



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

Reportable

CASE NO:20382/2023

In the matter between:

**SOUTH AFRICAN ALPHA SCP
ON BEHALF OF CHALLENGER**

Applicant

and

**ALWYN UYS
SIVULATHMEE MOODLIAR N.O.
CORNELIA MARIA CLOETE N.O.
BONEX INTERNATIONAL (PTY) LTD**

**First Respondent
Second Respondent
Third Respondent
Fourth Respondent**

CORAM; NDITA, J

Heard: 21 May 2025

Delivered:31 August 2026

SUMMARY: Company - Directors and officers, liability for debts of a company, reckless trading in contravention of section 424 of the Companies Act 61 of 1973. Facts establishing reckless trading. Evidence- Interlocutory application for evidence presented at an enquiry in terms of section 417 of the 1973 Companies Act, admissible in terms of section 3 of the Law of Evidence Amendment Act.45 of 1988.

Company-section 20(9) of the Companies Act 2008, piercing the corporate veil-
approach of the court. Procedure – application to strike out.

ORDER

1. The evidence presented at the Enquiry held in terms of section 417 of the 1973 Companies Act is hereby admitted in these proceedings and shall form part of the record herein.
 2. Paragraphs 51.5.2; 52 to 59; 63.3.2 to 63.3.4; 63.4; 63.5.1 to 63.5.2 and the last sentence of paragraph 63.6; and paragraphs 63.9.3, 63.10 and the last sentence of 63.5 as well as paragraphs: 70.3 and 96.1 are hereby struck out of the Applicant's founding affidavit. The Applicant is entitled to 80% of its costs.
 3. **CLAIM A** succeeds. It is hereby declared that the First Respondent, Mr Alwyn Uys is hereby declared to be liable for the debts of Bonfrut (Pty) Ltd (in Liquidation).
 4. The application to strike out the Applicant's replying affidavit is dismissed with costs.
 5. **CLAIM B** is dismissed with costs
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JUDGMENT

Introduction

[1] In this application, the Applicant in Claim A seeks relief in terms of section 424 of the Companies Act 61 of 1973 (“the 1973 Companies Act”) that the First Respondent be declared liable for the debts of Bonfrut (Pty) Ltd (in Liquidation) of which he was appointed as a director. In Claim B, the Applicant seeks the following declaratory orders in terms of section 20(9) of the Companies Act 71 2008 (“the 2008 Act”), against the Fourth Respondent:

1.1 that the Fourth Respondent be deemed not to be a juristic person separate from Bonfrut;

1.2 that pursuant to the declaration in paragraph 1.1 above, Bonfrut and the First Respondent shall be regarded as a single entity by ignoring their separate legal existence and treating Bonfrut as it were the only company; and

1.3 the Fourth Respondent is liable to the Applicant in the amount owed by Bonfrut to the Applicant, by virtue of section 20(9) of the Companies Act, of 2008.

1.4 The First and Fourth Respondents be ordered to pay the

costs of this application, jointly and severally. The one paying, the other to be absolved, together with any other respondent who opposes, including the costs of Senior counsel.

[2] This application is opposed by the First and Fourth Respondents.

[3] In addition to the main application, the Applicant brought an interlocutory application seeking that the court allow into evidence transcripts of testimony given at the liquidation enquiry in terms of section 417 of the 1973 Act and section 3 of the Law of Evidence Amendment Act 45 of 1988 regulating the admission of hearsay evidence.

[4] The First and Fourth Respondents have also brought an interlocutory application seeking to strike out substantial parts of the founding and replying affidavits on the basis that they comprise, variously, hearsay, unsubstantiated argument and/or new matter in reply.

The Parties

[5] The Applicant, South Africa Alpha SPC (On behalf of Challenger Trade Segregated Portfolio ("Challenger")), is a foreign company in the Cayman Islands, within the jurisdiction of the Cayman Islands Monetary Authority, with its principal business at c/o Harney Services (Cayman)

Limited, [...] Floor H[...] Place, 1[...] S[...] C[...] Street, George Town, Grand Cayman, KYQ-1002, Cayman Islands.

[6] The First Respondent is Alwyn Uys (“Mr Uys Junior”) an adult male businessman who is an erstwhile director of Bonfrut (PTY) LTD (in liquidation) (“Bonfrut”) and a director of the Fourth Respondent, Bonex International (PTY) Ltd.

[7] The Second Respondent is Sivulatchwee Moodliar N.O., a major female insolvency practitioner and director of Sanek Trust Recovery Services (Pty) Ltd of [...] Floor, [...] S[...] G[...] M[...], Cape Town. She is cited in these proceedings in her representative capacity as duly appointed joint liquidator of Bonfrut.

[8] The Third Respondent is Cornelia Maria Cloete N.O., a major female insolvency practitioner of Xirimele Trustees of 4[...] E[...] B[...] Street, Garsfontein, Pretoria. She is cited in these proceedings in her representative capacity as duly appointed joint liquidator of Bonfrut.

[9] The Second and Third Respondents are collectively referred to as the liquidators. Both were appointed on 14 December 2020. No relief is sought against the liquidators, save in the event of opposition, the Applicant seeks costs against them jointly and severally with all the Respondents who oppose this application.

[10] The Fourth Respondent, Bonex International, (PTY) LTD, is a private company duly registered in accordance with the laws of the Republic of South Africa with its registered address at [...] S[...] Avenue, St Francis Bay Eastern Cape Province.

[11] To align this judgment with the papers, the First Respondent is referred to as Mr Uys Junior and his father as Mr Uys Senior. The First and Fourth Respondents are intermittently referred to as the Respondents.

Factual Background

[12] In the founding affidavit deposed to by Mr Gary Isbister, the Applicant's asset manager, it is averred that the relief sought is sought on notice of motion because the facts giving rise thereto are common cause, based on admissions made by the First Respondent and other relevant witnesses during an enquiry convened in terms of sections 417 and 418 of the 1973 Companies Act.

