



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

**JUDGMENT**

REPORTABLE

Case no: 22720/2024

In the matter between:

**ADRIANUS MERCEIJ**

**Intervening Party**

And

**THOMAS CHRISTOPHER VAN ZYL N.O.**

**First Applicant**

**FAZLUL HUQ SULIMAN N.O.**

**Second Applicant**

**MONICA GEZINA COWIN N.O.**

**Third Applicant**

**SAFIYAH EBRAHIM COOK N.O.**

**Fourth Applicant**

**RENEE BERNICE BAILEY N.O.**

**Fifth Applicant**

(In their capacities as the duly appointed Final  
Liquidators of HGG FINANCIAL GROUP INC.)

And

**SQUARE ROCK LIMITED (in liquidation)**

**Respondent**

**Coram: MANTAME J**

**Heard: 03 November 2025**

**Delivered: 29 June 2026**

---

## ORDER

---

1. The separation of issues in terms of Rule 33(4) fails.
2. The point in limine on *locus standi* raised by the HGG liquidators fails.
3. The Intervening Party, Mr Adrianus Mercej is granted leave to intervene in the main proceedings (section 29 application)
4. The judgment and order granted by Nuku, J on 23 October 2024 is rescinded.
5. The respondents are ordered to pay the costs including the costs of two Counsel where so employed on Scale C.

---

## JUDGMENT

---

### **Mantame J**

#### *Introduction*

[1] The Intervening Party in these proceedings, Mr. Adrianus Mercej (Mr. Mercej) instituted an application first: for leave to intervene in the main application where Nuku, J on 23 October 2024 granted an order in camera that; (i) the payments made by HGG Financial Group Inc. (HGG ) (In Liquidation) to Square Rock Ltd (SR) ( In Liquidation) in the amount of €4 739 968, 22 is set aside as voidable preferences in terms of section

29 (1) of the Insolvency Act 24 of 1936 (the Act) (the section 29 application); (ii) that the applicants, in their capacity as the joint liquidators of HGG Inc are declared, in terms of section 32 (3) of the Act, to be entitled to recover the amount of €4 739 968,22 from SR; (iii) that SR pay the amount of €4 739 968, 22 to the applicants with interest calculated at a rate of 10 percent per annum from the date of the order to the date of payment, on any outstanding balance from time to time.

[2] Second, if leave to intervene is granted, that the Court further grants a rescission of the order granted by Nuku, J on 23 October 2024. The application for rescission is sought in terms of Rule 42 (1) (a) of the Uniform Rules of Court (Rule 42) *alternatively* the common law.

[3] The liquidators of HGG opposed the application mainly on the basis that Mr. Merceij lacks *locus standi* to intervene in these proceedings.

[4] At the commencement of these proceedings Counsel for HGG liquidators proceeded with an application in terms of Rule 33 (4) that the question of law relating to the Intervening Party's *locus standi*, which co – incides with the application for leave to intervene first be disposed of, and to have all further proceedings stayed until such question of law has been disposed of and an order to that effect has been granted.

[5] The parties agreed at the hearing of this application that other aspects that were raised by the Intervening Party i.e. (i) HGG Inc.'s Insolvency, (ii) HGG (Illegal) Ponzi Scheme, and (iii) the illegality of the five loans as being non – compliant with the

Reserve Bank requirements need not to be determined by this Court at this stage. Likewise, the striking out that was previously raised by HGG's liquidators was not pursued.

[6] Before dealing with the issue of separation and the other points raised, it would be prudent to first examine the factual matrix leading to the Intervening Party making himself known in these proceedings.

#### *Background facts*

[7] Mr. Mercej, a Dutch citizen has been a successful global businessman for more than 40 years. The first business which he successfully set up was in the fragrance industry where he operated as a grey – market trader, purchasing exclusive fragrances from global suppliers and on-selling them to retailers who otherwise could not gain direct access to the exclusive fragrance houses. After his achievements in this business, he expanded his business operations to include *inter alia* a private financing institution. This included setting up corporate entities which provided finance to businesses.

[8] Mr. Mercej divorced in 2010 and decided to move to South Africa in May 2011. The business affairs were overseen by his adult children in the Netherlands. It was never his intention to live in South Africa indefinitely. His primary residence, as a now a retired businessman is in the Netherlands.

[9] SR was incorporated in Mauritius as a private company limited by shares. Mr. Mercej was the sole director and shareholder of SR. At the same time that SR was incorporated, Mr. Mercej also set up a trading entity in Mauritius called FOX2TRADE (F2T). F2T was a Global Business (Category 1) (GBC1) company and a wholly – owned subsidiary of SR. SR was licensed as a Global Business (Category 2) on 1 June 2011. Mr. Mercej provided a start-up capital to SR, and SR in turn provided finance to F2T. F2T generated more and more profits and declared these profits as dividends to SR, in time, and SR began to expand its private financing business. It not only provided to F2T, but also expanded and financed other companies in his group of companies and third parties.

[10] According to Mr. Mercej, the Mauritian companies were primarily set up to take advantage of the beneficial tax regime which Mauritius offered at the time, and there was nothing untoward about this. It was not, as HGG’s liquidators seem to suggest, that Mr. Mercej’s conduct was improper in this regard as he merely took advantage of the beneficial Mauritian tax regime to which he was entitled to, so he said.

[11] In conducting business in Mauritius he used an agency called Vistra (Vistra). Vistra’s services included *inter alia*, company formation and management, company secretarial services, accounting services, tax and regulatory compliance services.

