manner that gives effect to its purposes as set out in section 7. Section 5(2) states that, to the extent appropriate, a court interpreting the Act may consider foreign law. In terms of section 19(1), a company becomes a juristic person from the time and date that its incorporation is registered and exists continuously until its name is removed from the companies register. This is in conformance with the common law.

[82] I agree with the judgment in *Gore*[74] that section 20(9) is supplemental to the common law, rather than substitutive.[75] I also agree with *Gore* that the section is cast in very wide terms, indicative of an appreciation by the Legislature that it might find

[71] *Cool Ideas 1186 CC v Hubbard* [2014] ZACC 16; 2014 (4) SA 474 (CC); 2014 (8) BCLR 869 (CC) at para 28 and *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] ZASCA 13; 2012 (4) SA 593 (SCA) at paras 17-26. See also *Independent Institute of Education (Pty) Limited v KwaZulu-Natal Law Society* [2019] ZACC 47; 2020 (2) SA 325 (CC) at para 18 and *Malakite Body Corporate v City of Johannesburg Metropolitan Municipality* [2025] ZASCA 192 at para 13.

[72] *University of Johannesburg v Auckland Park Theological Seminary* [2021] ZACC 13; 2021 (6) SA 1 (CC); 2021 (8) BCLR 807 (CC) at paras 65-6.

[73] *Cool Ideas* above n 71.

[74] *Ex parte Gore N.O.* [2013] ZAWCHC 21; [2013] 2 All SA 437 (WCC); 2013 (3) SA 382 (WCC).

[75] Id at para 34.

application in widely varying factual circumstances.[76] The 2008 Companies Act does not define what would constitute an unconscionable abuse. It avoids metaphors like fraud, scam and façade.[77] The court must find the relevant wrongdoing on the facts of each case.

[83] In this matter, CMSA accepts that the liquidators had the necessary standing to bring the section 20(9) application. It also does not dispute that the liquidators proved that the conduct of the subject companies amounted to an unconscionable abuse of their respective corporate personalities. Importantly, it does not challenge the High Court's order that the subject companies are to be deemed not to be separate juristic persons in respect of all their rights, obligations or liabilities.

[84] The court is not obliged to invoke section 20(9), even though an unconscionable abuse of a company's separate personality has been shown. The court *may* do so. This indicates that the court has a discretion whether to pierce the corporate veil.[78] As stated above, CMSA does not challenge the High Court's exercise of its discretion to disregard the separate corporate existence of the subject companies.

[85] It is common cause that section 20(9) consists of two parts. Paragraph (a) confers the power on a court to declare that a company is deemed not to be a juristic person. Such a declaration may only be made in respect of any right, obligation or liability of the company or of a shareholder of the company. The phrase "any right, obligation or liability" could include all the company's rights, obligations and liabilities or only certain of those rights, obligations or liabilities. Paragraph (b) grants the court

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[76] Id at para 32.

[77] In *VTB* above n 67 at para 124, the Court said:

> "Words such as 'façade', and other expressions found in cases, such as 'the true facts', 'sham', 'mask', 'cloak', 'devise', or 'puppet' may be useful metaphors. However, such pejorative expressions are often dangerous, as they risk assisting moral indignation to triumph over legal principle, and, while they arrive at a result which seems fair in the case in question, they can risk causing confusion and uncertainty in the law."

[78] Cassim above n 65 at 310.

the power to make "any further" appropriate order "to give effect" to the declaration made in terms of paragraph (a).

[86] The phrase "any further order" in section 20(9)(b) is very broad. It grants the court the "very widest of powers" to grant consequential relief.[79] *Gore* states that an order under "paragraph (b) will always have the effect . . . of fixing the right, obligation or liability in issue of the company somewhere else".[80] This observation accords with the common law principle espoused in *Cape Pacific*:[81]

> "Thus if a company, otherwise legitimately established and operated, is misused in a particular instance to perpetrate a fraud, or for a dishonest or improper purpose, *there is no reason in principle or logic why its separate personality cannot be disregarded in relation to the transaction in question (in order to fix the individual or individuals responsible with personal liability) while giving full effect to it in other respects*. In other words, there is no reason why what amounts to a piercing of the veil *pro hac vice* [(for or on this occasion only)] should not be permitted."[82] (Emphasis added.)

[87] In the United Kingdom, the principle was expressed in *Prest*[83] as follows:

> "I conclude that there is a limited principle of English law which applies when a person is under an existing legal obligation or liability or subject to an existing legal restriction which he deliberately evades or whose enforcement he deliberately frustrates by interposing a company under his control. *The court may then pierce the corporate veil for the purpose, and only for the purpose, of depriving the company or its controller of the advantage that they would otherwise have obtained by the company's separate legal personality*."[84] (Emphasis added.)

[79] *Gore* above n 74 at para 34.

[80] Id.

[81] *Cape Pacific Ltd v Lubner Controlling Investments (Pty) Ltd* [1995] ZASCA 53; [1995] 2 All SA 543 (A); 1995 (4) SA 790 (A).

[82] Id at 804C-D

[83] *Prest v Petrodel Resources Limited* [2013] UKSC 34; [2013] 4 All ER 673 (HL).

[84] Id at para 35.