[13] It is common cause that Bonfrut operated a fruit exportation business in South Africa, Europe and America. It secures fruit from farmers ("Suppliers") prior to their harvest, which it then on-sells to its international customers ("Offtakers"). Bonfrut advanced funds to the Suppliers to secure their fruits prior to harvesting, with the result that the

capital outlay was required some time prior to the recovery of this expense from the purchase price paid by the relevant Offtaker. Since Bonfrut did not have the capital to fund such advances itself, funding was sought from Challenger.

[14] On 23 January 2018, the Applicant and Bonfrut entered into two agreements, namely, a Full Invoice Discounting Agreement (“Discounting Agreement”) and a Cession in Security Agreement (“the Cession Agreement”). In terms of the cession agreement, Bonfrut ceded and assigned all ceded rights in favour of Challenger as security for Bonfrut’s obligations in accordance with the terms of the Discounting Agreement. These are collectively referred to as the Challenger Agreements. In respect of both agreements, Mr Gerhard Uys (“Mr Uys Senior”) represented Bonfrut. Pursuant to the agreements, Bonfrut became indebted to the Applicant in a sum of USD 687 949, 40. Bonfrut was placed in liquidation, and Challenger lodged a claim in Bonfrut’s insolvent estate. To this end, the liquidation and distribution account in respect of Bonfrut reflects that the latter remains indebted to Challenger in the amount of R9 583 692.00

[15] On 21 September 2020, the Liquidators launched an ex parte application for the convening of a Commission of Enquiry into Bonfrut’s business, dealings and affairs in terms of section 417 and 418 of the

1973 Companies Act. Several witnesses gave evidence during the hearing. The Applicant has attached to the record a copy of the certified transcript of the proceedings. According to the Applicant, the evidence obtained at the Enquiry establishes that:

15.1 Mr Uys Junior, being an erstwhile director and prescribed officer of Bonfrut, knowingly carried on its business recklessly, with gross negligence and/or with an intention to defraud its creditors, most notably, Challenger;

15.2 the incorporation and use of Bonex constituted an unconscionable abuse of its separate juristic personality, in that the business of Bonfrut was unlawfully hijacked and transplanted into Bonex in an attempt to avoid payment to Bonfrut's creditors, with the result that Bonex should be deemed not to be a juristic person.

[16] I have already indicated that the order sought against Mr Uys Junior and Bonex is based on the evidence from the Enquiry. According to the Applicant, the evidence establishes the following:

16.1 That Mr Uys Junior and Bonex knowingly conducted the business of Bonfrut whilst it was trading in insolvent circumstances and with the intention to defraud the creditors of Bonfrut. Additionally, Mr Uys Junior incurred Bonfrut's liability to Challenger and then used these funds to pay other creditors of Bonfrut,

knowing full well that the result would be that Bonfrut would not be able to satisfy the liability owed to Challenger.

16.2 Mr Uys Junior showed no regard for the separate legal entities of Bonfrut and Bonex as he transferred the business previously operated by Bonfrut and corporate opportunities of Bonfrut to Bonex. He also redirected funds owing to Bonfrut to Bonex, who trades with the same customers Bonfrut traded with.

16.3 Mr Uys Junior used the proceeds from purchased invoices which were ceded to Challenger in terms of the Agreements to pay company expenses and other creditors instead of paying Challenger, in breach of the Challenger Agreements. Furthermore, he also intentionally shifted Bonfrut's business to Bonex, to avoid Bonfrut's liability to Challenger and other creditors.

16.4 Payments due to Bonfrut were intentionally redirected to growers /farmers to defraud Challenger and other creditors of Bonfrut. Thus, Bonex was incorporated and used in a manner such that there was no distinguishable corporate identity between Bonex and Bonfrut s liability to Challenger.

[17] With regard to the Applicant's claim B in terms of section 20(9) of the 2008 Act, the Applicant alleges that the transcript of the proceedings

unequivocally established that Bonex was used by Mr Uys Junior and Mr Uys Senior:

17.1 such that there was no distinguishable corporate identity between Bonex and Bonfrut;

17.2 for a dishonest and improper purpose;

17.3 as a device or façade to conceal wrongdoing'

17.4 in a manner that affects a third party in a way that reasonably should not be countenanced.

[18] I first deal with the interlocutory application for the acceptance into the record of the alleged hearsay evidence tendered at the Enquiry in terms of section 417 of the 1973 Companies Act.

The application in terms of section 3 of the Law of Evidence Amendment Act

[19] The Applicant brought an interlocutory application in terms of section 3(1) of the Law of Evidence Amendment Act 45 of 1988 for an order in the following terms:

"1. Declaring, to the extent necessary, that the transcripts relied upon by the applicant in the main application are admissible under section 3 of the Law of Evidence Amendment Act 45 of 1988".

[20] In seeking the relief against the Respondents in the main application, the Applicant relies heavily on the evidence tendered at the Enquiry held in terms of sections 417 and 418 of the 1973 Companies Act to draw inferences of impeachable conduct on the part of Mr Uys Junior and Bonex. It is common cause that the Enquiry was partially conducted in the Afrikaans language, however, the relevant portions have been translated to English by a sworn translator. The specific transcripts sought to be admitted include, but are not limited to:

20.1 The testimony of Mr Alwyn Uys (Mr Uys Junior), regarding his role in the management of Bonfrut, his knowledge of the company's insolvency, and his actions in relation to the misapplication of company funds.

20.2 The testimony of Ms Liesbet Ferreira (Ms Ferreira), a former employee of Bonfrut, provided key information regarding the improper diversion of funds for creditors, including Challenger.

20.3 The evidence of Mr Gerhard Uys (Mr Uys Senior), a former director of Bonfrut, regarding the fraudulent transfer of assets from Bonfrut to Bonex International. A company allegedly used to shield Bonfrut's assets from its creditors.

20.4 The testimony of Ms Alana Potgieter (Ms Potgieter), who provided evidence concerning her involvement in the financial

administration of Bonfrut and her role in facilitating transactions, including those with Challenger.

20.5 The evidence of Ms. Lizi van Niekerk, (Ms van Niekerk), a former procurement/sales employee at Bonfrut's financial operations. Her involvement in business transactions that are relevant to the case is important for the determination of the issues in this matter.