[12] In 2018, Mr. Mercej was introduced by some friends, including Mr Rob Van Veen (Mr. Van Veen) to Mr. Hendrik Gerryts (now deceased) (Mr Gerryts). Mr. Van Veen told him that Mr. Gerryts was the corporate controller of a business group called HGG (HGG

Group) and Mr Van Veen suggested that he meets with Mr. Gerryts to explore the possibility of providing finance to the HGG Group. HGG Group consisted of several businesses including an accounting business, an insurance business, and a property development business. Mr. Mercej's first contact with the HGG Group was in September 2018 when he was informed that the property development arm of the HGG Group was involved in a big development in Paarl (the Bretagne Development).

[13] Further, the HGG Group had access to clients who were registered for Value Added Tax (VAT) and often required bridging finance while they waited for their VAT returns from the South African Revenue Services (SARS). In such instances, the HGG Group would make bridging finance available to the clients who would then repay the HGG Group with interest once they received their VAT refunds from SARS. According to Mr. Gerryts, the HGG Group required private financing to make these loans available to its clients.

[14] Based on the aforesaid information from Mr. Gerryts, Mr. Mercej came to the conclusion that the HGG Group was a financially sound business, and that it would make financial sense for SR to provide finance to it. Although these discussions happened in 2018, SR officially became involved as a private financier of the HGG Group in 2020. Given SR's positive previous experience with the Edu Bond transactions, Mr. Mercej suggested to Mr. Gerryts that they conclude their business on the same basis as Edu Bond deals. However, they are not relevant for purposes of these proceedings.

[15] On 14 April 2020, SR concluded its first loan agreement with two of the companies in the HGG Group, namely. HGG Financial Group Inc. and HGG Invest (Pty) Ltd (HGG Invest). The four loan agreements were concluded between October and November 2020. The five loans that were made between April and November 2020, totalled an amount of R97,5 million. All these loans were repaid by HGG to SR on 22 December 2022.

[16] While the above-mentioned events were unfolding, Vistra advised him that the Mauritian Financial Services Act had been amended to introduce a new type of company called 'the Authorised Company', and that the GBC 2 companies were being phased out. The GBC2 companies, which like SR, had been incorporated on or before 16 October 2017, would be 'grandfathered' and/ or allowed to continue operating under the old laws until 30 June 2021. After that date, the GBC2 companies would have the option to convert into 'Authorised Companies' or 'Global Business Companies', or alternatively be dissolved.

[17] By the time Mr. Mercej received this notice from Vistra in September 2020, SR had already concluded its first loan agreement and advanced the funds to HGG. On the other hand, F2T was a wholly owned subsidiary of SR, and Mr. Mercej was therefore advised that it would be necessary to first wind up F2T before SR could be liquidated. Pursuant to that advice, he instructed Vistra to proceed with the process of winding up in October 2020. This process was long and SR's GBC 2 license lapsed on 30 June 2021. This meant that it could no longer trade. However, it was still able to accept repayments of funds, including repayments of the loans it made to HGG and other

entities, and declare dividends to shareholders, which was Mr. Mercej. Out of an abundance of caution, Mr. Mercej requested Vistra to wait for the repayment of all the loans which SR had made and then take steps to liquidate SR. In response, Vistra advised that such steps would be unlawful and impossible. And that a delay in the liquidation of SR could result in the charging of additional administration fees.

[18] However, after SR had received repayments of all its loans from HGG and its other debtors, the liquidation of SR was commenced. Resolutions dated 27 December 2021 signed by Mr. Mercej as the sole director and shareholder of SR, to voluntarily liquidate the company; a solvency assessment document; and a statement of affairs of SR signed by Mr. Mercej and depicting a true and faithful account of the books and financial position were prepared. The requisite documentation was prepared by Vistra and signed by Mr. Mercej before 31 December 2021, i.e. the deadline which Vistra had warned him, if not met, would result in the charging of additional administration fees.

[19] Mr. Gowtamsing Dabee (Mr. Dabee) was the liquidator of SR in Mauritius and did not have any contact with Mr. Mercej during this process. As this was a voluntary winding up of a company with no assets and or liabilities, he required no further documentation to carry out his mandate. Mr Dabee never took custody of any of the books and records of SR as he was not entitled, under Mauritian Law, to rely on the state of affairs to execute the mandate. The administration was simple given the fact that SR had no assets nor liabilities, nor was it tax resident in Mauritius. No assessment by the Mauritian tax authorities or tax certificate was required for SR to be finally wound - up and dissolved. SR was finally dissolved or wound up on 15 October 2022.

[20] On 4 March 2022, Mr. Gerrys, the controller of HGG passed away. Shortly thereafter on 11 March 2022, HGG was provisionally liquidated. Mr. Merceij stated that until he learnt of HGG's liquidation, he had no idea that HGG experienced financial problems. The final order of liquidation was issued on 14 April 2022. The applicants were therefore appointed as liquidators of HGG on 17 November 2022.

[21] The HGG liquidators on discovering *inter alia* that some payments were made by HGG to SR before its liquidation, proceeded with section 29 urgent application in camera before Nuku J and an order setting aside those payments as voidable preferences was granted on 23 October 2024.