[88] The phrase "to give effect to", in paragraph (b), is not defined in the 2008 Companies Act. It must therefore be given its ordinary grammatical meaning, unless to do so would lead to an absurdity. The phrase "to give effect to" means to make operative or put into force.[85] It therefore means to operationalise or implement. Although paragraph (b) is couched in wide terms, its breadth is restricted by the phrase "to give effect to" and the word "appropriate". It is not a self-standing power, divorced from the declaratory order under paragraph (a).

[89] The two paragraphs are interconnected. A court's power is circumscribed by paragraph (b). A court is obliged to ensure that the order in terms of paragraph (b) gives effect to the declaration under paragraph (a). If the order is not appropriate to give effect to the declaration under paragraph (a), it should not be made. The purpose of the order under paragraph (b) is to cause or facilitate the proper implementation of paragraph (a). The facts of the case and the rights, obligations or liabilities which form the subject matter of the paragraph (a) declaration will dictate the kind of order to make under paragraph (b).

[90] Paragraph (b) does not sanction or proscribe the winding-up of a company. On the facts of this case, it is not necessary to decide whether a court may order the liquidation of a company under section 20(9)(b). I doubt whether there could ever be circumstances in which a liquidation order would be appropriate under section 20(9)(b). However, in my view, the question in this case is rather whether it was appropriate for the High Court to order the liquidation of the subject companies to give effect to the relocation of the rights, obligations and liabilities of the subject companies.

[91] The answer is no. I say so because the liquidation of the subject companies was unnecessary in order to achieve the High Court's intended purpose, namely that the subject companies should be deemed not to be juristic persons in respect of their rights, obligations and liabilities, and that such rights, obligations and liabilities should be

[85] Brown *The New Shorter Oxford English Dictionary on Historical Principles* (OUP, Oxford 1993) 1 on 786.

relocated to TMC. There was no need to order the liquidation of the subject companies to bring about this result. The additional order made in terms of paragraph (b) inappropriately sought to annihilate the subject companies, whereas the order already sufficiently dealt with all their rights, obligations and liabilities. The appropriate order to give effect to the order under paragraph (b) is to state what should happen to their rights, obligations and liabilities, namely that they should be relocated to TMC.

Conclusion

[92] CMSA brought the rescission application and litigated the matter up to this Court in the mistaken belief that if it succeeded in establishing that the subject companies could not be liquidated, there would have to be separate liquidations of TSS and TFA before CMSA could be sued for voidable dispositions. CMSA did not dispute that the High Court was empowered, without liquidating the subject companies, to order that they would be deemed not to be separate juristic persons in relation to their assets, liabilities and obligations, and that such assets, liabilities and obligations should instead be relocated to TMC.

[93] Consequently, any obligations that TSS and TFA owe or owed to CMSA would now be obligations owed by TMC to CMSA. Therefore, any assets disposed of by TSS and TFA to CMSA would now have to be regarded as assets disposed of by TMC to CMSA. Resultantly, CMSA cannot insist on retaining TSS and TFA as its contractual counterparties.

[94] The liquidators have not sued CMSA in their capacity as purported liquidators of TSS and TFA, but as liquidators of TMC. It is therefore the commencement date of TMC's liquidation that is germane. If the High Court had not made orders purporting to liquidate the subject companies, but only relocated their assets, liabilities and obligations to TMC, they would have been left as empty shells. The setting aside of the parts of the order which sought to liquidate the subject companies ultimately amounts to a pyrrhic victory for CMSA.

[95] The parts of the order relating to the liquidation of the subject companies should be set aside and corrected for the reasons stated above. It is not an appropriate order as contemplated in section 20(9)(b).

[96] The liquidators argued that CMSA should have requested declaratory relief instead of approaching the High Court in terms of rule 42(1)(a). However, this argument puts form over substance. CMSA prayed for the setting aside or variation of the High Court order. Rule 42(1)(a) is an appropriate pathway to achieve the variation because the order was erroneously sought in CMSA's absence.

Costs

[97] The setting aside of the purported liquidation orders is a hollow victory for CMSA, therefore each party should bear its own costs.

Order

[98] I accordingly make the following order:

1. Leave to appeal is granted.
2. The appeal is upheld in part.
3. The order of the Supreme Court of Appeal is set aside and replaced by the following:

   "(a) The appeal is upheld to the extent set out below, with no order as to costs.

   (b) Paragraph 2 of the order of the High Court is set aside and replaced with the following:

   '(2) The following order is made:

   (a) Trillian Capital Partners (Pty) Ltd [Reg No: 2015/111759/07], Trillian Securities (Pty) Ltd [Reg No: 2015/152852/07], Trillian Nominees (Pty) Ltd [Reg No: 2017/036662/07], Trillian Shared Services (Pty) Ltd [Reg No: 2015/111747/07], Trillian

Property (Pty) Ltd [Reg No: 2016/046295/07] and Trillian Financial Advisory (Pty) Ltd [Reg No: 2014/122082/07] ("the subject companies"):

(i) shall be deemed not to be separate juristic persons in respect of any right, obligation or liability of those companies or of a shareholder of the subject companies;

(ii) in terms of section 20(9)(b), any right, obligation or liability of the subject companies shall be relocated to Trillian Management Consulting (Pty) Ltd ("TMC") (in liquidation).

(b) The costs of this application are costs in the winding-up of TMC in liquidation.'"

4. Each party to pay their own costs.

For the Applicant:	G D Wickins SC and J Brewer instructed by Tabacks Attorneys Incorporated
For the First and Second Respondents:	B H Swart SC and P Lourens instructed by MacRobert Attorneys