20.6 The evidence of Mr Charl Uys, brother of Mr Gerhard Uys (Mr Uys Senior) who also testified regarding his involvement in Bonfrut's financial dealings and the overall business management during the period of insolvency.

[21] It was submitted on behalf of the Applicant that the admission of the transcripts of evidence is essential to ensure that all relevant evidence is placed before court, more so that the evidence was obtained lawfully, with the Respondents having had an opportunity to testify, and the probative value of the evidence outweigh any potential prejudice to the Respondents.

[22] The Respondents resist the admission of the 417 Enquiry evidence on the basis that it cannot be used against a party as proof of facts dealt with in the transcript but may be used to cross-examine such person in respect of such facts dealt with in the Enquiry. According to

this contention, the exclusion of such evidence is not based on the fact that it constitutes hearsay as defined in section 3 of the Law of Amendment Act, but rather, on an independent common law rule due to the prejudicial effect of allowing such evidence in legal proceedings which may easily lead to an unfair hearing. In any event, so further contend the Respondents, the entirety of the Applicant's application is based on facts that do not fall within the personal knowledge of the deponent to the founding affidavit.

[23] Counsel for the Applicant pointed out, correctly, in my view, that it is established in our law that evidence procured at an enquiry is admissible against the party who gave evidence, contrary to the averments made by the First Respondent to the effect that:

“Even where a party gave evidence at such proceedings, transcripts thereof cannot be used against that party as proof of the facts dealt with in the transcripts but may only be used to cross-examine such person in respect of such facts or as proof of what he said in the proceedings.”

It is not questionable that the Enquiry proceedings relating to evidence given by the First Respondent are admissible against the First Respondent. Section 417 provides that:

“417 Summoning and examination of persons as to affairs of the company.-

(1) In any winding-up of a company unable to pay its debts, the Master of the Court may, at any time after a winding-up order has been made, summon before him or it any director or officer of the company or person known or suspected to have in his possession any property in the of the company or person known or suspected to have in his possession any property of the company believed to be indebted to the company, or any person whom the Master or the Court deems capable of giving information concerning thee trade, dealings, affairs, or property of the company.

(2) ...

(a) ...

(b) ...

(c) An incriminating answer or information directly obtained, or incriminating evidence directly derived from, an examination in terms of this section shall not be admissible as evidence in criminal proceedings in a court of law against the person concerned or the body corporate of which he or she was an officer, except in criminal proceedings where the person concerned is charged with tan offence relating to –

(i) the administering of an oath or the administering or making of an affirmation;

(ii) the giving of false evidence;

(iii) the making of a false statement;

(iv) a failure to answer lawful questions fully or satisfactorily.”

[24] Counsel for the Respondents submitted that the application for admission of such proceedings must be refused because (a) the provisions of section 3 of the Law of Evidence Amendment Act do not

apply to transcripts of section 417 proceedings and (b) the transcripts should in any event not be admitted even if section 3 applies. Furthermore, so continues the contention, Section 417 (c) circumscribes instances where the transcript of a section 417 enquiry may be admissible in criminal proceedings. Relying on *O'Shea NO v Van Zyl NO & Others* [2011] ZA (SCA) 156 at para [21] where the court explained that rationale for the rule against admissibility of transcripts of liquidation enquiries as being because *"To allow a liquidator to rely on such statements without calling the witness would be inimical to the law of evidence"*.

[25] In opposing the application, the Respondents emphasise that it is settled law that transcripts of proceedings are inadmissible in subsequent civil proceedings, save that the transcript of the evidence of an individual may be used only against the person who testified (but not against the a director of a company). Accordingly, so further contends the Respondents, all transcripts of the testimony given at the Enquiry are inadmissible against Bonex, and all transcripts, except for those of Mr Uys Junior, himself, are also inadmissible against Mr Uys Junior.

[26] In prayers 1 to 6 of the Respondent's application to strike out, the Respondents seek that the provisions of the transcript be struck out on the basis that Mr Gary Isbister, the deponent to Challenger's founding

papers has little or no personal knowledge of the internal operations of Bonfrut and is therefore in no position to give evidence as to whether (a) Bonfrut was carrying on business recklessly at any time, (b) Bonfrut was carrying on business with the intent to defraud its creditors or for a fraudulent purpose or (c) whether Mr Uys Junior was knowingly a party to any such conduct. Furthermore, Mr Isbister has no knowledge of whether conduct by Bonex amounts to unconscionable abuse of its juristic personality, the requirement for the relief it seeks in terms of section 20(9) of the 2008 Act.

[27] Counsel for Challenger contended that there is authority for the contention that transcript of liquidation proceedings may be admitted in terms of section 3(1) of the Law of Evidence amendment Act 45 of 1988. It is so that in *Engelbrecht NO and Others v Van Staden and Others* 2011 ZAWCHC 447 (6 December 2011) Rogers AJ, (as he then was) examined the admissibility of evidence elicited in a section 417 enquiry into subsequent civil proceedings and whether such evidence can be used against other respondents and expressed the following opinion:

“[18]...the Supreme Court of Appeal approved the statement of general principle laid down in *Gilbert Hamer* and applied it to the case where one of several trustees of a family trust testified at a s 417 enquiry..... In the O'Shea case there was no evidence that Mr O'Shea (a co-trustee) had testified as an authorised representative of the trust rather than in his personal

capacity. His evidence was thus held to be inadmissible to establish the liquidators' claim against the trust. ..