[22] Mr. Merceij on becoming aware of the order and on considering the section 29 application, noted that the liquidator's powers were extended in terms of section 386 (5) of Act 61 of 1973, (the 1973 Act) as well as by an order for a commission of inquiry to be convened in terms of section 417/418 of the 1973 Act but was unsure of when this extension of powers took place. Also, in paragraph 47 of the Section 29 proceedings, it appears that the liquidators instituted several court proceedings in Mauritius, including: -

22.1 An application for recognition of HGG liquidators in Mauritius

22.2 An application for leave to institute proceedings to restore SR to the Mauritian Companies Register;

22.3 An application to restore SR to the Mauritian Companies Register; and

22.4 An application for the SR liquidators (Mr Dabee) resumption of office.

[23] Despite being the sole director and shareholder of SR prior to its liquidation Mr Mercej complained that he was not made aware of any Mauritian proceedings as stated above. After the HGG liquidators were successful with the Mauritian proceedings on or about 18 October 2024 they instituted the section 29 application in this Court before Nuku J. On the face of it, as stated above it appears that it was instituted simply to set aside certain payments which HGG had made to SR in the six months leading up to HGG's liquidation as voidable dispositions in terms of section 29. However, it became clear to him that HGG's liquidators' true motive in bringing this application was to gain a tactical advantage in proceedings which they intended to institute against him in the Netherlands.

[24] As contended, the HGG's liquidators did not take note that Mr Mercej had direct, substantial, material and/or residual powers in the section 29 proceedings. He was not notified nor joined as a party in the proceedings. Curiously, the application was brought on an urgent, confidential, and on in camera basis. The HGG's liquidators in proceeding in this manner, adopted an unusual process to follow in voidable dispositions proceedings, more especially where only a final order is sought.

[25] After Nuku, J granted an order on 23 October 2024, the SR liquidator after reinstatement confirmed in writing to the HGG liquidators' attorney that HGG had been registered as a creditor of SR on 28 October 2024. Shortly thereafter, on 7 November 2024, HGG liquidators instituted pre – judgment attachment proceedings against Mr. Mercej in the Netherlands – this was said to be akin to anti – dissipation proceedings in

South Africa. The purpose of these pre – judgment attachment proceedings was to secure by way of a precautionary attachment of Mr Merceij’s property known as Helvoirt, sections D5709, D5878 and D5875 and later the recovery of a future claim which the HGG’s liquidators intended to pursue against him. Mr. Merceij was not given notice of these proceedings, and merely received a copy of the papers with the order granted in respect thereof. The HGG’s liquidators attached the afore-mentioned immovable properties per the order of 7 November 2024.

[26] On 5 December 2024, the HGG’s liquidators instituted action proceedings against Mr. Merceij in the Netherlands. According to him on consideration of the pre – judgment attachment order and Dutch summons, it became apparent that the true purpose of the main application (section 29 order) was to gain a tactical advantage against him in the Dutch proceedings. In addition, the HGG’s liquidators made several misrepresentations to the Dutch court in the pre – judgment attachment application, to create the impression that a finding of moral turpitude on his part has been made in South African Court.

[27] The HGG liquidators’ claim in the Netherlands is that Mr. Merceij is liable to repay the amount **he** (not SR) received within six months before HGG’s bankruptcy amounting to €4 739 968, 22 in terms of the repayment obligation is section 29 (1) of the Insolvency Act. The South African Court has already held that the payments made by HGG within six months prior to bankruptcy qualify as voidable preferences “within the meaning of this article.” In that application, it was said that, under South African law, not only is SR liable for these payments, but also Mr. Merceij.

## *Separation of Issues*

### *Locus Standi, Intervening Party, Application and Rescission Application*

[28] HGG's Counsel submitted that the *in limine* point of *locus standi* is a crisp point which the Court needs to determine upfront in terms of Rule 33 (4) of the Uniform Rules of Court. In support of this contention, HGG's liquidators relied on *Giant Concerts v Rinaldo Investments (Pty) Ltd and Others*,<sup>1</sup> where the Constitutional Court, in dealing with the issue of *locus standi*, cross referenced to Hoexter<sup>2</sup> and stated the following:

'As Hoexter explains:

"The issue of standing is divorced from the substance of the case. It is therefore a question to be decided *in limine* [at the outset] before the merits are considered."

[29] Further, it was submitted that Corbet J, in *United Watch & Diamond Co (Pty) Ltd and Others v Disa Hotels Ltd and Another*<sup>3</sup>, held that the applicant must demonstrate that he has legal interest in the proceedings. HGG's liquidators argued that the interest in these proceedings that was alleged by the Intervening Party is not enough. The argument proceeded, for the Intervening Party to establish legal interest as opposed to financial interest, the Dutch proceedings are utterly irrelevant, so said HGG's liquidators. Friedman, J in *Standard General Insurance Co Ltd v Gutman NO and Others*<sup>4</sup> held that:

---

<sup>1</sup> (CCT 25/12) [2012] ZACC 28;2013 (3) BCLR 251 (CC) at para 32 – 34.

<sup>2</sup> C Hoexter *Administrative Law in South Africa* 2 ed (Juta & Co, Cape Town 2012) at 488

<sup>3</sup> 1972 (4) SA 409 (C) at 415H

<sup>4</sup> 1981 (2) SA 433 G-H

'The question of what class of persons has the necessary locus standi to bring an application for the rescission of a judgement was considered in *United Watch and Diamond Co (Pty) Ltd and Others v Disa Hotels Ltd and Another* 1972 (4) SA 409 (C)'

...

"the test and substantial interest in the subject matter of the action is again regarded as being the decisive criterion..."

[30] The HGG's liquidators contended that the Intervening Party, in his founding affidavit, merely paid lip service to the provisions of Rule 42 (1) of the Uniform Rules of Court (Rule 42 (1)) and did not provide any factual foundation for the legal conclusion that he has a direct and material interest in these proceedings. For a party to have *locus standi*, he must establish legal, as opposed to financial interest. In *De Villiers v GJN Trust and Others*<sup>5</sup>, the SCA held:

'[22] In *United Watch and Diamond Co (Pty) Ltd and Others v Disa Hotels Ltd and Another* 1972 (4) SA 409 (C) Corbet, J held that, in order to establish locus standi under rule 42 (1) (a), an applicant must show a direct and substantial interest in the judgment order that the applicant wishes to have varied or rescinded. This means a legal interest in the subject matter of the action or application which could be prejudicially affected by the order in that action or application. This judgment has been cited with approval on numerous occasions including by this court in, *inter alia*, *Aquatour (Pty) Ltd v Sacks and Others* 1989 (1) SA 56 (A) at 62.'

...

---

<sup>5</sup> 2019 (1) SA 120 SCA at paras 220 and 25

[25] In the rescission application the appellants averred that the s420 order adversely affected their interests in that they were not afforded the opportunity to respond to the serious allegations of impropriety that had been in the s420 application. This misses the point. Although the purpose of the s420 application was to enable the liquidators to claim from the appellants, the subject matter of that application was the restoration of the dissolved company to a company in liquidation and not the enforceability of the alleged claims against the appellants. The prosecution of these claims will no doubt take place by due process, during which the applicants will be afforded the full opportunity to protect their rights.'

[31] It was therefore argued that the merits of the section 29 application are irrelevant. For instance, the affidavit filed by Mr. Robert Jan Van Galen (Mr. Van Galen) informing this Court about the consequences which the order granted by Nuku, J on 23 October 2024 might have in the Dutch proceedings are equally irrelevant. Further, Mr. Van Galen's opinion on the *Gazprombank Open Joint Stock Company v Bensadon (Gazprombank)*<sup>6</sup> concerning the recognition of a foreign judgment in the Dutch proceedings between the same parties that conducted the foreign proceedings was said to be irrelevant. There is no foreign judgment which involves Mr. Mercej and he was not cited as a party in any of the South African proceedings. In fact, it was said that Mr. Mercej has not proffered any reason why the merits in the main application (section 29 proceedings) are relevant to his application for intervention as he clearly had no *locus standi*.

---

<sup>6</sup> ECLI:NL:HR: 2014:2838 (Supreme Court of the Netherlands)

[32] The Intervening Party asserted that it ought to be admitted in these proceedings as the section 29 order is now being used or was intended to be used as a springboard by HGG's liquidators to recover personally from Mr. Mercej in the Netherlands. It needs not prove any *locus standi* other than that. To expand further on this argument, the following was stated; *first*, the HGG liquidators brought this application in secret and as a matter of urgency. The Intervening Party contended that there was no warrant for the bringing of the section 29 application in this manner as there was non – compliance with section 32 of the Superior Courts Act 10 of 2013 which requires proceedings to be carried on in an open court, unless it is a special case. No special case was alleged in these proceedings. The manner in which these proceedings was brought was utterly flawed.

*Second*, Mr. Mercej opposed the separation of issues on the basis that it would not be convenient to have the question of legal standing determined separately as the issues are inextricably linked. In any event, the Rule 33 (4) notice that was delivered by HGG's liquidators is misconceived and fatally defective. Rule 33 (4) applies only to actions, and its invocation is irregular in respect of motion proceedings. This is manifest from the introductory phrase to Rule 33 (4) which states that '*if*, in any pending action...'<sup>7</sup>. In light of this peremptory language, it is not surprising that the Supreme Court of Appeal has determined that the sub – rule does not apply to applications – See *Louis Pasteur Holdings (Pty) Ltd v Absa Bank Ltd and Others*<sup>8</sup> where it was held:

'A further issue that requires comment is that the separation question was sought and granted in terms of rule 33 (4) of the Uniform Rules of Court. Commenting upon this rule,

---

<sup>7</sup> Rule 33 (4) of the Uniform Rules of Court

<sup>8</sup> 2019 (3) SA 97 (SCA) para 32

*D Harms Civil Procedure in the Superior Courts Part B High Court at B33.9*, states the following:

'The provision does not apply to applications, but a court may deal with separate issues in applications *in limine* and in its inherent power apply a similar procedure to them.'

In *Theron and Another NNO v Loubser NO and Others* [2013] ZASCA 195;[2014] 1 All SA 460;2014 (3) SA 323 (SCA) paras 10 – 16, Ponnar JA, after an extensive review of the relevant authorities concluded that there was a body of authority, the correctness of which he left open, as to the circumstances in which a High Court may in the exercise of its inherent jurisdiction, separate issues in application proceedings. Wallis, JA writing for the majority in para 23, expressed the view that it was undesirable to examine those cases in the High Court, where this procedure had been followed, as to do so may be taken as implying an endorsement of some, or all of these cases. Wallis, JA added the following in para 26:

'In general, however, the desirable course to be followed in application proceedings, where the affidavits are both the evidence and the pleadings, is for all the affidavits to be delivered and the entire application to be disposed of in a single hearing.' [Emphasis Added]

[33] Mr Mercej submitted that the question of *locus standi*, is not simply a legal one and must be determined in the light of all the relevant facts. For instance, in *Firm – O –*

*Seal CC v Wynand Prinsloo and Van Eeden Inc and Another*.<sup>9</sup>, it was held that the Court should restrain itself from ordering an issue to be tried separately, as the court *a quo* did where it has the result of opening the door to a fractional disposal of proceedings and the piecemeal hearings, including of appeals on each part to be so disposed of, thereby causing an unnecessary waste of time and costs. Although these were action proceedings, the *Court a quo* determined the question of *locus standi* separately and the SCA stated as follows:

‘...In confining itself to the single issue [the question of locus standi], as it did, the approach of the High Court opened the door to a fractional disposal of proceedings and the piecemeal hearings of appeals on each part so disposed of.’