[20] *Gilbert Hamer* and *O'Shea* at least decided that evidence given in the circumstances dealt with in those matters and which would ordinarily be inadmissible hearsay when adduced against any person other than the witness himself is not rendered admissible by provisions such as s 65(5) of the Insolvency Act. What is less clear is whether they also decide that such statements may never be received into evidence against a third party, for example under the modern law regarding the admissibility of hearsay evidence as regulated by s 3 of the Law of Evidence Act 45 of 1988. The latter Act was not in force when *Gilbert Hamer* was decided. In *O'Shea* the possibility of receiving the evidence as hearsay in terms of Act 45 of 1988 appears not to have been raised. The references in *Gilbert Hamer* and *O'Shea* (and in the authorities reviewed therein) to privity of interest and the circumstances in which admissions made by an agent are admissible against his principal suggest that the conclusion that the evidence was inadmissible rested on the fact the evidence was hearsay, which in modern law is not an absolute bar to receiving the evidence. There is the further consideration that although s 65(5) of the Insolvency Act contains (as did s 155(2) of the 1926 Companies Act) an express provision regarding admissibility in later proceedings (including civil proceedings), the provisions of s 417 of the Companies Act 61 of 1973 (as they have read since their amendment in 2002) deal expressly only with later criminal proceedings. The admissibility or inadmissibility of such evidence in civil proceedings thus appears to rest on

general principles of the law of evidence rather than on the terms of the Companies Act.[emphasis added]

[21] I am thus inclined to think that a court may in appropriate cases permit a litigant to rely on evidence given by X at a s 417 enquiry for purposes of making out a case against Y provided this would be in the interests of justice, having regard to the requirements laid down in s 3 of Act 45 of 1988.”

[28] This approach was endorsed in *Van Zyl and Another NNO v Kaye NO and Another* 2014 (4) SA 452 (WCC) wherein Binns-Ward J, affirming Rogers AJ’s reasoning stated that:

“[41] Section 417(2) in its current form was enacted to address the issues of constitutional incompatibility inherent in the abrogation of the right against self-incrimination. I do not think that the subsection has any bearing on civil proceedings.

[42] It is plain that the provisions for secrecy in s 417(7), and the resultant limitation on the use of the evidence, are to promote the achievement of the objects of the enquiry proceedings, and not for any other policy purpose. Once that purpose has been served,the basis and the need for such secrecy fall away.

[43] I find nothing in the provisions, save as expressly provided in s 417(2), that militates in principle against the use of the evidence adduced at such enquiries in other proceedings to the extent that the ordinary rules of evidence would allow.

[44] the effect of allowing the use of the evidence at subsequent civil proceedings has thus far been that the evidence has been permitted to be

used only against the examinee as a party or a witness in such subsequent proceedings. I agree with the opinion expressed by Rogers AJ in *Engelbrecht*, that the exclusion of its wider use would appear to have been founded on the hearsay rule. For all these reasons I have concluded that the evidence adduced at the enquiry is amenable to being introduced in the current proceedings in terms of s 3(1) (c) of Act 45 of 1988, subject of course, to the requirements if that provision being satisfied.”

[29] The *obiter* remarks in *Engelbrecht*, subsequently endorsed in *Van Zyl, supra*, were affirmed and applied by Griesel J, in *Von Wielligh v Bester N.O. and Others v Merchant Commercial Finance and Others* Case number 16211/13 delivered on 18 February 2014, wherein reliance was placed on the evidence elicited in an enquiry, in order to prove impeachable transactions, but because there was no application in terms of section 3(1) the Law of Evidence Amendment Act, the learned judge held thus:

“[11] It was thus incumbent the applicant to seek admission of the hearsay evidence, not for the respondent to seek its exclusion. The applicant has not sought to make out a case or to lay a basis for the admission of the evidence on this basis, with the result that I am not persuaded that the evidence in question ought to be admitted in the interests of justice,”

[30] What emerges from the above review of cases relating to the admission of section 417 Enquiry proceedings is that where an application for the admission of such proceedings has been made in

terms of section 3 (1) of the Law of Evidence Act, a court may consider whether it is in the interest of justice to admit into the evidence the record of such Enquiry in subsequent proceedings. In my view, this position has now been firmly established in our law. In the matter at hand, as earlier alluded to, Challenger has filed an application for the enquiry proceedings in terms of section 417 to be admitted in terms of section 3 of the Law of Evidence Act. Thus, I turn to consider the assessment in terms of the Act.

[31] Section 3 of the Law of Evidence Amendment Act provides as follows:

“3 Hearsay evidence

(1) Subject to the provisions of any other law, hearsay evidence shall not be admitted as evidence at criminal or civil proceedings, unless-

(a) each party against whom the evidence is to be adduced agrees to the admission thereof as evidence at such proceedings;

(b) the person upon whose credibility the probative value of such evidence depends, himself testifies at such proceedings; or

(c) the court, having regard to-

(i) the nature of the proceedings;

(ii) the nature of the evidence;

(iii) the purpose for which the evidence is tendered;

(iv) the probative value of the evidence;

(v) the reason why the evidence is not given by the person upon whose credibility the probative value of such evidence depends;

(vi) any prejudice to a party which the admission of such evidence might entail; and

(vii) any other factor which should in the opinion of the court be taken into account,

is of the opinion that such evidence should be admitted in the interests of justice.

(2) The provisions of subsection (1) shall not render admissible any evidence which is inadmissible on any ground other than that such evidence is hearsay evidence.

(3) Hearsay evidence may be provisionally admitted in terms of subsection (1)

(b) if the court is informed that the person upon whose credibility the probative value of such evidence depends, will himself testify in such proceedings: Provided that if such person does not later testify in such proceedings, the hearsay evidence shall be left out of account unless the hearsay evidence is admitted in terms of paragraph (a) of subsection (1) or is admitted by the court in terms of paragraph (c) of that subsection.

(4) For the purposes of this section-

“Hearsay evidence” means evidence, whether oral or in writing, the probative value of which depends upon the credibility of any person other than the person giving such evidence;

“party” means the accused or party against whom hearsay evidence is to be adduced, including the prosecution.”

[32] The underlying principle in section 3(1) (c) is that hearsay evidence is not admissible in both civil and criminal proceedings, however, the test whether such evidence should be admitted in any proceedings is a determination of whether it is in the interests of justice to do so. I now turn to consider whether in *casu*, it is in the interest of justice to admit the record of from section 417 Enquiry. In so doing, I must consider the various factors listed in the provision that must be taken into account when conducting this kind of assessment. It is trite that the factors listed in section 3 should be viewed collectively.