[34] Mr. Mercej submitted that he is directly affected by the order in the main application and therefore has legal standing to intervene in these proceedings. It may not be that the question of *locus standi* is only a legal one, but rather both a procedural and substantive issue. There are no fixed rules as to the standing of a litigant. The test is the sufficiency and directness of the litigant’s interest in the proceedings which must perforce be determined with reference to all the relevant facts in the matter<sup>10</sup>. In *Jacobs*<sup>11</sup>, the SCA clarified that a litigant does not need a strict financial and proprietary right to challenge a local government ordinance and its conduct, and rather a direct interest in the matter is sufficient. This, therefore, means that a straight-jacket approach

---

<sup>9</sup> 2024 (6) SA 52 (SCA) at paras [2] and [10]

<sup>10</sup> Sandton Civil Precinct (Pty) Ltd v City of Johannesburg and Another 2009 (1) SA 317 (SCA) at para [19]

<sup>11</sup> Jacobs en ‘n Ander v Waks en Andere 1992 (1) SA 521 (A) at 534 D

is not an appropriate manner to deal with a question of *locus standi*. This issue has to be determined on a case by case basis.

[35] The authorities recently handed down by the superior courts clearly demonstrate that courts are astute in identifying the material issues involving *locus standi*. Obviously, the sufficiency of the interest depends on the facts of a particular case. Be that as it may, for the Courts not to stray, it goes without saying that they still have to adhere to the basic requirements of the access mechanism that is controlled by the court itself. The SCA in *Rattan*<sup>12</sup> stated that the adequacy of interest involves the following: (i) sufficient interest in the subject matter of litigation; (ii) the interest must not be too remote; (iii) the interest must be actual, not abstract or academic; (iv) the interest must be current and not a hypothetical one. In these circumstances, the section 29 order was granted in Mr. Mercejij's absence. Its purpose was to be used as a launch pad by the liquidators to mount legal proceedings against him personally in the Netherlands. As a result of the section 29 order, the liquidators obtained a pre – judgment attachment order in the Netherlands against Mr. Mercejij's immovable properties on 7 November 2024. In the Netherlands, on 5 December 2024 summons were issued against Mr. Mercejij personally for the recovery of €4 739 968, 22. That is the same amount that was said to be voidable preferences within the meaning of section 29 that was paid to SR.

[36] If such facts are taken into consideration, Mr. Mercejij submitted that the judgment or order granted in section 29 proceedings should be rescinded as he is not

---

<sup>12</sup> Four Wheel Drive Distributors CC v Leshni Rattan NO 2018 JDR 2203 (SCA) at para [7]; DE Van Loggerenberg and E Bertelsmann Erasmus: Superior Court Practice 2 ed Vol 1 at D1 -186

merely an interested party in these proceedings, but clearly an affected party. In doing so, reference was made to *Stander and Another v Absa Bank*,<sup>13</sup> where it was stated:

'It seems to me that the very reference to 'the absence of any party affected' is an indication that what was intended was that such party, who was not present when the order or judgment was granted, and who was therefore not in a position to place facts before the Court which would or could have persuaded it not to grant such an order or judgment, is afforded the opportunity to approach the Court in order to have such order or judgment rescinded or varied on the basis of facts, of which the Court would initially have been unaware, which would justify this being done.'

[37] It was always the Intervening Party's stance that not all the facts were put before the Court when the order was obtained. In fact, some of the facts were misrepresented. If that is indeed the case, then the section 29 order, it was said, was erroneously granted in that there existed, at the time the order was granted, facts of which the Court was unaware and which could have induced it not to grant the order.<sup>14</sup> For instance, it was stated that the liquidators knew that SR's business had been conducted solely by Mr. Mercejij prior to its winding up. All the relevant facts regarding its business were within his exclusive knowledge as a sole director and shareholder. At all times during these investigations on HGG's affairs, the liquidators had been in contact with Vistra in Mauritius regarding the affairs of SR. The liquidators' attorneys were advised that Mr. Dabee had been discharged from his duties as a liquidator and that Mr. Mercejij was

---

<sup>13</sup> 1997 (4) SA 873 (E) at 822 E-G; See also *Absa Bank v Prinsloo Familie Trust and Others* 2024 (3) SA 80 (GJ) at paras [67] and [68]

<sup>14</sup> *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 and Others (Council for the Advancement of the South African Constitution and Another as Amici Curiae* 2021 (11) BCLR 1263 (CC) at para 62

agreeable to providing the necessary documentation and information. That indeed makes sense as this was a voluntary winding up.

[38] Notwithstanding that Mr. Mercej tendered his full co – operation to the liquidators, this invitation for whatever reason was not taken up by them. The liquidators were therefore under a duty to make full and proper disclosure to the Court as in the case of any other *ex parte* application. Where an order is sought *ex parte* it is well established that the utmost good faith must be observed. All material facts which might influence a court in coming to its decision must be disclosed, and the withholding or suppression of material facts, by itself, entitles the court to set aside an order. This is so, even if the non – disclosure or suppression was not wilful or *mala fide*. In arguing this point, the Intervening Party relied to the principles that were enumerated by the SCA in *Redisa*<sup>15</sup> as follows:

- 38.1 The law sometimes allows parties to depart from a fundamental principle of the administration of justice, namely, *audi alteram partem*. But in those exceptional circumstances, the *ex parte* applicant assumes a heavy responsibility to neutralise the prejudice that the affected party suffers by his or her absence.
- 38.2 The applicant must thus be scrupulously fair in presenting their own case. They must speak for the party by disclosing all relevant facts they know or reasonably expect the absent party would want to place before the Court. The applicant must disclose and deal fairly with any defences of which they are aware or which they may reasonably

---

<sup>15</sup> Recycling and Economic Development Initiative of South Africa v Minister of Environmental Affairs of a related matter [2019] 2 All SA 1 (SCA)

anticipate. They must disclose all relevant adverse material that the absent respondent might have put up in opposition to the other.<sup>16</sup>

38.3 The applicant must exercise due care and make such inquiries and conduct such investigations as are reasonable in the circumstances before seeking *ex parte* relief. They may not refrain from disclosing matter asserted by the absent party because they believe it to be untrue.

38.4 Even where the *ex parte* applicant has endeavoured in good faith to discharge their duty,

they will be held to have fallen short if the Court finds that the matter which was disregarded was sufficiently material to require disclosure. The test is objective<sup>17</sup> and *ex parte* litigant should not be guided by any notion of doing the bare minimum. The judge who hears an *ex parte* application, particularly if urgent and voluminous, is rarely able to study the papers at length and cannot be expected to trawl through annexures in order to find material favouring the absent party.<sup>18</sup>

38.5 Unless there are very cogent practical reasons why an order should not be rescinded, the

Court will always frown upon an order obtained *ex parte* on incomplete information and will set it aside even if relief could be obtained on a subsequent application by the same applicant<sup>19</sup>.

38.6 Regard must be had to the extent of the non – disclosure, the question being whether the

Judge hearing the *ex parte* application might have been influenced by a proper disclosure, the reason for the non – disclosure and the consequences of setting aside the provisional order<sup>20</sup>.

---

<sup>16</sup> Ibid para [47]

<sup>17</sup> Ibid at para [47]

<sup>18</sup> Ibid at para [49]

<sup>19</sup> Ibid at para [40]; *Schlesinger v Schlesinger* 1979 (4) SA 342 (W) at 350 B

## *Discussion and Analysis*

[39] The HGG's liquidators made an application in terms of Rule 33 (4). At the hearing of the matter the issue of *locus standi* and separation of issues were somehow intertwined. However, I will first deal with the Rule 33(4) application. It is indeed correct that Rule 33(4), does not apply in motion proceedings. As indicated in *Louis Pasteur*<sup>21</sup> - since this procedure is not catered for in the application proceedings the Court may separate issues in applications *in limine* in exercising its inherent powers.

[40] The HGG's liquidators have not argued that this Court should invoke section 173 of the Constitution and thus exercise its inherent powers in determining this point *in limine*. It appeared as if they are entitled in terms of Rule 33 (4) to be granted a separation. In my view, separation of issues is not for the taking. In any event, this is not a matter where separation is warranted, even if this Court would exercise its inherent power. As the Intervening Party correctly stated, the Court has all the papers in front of it, meaning it has considered all the issues that were put before it holistically. The entire application in this regard is capable of being disposed of in one hearing without a waste of the Court's time and valuable resources which are currently significantly sparse.

---

<sup>20</sup> Ibid at para [52]

<sup>21</sup> Supra fn 9 at para 33

[41] As was pointed out earlier, where pleadings and affidavits are before court it is desirable that the entire application be disposed of in a single hearing<sup>22</sup>. A fractional disposal of proceedings and the piecemeal hearings is not warranted.

[42] In addition in *Molotlegi v Mokalse*<sup>23</sup>, the SCA held:

‘A court hearing an application for a separation of issues in terms of rule 33(4) has a duty to satisfy itself that the issues to be tried are clearly circumscribed to avoid any confusion. It follows that a court seized with such an application has a duty to carefully consider the application to determine whether it will facilitate the proper, convenient and expeditious disposal of litigation. The notion of convenience is much broader than mere facility or ease or expedience. Such a court should also take due cognisance of whether separation is appropriate and fair to all the parties. In addition, the court considering an application for separation is obliged, in the interests of fairness, to consider the advantages and disadvantages which might flow from such separation. Where there is a likelihood that such separation might cause the other party some prejudice, the court may, in the exercise of its discretion, refuse to order separation.’

[43] The HGG’s liquidators have referred to a number of judgments in disputing Mr. Merceij’s locus *standi*, including *De Villiers*<sup>24</sup> which does not assist HGG’s liquidators in that as the Intervening Party aptly pointed out that it dealt with a different factual matrix, with the Court in that decision considered an application for the avoidance of the

---

<sup>22</sup> Theron and Another NNO v Loubser NO and Others 2014 (3) SA 323 (SCA) para 10-16; Tau v Mashaba and Others 2020 (5) SA 135 (SCA) at para [15] and Firm – O – Seal supra fn 10 para 10

<sup>23</sup> 2010 JDR 0360 (SCA) para [20]

<sup>24</sup> Supra fn 6

dissolution of a company. So, it is for this reason that each case must be decided on its own facts.

[44] Notwithstanding, it is trite that separation based on *locus standi* is not a distinct separation issue on the pleaded case. For the reasons stated above, the application for separation therefore fails.

[45] The Court has a discretion to grant or deny the intervention of a party based on whether the interest is genuine, direct and/or legally recognizable. This therefore means that it is not a clear-cut exercise. The Court must determine the matter based on the available facts and law applicable thereto. The Constitutional Court in *SA Riding for the Disabled Association v Regional Land Claims Commissioner and Others*<sup>25</sup> held as follows:

[9] It is now settled that an applicant for intervention must meet the direct and substantial interest test in order to succeed. What constitute a direct and substantial interest is the legal interest in the subject-matter of the case which could be prejudicially affected by the order of the court. This means that the applicant must show that it has a right adversely affected or likely to be affected by the order sought.'