The nature of the proceedings

[33] It is well to restate that the standard of proof in the present proceedings is on a balance of probabilities, unlike that of proof beyond reasonable doubt in criminal cases. DT Zeffert and AP Paizes, *The Law South African Law of Evidence*, 2nd, page 401 opine that since the person upon whose credibility the probative value of the evidence depends is, in the case of hearsay evidence not subjected to the crucial devices designed to identify, assess and eliminate those aspects of the evidence that render it potentially unreliable, it is important for the court (a) to understand that what the potential dangers are (b) consider the extent to which those dangers actually arise in the case before it; and (c) identify factors that tend to reduce or even eliminate those dangers.

[34] I have already indicated that the evidence in question was given under oath during an Enquiry in terms of sections 417 and 418 of the 2008 Companies Act into the collapse of Bonfrut. More specifically, the witnesses' testimonies were obtained for the purpose of investigating the company's financial affairs and potential misconduct on the part of the directors.

[35] In the present matter, the witnesses were required by law to provide truthful and complete testimony duly led by a commissioner who oversaw the enquiry. The evidence was given by persons who had knowledge of the operations of both Bonfrut and Bonex. This was not second hand hearsay evidence, it was first hand hearsay evidence. In comparison to hearsay evidence tendered in criminal proceedings where a person made a written statement under oath but was for some reason unable to give evidence, it seems to me that the fact that in this enquiry the commissioner leads the proceedings and asks probing questions as evident from the transcript, lends credence to the acceptability and reliability of the evidence elicited during the Enquiry proceedings.

Nature of the evidence

[36] Schwikkard and Van der Merwe, *Principles of Evidence*, 3rd ed, 2009, at 279, list a myriad of factors that affect credibility under this rubric. They are:

- (a) the fact that the witness has or had no interest in the matter before the court may impact on the assessment of reliability;
- (b) the statement was made against the interest of the declarant;
- (c) other evidence supporting the hearsay evidence;
- (d) simplicity of the subject matter and the absence of the subject-matter and absence of contradictory evidence.

[37] In *Kapa v S* 2023 (4) BCLR 370 (CC) Majiedt J, at para [79] outlined that *“the enquiry under this rubric is, first, the extent to which the evidence can be considered reliable; and, second, the weighing of the probative value of the evidence against its prejudicial effect”*. The Court alluded to the following factors relevant to the reliability question:

- (a) any interest in the outcome of the proceedings by the witness;
- (b) the degree to which it is corroborated or contradicted by other evidence;
- (c) the contemporaneity and spontaneity of the hearsay statement; and
- (d) the degree of hearsay. (See *Kapa*, para 81)

[38] The individuals who testified regarding Bonfrut affairs held key positions in the company and were closely involved with its financial and operational decisions.

[39] Ms van Niekerk, an erstwhile procurement/sales employee, described how Bonfrut's internal sales figures were often manipulated to present a more favourable financial picture to creditors.

[40] Mr Charl Uys, the brother of Mr Uys Senior, provided a perspective of how Bonfrut's finances were managed during its period of insolvency.

[41] Each witness had direct involvement in the company's operations and provided firsthand knowledge of the alleged misconduct. It can be accepted therefore that their evidence is reliable. The witnesses' evidence is further supported by the testimony Mr Uys Junior who confirmed that he attended to the calculations on payments to be made to Challenger based on Bonfrut's cash flow.

The purpose for which the evidence was tendered

[42] I have already indicated that Challenger tendered the transcripts to establish that Bonfrut's directors and employees engaged in reckless trading and financial mismanagement which led to the company's inability to meet its obligations to creditors such as Challenger. Central to these allegations is the evidence of Ms Ferreira to the effect that funds from the Intaker invoices, which in terms of the parties' agreement, were meant to be paid to Challenger, were instead used to pay other creditors. Ms Ferreira gave evidence to the effect that she personally effected the already mentioned payments on instructions from the

company's directors, who were fully cognizant of the fact that this practice breached Bonfrut's agreement with the Challenger. Ms Ferreira's evidence is bolstered by Ms Potgieter's confirmation of the systematic nature of misappropriation and diversion of funds to cover Bonfrut's operational expenses.

[43] Ms van Niekerk's evidence shows how Bonfrut misled creditors by inflating sales figures and presented a false picture of its financial health. Her evidence is corroborated by that of Mr Charl Uys who stated that funds were shifted between accounts to delay the insolvency, all the while knowing that the company was unable to meet its financial obligations.

The probative value of the evidence

[44] The Supreme Court of appeal in *S v Ndhlovu* [2002] ZASCA 70; 2002 (6) SA 305 (SCA) the court explained the meaning of probative value thus:

“‘Probative value’ means value for purposes of proof. This means not only, what will the hearsay evidence prove if admitted?, but ‘will it do so reliably?’ In the present case, the guarantees of reliability are high. The most compelling justification for admitting the hearsay in the present case is the *numerous pointers to its truthfulness.*”

[45] Another useful guide in assessing the probative value of the evidence herein can be found in *Minister of Police v M and Others* (JR56/14) [2016] ZALCJHB 314; (2017) 38 ILJ 402 (LC) (19 August 2016) set out a few guidelines on when, in arbitration proceedings conducted in terms of the LRA, a single piece of hearsay, such as a transcript, might constitute *prima facie* proof of an allegation. Although the guidelines specifically refer to arbitration proceedings, I am of view that they are useful in the enquiry that is the subject matter of this judgment. These are the following, hearsay should:

- (1) be contained in a record which is reliably accurate and complete;
- (2) be tendered on the same factual dispute;
- (3) be bi-lateral in nature. In other words, the hearsay should constitute a record of all evidence directly tendered by all contending parties;
- (4) in respect of the allegations, demonstrate internal consistency and some corroboration at the time the hearsay record was created....;

- (5) show that the various allegations were adequately tested in cross-examination. For example, the transcripts record not only K's allegations but also RM's attempts to discredit them;
- (6) have been generated in procedurally proper and fair circumstances.