[46] In *Peermont Global (KZN)(Pty) Ltd v Afrisun (KZN) (Pty) Ltd t/a Sibaya Casino and Entertainment Kingdom and Others and a related matter*,<sup>26</sup> the court recognized the principle that a party is entitled to intervene as a party to the proceedings where:

---

<sup>25</sup> 2017 (5) SA 1 (CC) at para [9]

<sup>26</sup> [2020] 4 ALL SA 226 (KZP) at para [18]. [Footnotes omitted]

'18.1 it has a direct and substantial interest in the right that is the subject matter of the application, which could be prejudiced by the judgment of the court. The interest must be such that the intervenor's joinder is either necessary or convenient. But the possibility that a legal interest exists is sufficient, and it is not necessary for the court positively to determine that it exists.

18.2 the allegations made by the intervening applicant constitute *a prima facie* case or defence. It is, however, not necessary for the intervenor to satisfy the court that it will succeed in its case or defence. It is sufficient for the party seeking to intervene to rely on allegations which if they can be proved in the main application would entitle it to succeed. In assessing the intervenor's standing then, the court must assume that the allegations it advances are true and correct; and

18.3 the application is made seriously and is not frivolous.' [Emphasis added]

[47] In effect, this principle was endorsed in *Minister of Finance v Afribusines NPC*<sup>27</sup> where it was asserted that:

'A party is entitled to join and intervene in proceedings where they have a direct and substantial interest in the matter. A person is regarded as having a direct and substantial interest in an order if that order would directly affect that person's rights or interests.'

[48] Without a doubt, the section 29 order directly affected Mr Mercej's rights and interests as it resulted in the pre-judgment attachment of his properties in the Netherlands and a subsequent claim of € 4 739 968.22. A party can only be said to

---

<sup>27</sup> 2022 (4) SA 362 (CC) at para [23]

have direct and substantial interest in the matter if the relief sought cannot be sustained and carried into effect without prejudicing their interest<sup>28</sup>. The argument that Mr Mercej was no longer a director and/or shareholder of SR as the company was wound up and in the hands of a liquidator rings hollow. If he was not a person of interest, it follows that HGG's liquidators could not have proceeded against him personally in the Netherlands. The fact that he had a direct and substantial interest in the section 29 order, is borne out by the HGG's liquidators assertions at paragraph 47 of the section 29 application when the following was stated:

'47. Since we sought to pursue a claim in terms of sections 29 of the Insolvency Act against Square Rock, coupled with relief against Mercej in his capacity as director and shareholder of Square Rock, we were compelled to bring the following related and consecutive applications in the Supreme Court of Mauritius: (i) firstly, an application for our recognition as HGG Inc.'s liquidators in Mauritius, which application was successful, (ii) thereafter, we had to apply for leave to bring an application for Square Rock's restoration to the Mauritian Register, which was also successful and (iii) only thereafter could (and did) we apply for Square Rock's reinstatement. The application was also successful and, eventually on 20 November 2023, Square Rock was ordered to be reinstated and restored to the Mauritian Register whereafter Square Rock was formerly reinstated on the Mauritian Register as a company in liquidation on 13 December 2023 (effective from 7 December 2023).

...

---

<sup>28</sup>Amalgamated Engineering Union v Minister of Labour 1949 (3) SA 637 (A) 653; Gordon v Department of Health, KwaZulu – Natal 2008 (6) SA 522 (SCA) at para 9; ABSA Bank Ltd v Naude NO 2016 (6) SA 540 (SCA) at para [10]

49. Pending the restoration of Square Rock, we sought and obtained legal advice in regard to the potential recovery of money from Mercej. Reliant on the advice, we were unable to proceed with recovery steps against Mercej without having first achieved the restoration of Square Rock and the appointment of a liquidator for Square Rock to resume such office.

...

52. In the circumstances, it is imperative that we apply for the relief set out herein as a matter of extreme urgency to enable us to proceed with legal proceedings in the Netherlands against Mercej immediately after HGG has been admitted by Dabee as creditor of Square Rock (premised on, amongst others, HGG's claim in terms of section 29 of the Insolvency Act.

53. I pause to mention that we have to date already been authorised by this Honourable Court to apply for our recognition and to institute proceedings for the recovery of dispositions in the Netherlands.

54. Arrangements have been made with attorneys in Amsterdam in the Netherlands to have consultation and meetings in Amsterdam during the first week 2024. The attorneys have been advising us since 2022 in regard to HGG's claims. These consultations and meetings have been scheduled to enable the HGG liquidators to promptly commence with proceedings in the Netherlands to recover the above dispositions, should this Honourable Court be inclined to make such an order, from Mercej as the ultimate beneficiary of this disposition.'

[49] Clearly, the proceedings in Mauritius and Section 29 order paved the way for the recovery against Mr Mercej personally. Quite concerningly, Mr. Mercej who was said to be the ultimate beneficiary of these voidable dispositions, was not notified about these proceedings, let alone being cited in them. This is the individual who allegedly owed €4 739 968, 22 worth of the HGG's liquidators' funds after Mr. Dabee had finalised the liquidation of SR. Mr Mercej from the onset of the liquidators investigations tendered his full co – operation as SR sole shareholder and director who initiated the voluntary liquidation. In fact, according to Mr Merciej, he proceeded with the winding up of SR in order to regularise the status of SR and comply with the amended Mauritian company legislation. Most importantly, had that been placed before Court and other relevant information, it might have persuaded the Court in not granting the Section 29 order. Since Mr. Dabee was not in possession of the books and accounts of SR, it then followed that Mr. Mercej was the individual possessed with this information. Pointedly, the Court in the main application could not verify these alleged voidable dispositions from SR's records.

[50] In my view, Mr. Mercej did not only have direct, substantial, but also financial interest in the section 29 order. Evidently, the HGG's liquidators utilized the section 29 order as the lynchpin in securing the liquidators claim by obtaining a pre-judgment attachment order in the Netherlands against Mercej. The fact that Mr. Mercej would be endowed with any such protection, is because the common law has long recognised that there is no fixed rule that determines whether a party has standing to bring litigation, and the Courts have always adopted a flexible and practical approach in these

instances. The right to bring litigation before the courts is restricted for various reasons. The courts are not there to pronounce upon academic issues; they are not there to pronounce upon matters that have no significant consequences for the initiating party; they are not there for the benefit of busybodies who wish to harass others; and so on<sup>29</sup>. In *Peermont Global* it was held that the legal interest is not necessary for the court positively to determine that it exist. For these reasons, Mr Mercej has demonstrated that he has the requisite legal standing and therefore leave to intervene is granted.

[51] In *HR Computek (Pty) Ltd v Dr WAA Gouws*<sup>30</sup>, Coppin, J recognised that a former director of a company has legal standing to rescind the final order of liquidation in line with the principle that a company's directors have 'residual powers' to act on the company's behalf in opposing a winding – up order<sup>31</sup>.

[52] Despite the direct and substantial interest that the directors must demonstrate, it appears that the Courts have now moved towards recognising that a director has residual powers to bring rescission applications against a liquidated company. Binns – Ward, J in *Gary Lawrance Praetor and Geothermal Energy Systems (Pty) Ltd v Aqua Earth Consulting CC*<sup>32</sup>, in its re- instatement of what was said in *Storti* above, recognised that it appears to be generally accepted that a company's directors have what have been described as 'residual powers' to act on the company's behalf causing it to oppose the confirmation of the rule in a provisional winding up, or to appeal against

---

<sup>29</sup> *Public Protector v Mail and Guardian Ltd and Others* 2011 (4) SA 420 (SCA) at para [29]; *Cabinet of the Transitional Government for the Territory of South West Africa v Eins* 1988 (3) SA 369 at 388 B – H.

<sup>30</sup> 2023 (6) SA 268 (GJ) para 12

<sup>31</sup> *Storti v Nugent and Others* 2001 (3) SA 783 (W) at 795G -796 C

<sup>32</sup> (162/2016) [2017] ZAWCHC 8 para 4; *HR Computek (Pty) Ltd v Dr WAA Gouws (Johannesburg) (Pty) Ltd & Others* [2023] ZAGPJHC 844; 2023 (6) SA 268 (GJ) at para [17]

a winding – up order. In the recent SCA decision in *Dr WAA Gouws (Johannesburg) (Pty) Ltd v HR Computek Pty Ltd and Others*<sup>33</sup> it was recognised that the drafters of the 1973 Companies Act never envisioned the exclusion of the residual powers of the directors and company in the context of the common law. Section 354 (1) does not take away the inherent right acquired by a company in liquidation in terms of the common law for obvious reasons. The common law right provides a company with an opportunity to challenge its winding – up, where it should never have been placed in liquidation for a variety of reasons, including fraudulent conduct. The High Court correctly recognised that there are two distinct legal frameworks that govern the rescission application in this scenario. It therefore follows that Mr. Mercej as the former director of SR, is possessed with such residual powers to put facts into perspective and explain those payments before it can be concluded that they are voidable preferences.

[53] It might be that the position of Mr. Mercej is slightly more unique than those authorities pointed out above. However, since he is the only person who could have placed all the relevant and countervailing facts in the section 29 application, it then follows that the acquiring of the judgment in secrecy deprived him from putting that information before Court. The fact that the alleged voidable dispositions, are claimed directly from him, makes him “*any party affected*” and brings him within the confines of Rule 42 (1) (a).

[54] In conclusion, in granting the section 29 order, Nuku, J had a one-sided exposition of the facts. This was despite the fact that Mr. Mercej was present and made

---

<sup>33</sup> *Dr WAA Gouws (Johannesburg) (Pty) Ltd* [2025] ZASCA 103; 2025 (6) SA 89 SCA at para [13]-[14]

himself available for whatever information that was required from him. For instance, he would have denied that the payments that were made to SR are recoverable from him personally, and would have disavowed the fraudulent activities that were committed by HGG and that they were not associated to him. In *Redisa Cachalia*, JA warned about bringing an order in secrecy<sup>34</sup>. However, the HGG liquidators failed to disclose the full facts and pertinent information before Court, more especially the books and accounts of SR which were in possession of Mr. Mercej. Further, complaints were mounted on the fact that HGG's liquidators in the section 29 application made some misrepresentations. If indeed that was the case, such information would need to be corrected. For those reasons, the application for rescission of the Section 29 order granted by Nuku, J on 23 October 2024 succeeds.

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

55.1 The separation of issues in terms of Rule 33(4) fails.

55.2. The point in limine on *locus standi* raised by the HGG's liquidators fails.

56.3. The Intervening Party, Mr Adrianus Mercej is granted leave to intervene in the main proceedings (section 29 application)

55.4. The judgment and order granted by Nuku, J on 23 October 2024 is rescinded.

55.5 The respondents are ordered to pay the costs including the costs of two Counsel where so employed on Scale C.

---

<sup>34</sup> *Redisa supra* fn 16

---

**B P MANTAME**  
**JUDGE OF THE HIGH COURT**

**Counsel for the Applicants:** Adv Roelof Van Riet SC

Adv. Louis Olivier SC

**Instructed by:** Boshoff Bronn Smit Attorneys

**Counsel for the Intervening Party:** Adv Gavin Woodland SC

**Instructed by:** ENS CAPE TOWN