[46] In *casu*, the witnesses were not cross-examined. Counsel for the Respondents strenuously argued against the admission of the hearsay evidence bemoaning the fact that the witnesses were not subjected to cross-examination thereby depriving the Respondents of an opportunity to test the veracity of those who gave evidence.

[47] Admittedly, the admission of the section 417 enquiry proceedings is significantly prejudicial to the First and Fourth Respondents as they would be deprived of the opportunity to cross-examine the witnesses. However, in, *Kapa, supra*, the court explained at paragraph [81] that :

“In *Savoi*, this Court explained that courts’ aversion to hearsay evidence stems from its *general* unreliability as it is not subject to the reliability checks applicable to other evidence – such as cross-examination – and as its nature makes it difficult for a party to effectively counter inferences drawn from it. This Court noted, however, that notwithstanding hearsay evidence being untested, and despite the possibility of risks of faulty memory or erroneous perception, insincerity or ambiguities in narration, hearsay evidence may prove to be reliable.”

[48] In *Ndhlovu, supra*, at para [24], the Supreme Court of Appeal pointed out that section 35(3)(i) does not create an automatic right to cross-examine. The Supreme Court of Appeal said that:

“The Bill of Rights does not guarantee an entitlement to subject all evidence to cross-examination. What it contains is the right (subject to limitation in terms of section 36) to ‘challenge evidence’. Where that evidence is hearsay, the right entails that the accused is entitled to resist its admission and to scrutinise its probative value, including its reliability. The provisions enshrine these entitlements. But where the interests of justice, constitutionally measured, require that hearsay evidence be admitted, no constitutional right is infringed. Put differently, where the interests of justice require that the hearsay statement be admitted, the right to ‘challenge evidence’ does not encompass the right to cross-examine the original declarant.”

[49] In *Kapa, supra*, the Court further held that the factors listed in section 3(1)(c) must be viewed holistically and weighed collectively in determining whether it is in the interests of justice to admit the hearsay evidence. The Court then remarked that minority judgment *‘impermissibly evaluates the probative value of the statement in a piecemeal fashion. It should instead apply a holistic approach, assessing whether on the whole the statement was of adequate probative value in light of all of the other circumstantial evidence taken together. Approached in this way, the outcome must be different’* (para 98).

[50] In my judgment, the factors favouring the admission of the section 417 Enquiry transcripts far outweigh those favouring its exclusion. I am of the view that the evidence at the Enquiry is not only reliable, but it also has a high degree of corroboration with admissible evidence and/or common cause facts. I find that it is in the interests of justice to admit the evidence elicited in the section 417 enquiry in its entirety, inclusive of the all the annexures.

[50] The question that must next considered is what weight this court should attach to it.

[51] The evidence tendered at the enquiry is in my opinion of high probative value. This I say because it is not merely viva voce evidence relating to the central issue of Bonfrut's mismanagement, but it is supported by documentary evidence in the form of financial statements, notwithstanding the fact that the evidence is that some of them were manipulated to reflect a much healthier financial status of Bonfrut. In addition, the financial statements were neither audited nor independently reviewed. Furthermore, the witness's versions are corroborative of each other. Mr Uys Junior confirmed that he attended to calculation on payments made to Challenger, based on Bonfrut's cash flows and further that he approved payments made to Challenger. Mr Uys Junior further conceded that he had access to Bonfrut's bank accounts, both

prior to his appointment and after his resignation. It is common cause that Mr Uys Junior was appointed as a director of Bonfrut on 17 October 2018 (and as confirmed by Mr Uys Senior), even after Mr Uys Junior's resignation as director on 26 September 2019, he continued to render services to Bonfrut, the extent of which diminished over time.

[52] Like reliability, probative value is enhanced by the existence of admissible evidence which is consistent with the hearsay evidence. In the present matter, the hearsay evidence sought to be admitted is reliable and sufficiently corroborated by the circumstantial evidence.

The reason the evidence is not given by the person upon whose credibility the probative value depends

[53] I have already indicated that the evidence given by the First Respondent, Mr Uys (Junior) is admissible in these proceedings. It was contended on behalf of Challenger that the witnesses who testified at the Enquiry cannot be compelled to provide affidavits in this matter, and in the circumstances, the Transcript is the best available evidence.

[54] The Respondents emphasise that motion proceedings are inappropriate in the present matter as the people who testified at the Enquiry could be summoned to give evidence in court. Whilst this may be so, this matter is concerned with the admission of the Transcript

where the witnesses actually gave evidence as opposed to reliance on statements made by witnesses who did not give any evidence.

Any prejudice to a party that the admission of such evidence may entail

[55] Counsel for Challenger argued that there cannot be any prejudice to the Respondents occasioned by the admission of the evidence tendered at the Enquiry as they have had ample opportunity to review the transcripts and are fully aware of the evidence presented therein whereas excluding the transcripts on the other hand would significantly prejudice the Applicant by denying it access to critical evidence regarding Bonfrut's financial mismanagement.

[56] I have already dealt with the prejudice to the Respondents caused by the missed opportunity to cross-examine witnesses and have found that notwithstanding, it is in the interests of justice to admit the transcript of the Enquiry proceedings.

The Application to strike out

[57] The Applicant brought an application to strike out the entirety of annexures FA11A and FA11B to the founding Affidavit except for the transcripts of the evidence of Mr A Uys. In light of the finding I have made hereinabove, the application to strike out evidence based on the transcript in respect of all the witnesses who testified falls away. Likewise, all the exhibits attached to the answering affidavit provide

context to the testimony given by the various witnesses, as such it is necessary to have them treated as admissible hearsay evidence. These are exhibits “**FA1**” to “**FA50**”). For the sake of completeness, I must now turn to consider each of the paragraphs assailed by the Respondents.

[58] Paragraphs 30-32 reads as follows:

30 Mr Uys Junior’s LinkedIn profile, a screenshot of which is attached hereto, marked “FA12”, states that he was employed by Bonfrut for a period of 7 years and 11 months in the position of “*Marketing Financial Analyst and assistant to the CEO*”.

31. His role and responsibilities in this position are described as follows:

“Responsible for key financial tasks in assistance to the CEO regarding budgeting, financial planning and financial analysis.

32 On a secondment basis, worked on projects relating to financial due diligence procedures by calculating profit margins of essential sales products, short to long term liabilities, financial modelling and integrating VBA into the database enhancing the data input output efficiency”.

[59] In my view, there is no basis for striking out the above paragraphs because during the Enquiry, Mr Uys Junior confirmed that his responsibilities included all of the above.

Paragraph 34.1

“Ms Potgieter confirmed that Mr Uys Junior attended to financial management, budgets, payments and to Bonfrut’s account with Challenger>”

[60] The evidence of Ms Potgieter does not constitute hearsay evidence as it has already been admitted into these proceedings.

34.2 Mr Uys Junior confirmed that he had access to Bonfrut’s financial system and could at all times see the amounts owed by to Bonfrut’s creditors (which would have been required for the purposes of inter alia budgeting and making payments)

34.3 Ms van Niekerk, Ms Potgieter and Mr Uys Senior testified that Mr Uys Junior had access to Bonfrut’s bank accounts and attended to payments. Importantly Mr Uys Junior confirmed that he had this access both prior to his appointment as director of Bonfrut and thereafter,

Paragraph 34.4

Mr Uys Junior and Ms Ferreira confirmed that Challenger was Mr Uys Junior’s responsibility. In this regard:

34.1 Mr Uys Junior confirmed that he attended to the calculations on payments made to Challenger based on Bonfrut’s cash flows and further, that he approved payments made to Challenger;

34.2 Ms Potgieter confirmed that Mr Uys Junior was responsible for creditor payments and in particular, payment to the administration of Challenger.

[60] The evidence relating to the above paragraphs has already been declared admissible.

Paragraph 34.5

[61] Paragraph 34.5 does not exist.

Paragraph 35.1

Mr Uys Junior was appointed as a director of Bonfrut on or about 17 October 2018, but fulfilled the same role after his appointment as he did prior thereto, his appointed having been necessitated by the fact that Mr Uys Senior, who had previously been Bonfrut's sole director, having required a potentially life threatening operation; and

35,1.1 Mr Uys Senior confirmed that even after Mr Uys Junior's resignation as a director of Bonfrut on 26 September 2019 he continued to render services to Bonfrut, although the extent of these services diminished over time (which is unsurprising considering that Bonfrut went into liquidation shortly thereafter).

[62] The contents of this paragraph were confirmed by the evidence of Mr Uys Senior at the Enquiry.

Paragraph 38 including subparagraphs and FA13

Para 38: In seeking such funding, Bonfrut presented Challenger with amongst other things, its annual financial statements for the year ended 31 May 2017, a copy of which is attached hereto, marked "FA13". As appears from the contents, these financial statements were neither audited nor independently reviewed, and a very healthy picture of Bonfrut financial position was represented, in that they reflect the following:

38.1 total assets exceeded total liabilities by more than R5.5 million;38.2 revenue had increased from R82 million in the previous financial year to R85 million in the 2017 financial year;

38.3 gross profit had increased from R5.2 million in the previous financial year, with profit for the year having escalated from R414 855.00 in the previous year to R626 676.00 in the 2017 financial year; and

38.4 shareholder loans decreased over the course of the financial year, from R1,5 million to a mere R500 000.00

[63] The deponent to the founding affidavit states that the financial statements were presented to Challenger in order to assess whether it was comfortable to advance finance to Bonfrut and he has personal knowledge of this fact. Regarding annexure “FA13” all annexure to the founding affidavit have already been admitted as evidence. Thus, there is no basis to strike out this paragraph.

Paragraph 39

39.1 On 14 September 2017 Bonfrut had borrowed R700 000.00 from Ms van Niekerk in order to pay salaries, as it did not have sufficient fund available to make payment of same; an’

39.2 as appears from the document provided by Charl during the course of the Enquiry, a copy of which (and the sworn translation thereof) is attached hereto, marked “FA14”, over the period 18 to 29 December 2017 (a month prior to the conclusion of the Discounting Agreement), Bonfrut had borrowed additional funding in the amount of R5million from Charl.

[64] The contents of these paragraphs have been admitted by Mr Uys Junior in paragraph 77 of the answering affidavit. More specifically with regard to paragraph 39.2, Mr Uys Junior in the answering affidavit stated that *“However, it is correct that Bonfrut needed to manage its cash flow, as is normal in this industry. In order to do this the loans referred to in paragraphs 39.1 and 39.2 were made at the instance of my father.”* In paragraph 78, Mr Uys Junior further states that *“I was not directly involved with these transactions and I have no direct knowledge of their terms, but I understand that the amount referred to in paragraph 39.2 was repaid by September 2008 (9 months after the agreement with applicant and was entered into almost a year before the applicant first defaulted on any payments due in terms of the agreement.)* In any event, The transcript of the Enquiry has already been admitted as evidence.

Paragraph 45.5

45.5 As soon as Offtaker paid the paid the Offtaker Invoice amount into Bonfrut's Forex account (who received same on behalf Challenger, Challenger, having taken cession of the right to payment of the Offtaker Invoices) the amount owing to Challenger in terms of the Discounting Agreement would fall due to [sic] paid from Bonfrut's US Dollar Forex account and the balance owing to the supplier in terms of the Supplier Invoice would be paid; and

45.6 Ms Ferreira administered and paid Challenger based on instructions received from Mr Uys Senior and Mr Uys Junior.

[65] This is the evidence elicited at the section 417 Enquiry. Besides Mr Uys Junior at paragraph 86 of the answering affidavit acknowledged that he had a basic understanding of the Discounting Agreement, this being the terms of thereof.

Paragraph 46

46.1 Ms Ferreira testified that she was aware of the implications of the Challenger Agreement in that the proceeds from the purchased Offtaker Invoices were ceded to Challenger. Ms Ferreira conceded that the funds collected in terms of the Offtaker Invoices (the rights to which had been ceded to Challenger) were not paid to Challenger but were instead used to pay Bonfrut's expenses. She further testified that Mr Uys Senior and Mr Uys Junior would instruct her to use these funds to make payment of the balance owing in terms of the Supplier Invoices before making payment to Challenger and that she would give effect to these instructions.

46.2 Ms Potgieter testified that she understood that when a container was loaded, Bonfrut would request funding from Challenger, and would receive 80% of the Offtaker Invoice value, but the moment payment was received by the Offtaker in respect of the Offtaker Invoice, Challenger had a right to payment before the Supplier. She further indicated that it was her understanding that, despite the aforesaid, these funds were applied to paying Suppliers prior to any payment being made to Challenger.

[66] This is evidence elicited at the Enquiry. Mr Uys Junior at paragraph 92 of the answering affidavit also states that *“It is correct that I assisted Ms Ferreira with the administration of the discounting agreement and that invoices were presented to the applicant in order to assist with Bonfrut’s cashflow. It is also correct that applicant became entitled to the payment from the monies received from the Offtakers.”*

Paragraph 46.3

Mr Uys Junior testified that:

46.3.1 he and Ms Ferreira worked with Challenger and did all the necessary administration relating to the Invoice Discounting Agreement;

46.3.2 Bonfrut did not have the capital required to fund the upfront payment to Suppliers and that this capital was provided by Challenger; and

46.3.3 he was ware that Challenger was entitled to the income received from Offtaker Invoices as this claim had been ceded from Bonfrut to Challenger.

[67] The evidence of Mr Uys Junior is as a matter of law admissible in these proceedings and there therefore is no reason to have struck out. As already alluded to above, Mr Uys Junior conceded at paragraph 92 that Challenger became entitled to the payment from monies received from the Offtakers.

Paragraph 46.4

Mr Uys Senior testified that, in terms of the Discounting Agreement any funds received in respect of Offtaker Invoices constituted Challenger's funds and were to be applied first to paying Challenger.

[68] Mr Uys Senior 's evidence at the Enquiry has already been ruled to be admissible in the present proceedings as an exception to the hearsay rule. Again, these allegations have been admitted by Mr Uys Junior in paragraph 92 of the Answering Affidavit.

Paragraph 48

I draw attention to the fact that, just five days after the conclusion of the first Sale Transaction, Mr Uys Senior addressed correspondence (a copy of which (and the sworn translation thereof) is attached hereto marker "**FA15**").

48.1 Bonfrut had lost significant volume in both citrus and grapes (such that the turnover would have decreased dramatically);

48.2 Bonfrut needed to reduce overheads, of which salaries were the largest part;

48.3 Bonfrut intended to incentivise its staff to increase volume through a commission structure;

48.4 Bonfrut was not profitable (despite what was reflected in the 2027 financial statements) and that it could not operate at a loss indefinitely; and

48.5 attaching a proposal through which the salary structure applicable to them would be changed to a commission structure.

[69] FA15 is an email sent by Mr Uys Senior. Both the annexure and the contents thereof have been admitted by Mr Uys Junior. There is no basis to strike out these paragraphs. Besides, the Respondents have not asked for annexure FA15” to be struck out. Additionally, all exhibits attached to the founding affidavit have already been declared to be admissible in these proceedings.

Paragraph 51

Bonfrut’s Annual Financial Statements for the year ended 31 May 2018, (a copy of which is attached , marked “FA16” were signed by Mr Uys Senior, in his capacity as Bonfrut’s sole director, on 17 September 2018. In similar vein to the previous financial years, these financial statements were neither audited independently nor reviewed. I draw attention to the following:

51.1 despite being apparent from what is described above that Bonfrut was likely already insolvent (or, at the very least, close to insolvency), the financial statements reflect that it was both commercially and factually insolvent;

51. 2 there was significant decrease in revenue from R85 million in the previous year to R76million in this financial year;

51.3 despite the decrease in revenue of almost R9million. Gross profit had increased by R1,5 million;

51.4 Mr Uys Senior’s loan account had increased from R531 993.00 to R1 862 068.00

51.4.1 I draw attention to the fact that it is specifically recorded that this loan account was unsecured, interest free and that it was not expected that same would be repaid within the next 12 months, thereby allowing this to be categorised as a long term liability, thereby creating the impression of a more favourable balance sheet;

51.4.2 having regard to what is set forth below, the impression created was false as this loan was, in fact, largely repaid over the next financial year

51.5 there was significant increase in trade and other receivables, from R516 046.00 in the previous year to R7 358 306;

51.5.1 given that revenue decreased, one would have expected to see trade receivables decrease by a proportionate amount, As appears from the evidence obtained at the enquiry, as significant portion of this amount constituted bad debt, and ought to have been written off;

51.5.2 the write off of trade receivables would, however, have made Bonfrut's balance sheet look weaker, with the result that Challenger would have been less likely to provide it with finance. It is likely on this basis that the debt was not written off (in this financial year, or in the financial years that followed, until Bonfrut was liquidated;

[70] Paragraph 51.5.2 constitutes an opinion of the deponent to the founding affidavit, is speculative and argumentative. It falls to be struck out.

51.6 Mr Uys Senior's loan account increased from R531, 993.00 in the previous financial year to R1 862 068.00.

57.7 As described above, a substantial loan had been obtained from Charl, in the value of R5 million.

51.7.1 for the sake of completeness, I note that both Mr Uys Senior and Charl testified that the aforesaid loan was not, in fact, made by Charl to Bonfrut but was rather made by Charl to Mr Uys Senior and then by Mr Uys Senior to Bonfrut, however:

51.7.1.1 over the course of several years, Bonfrut's annual financial statements consistently reflected separate (material) balances owing to each of Mr Uys Senior and Charl; and

51.7.1.2 the aforesaid version is also contradicted by various other evidence obtained at the enquiry, which is not relevant to the present application;

51.7.2 despite the fact that this loan is recorded as being "repayable on demand", it is (similarly to Mr Uys Senior's loan account), reflected as a long term liability on Bonfrut's balance sheet;

51.7.3 had it been reflected as a current liability (as it should have been, given its repayment terms and that it was, in fact repaid in the next financial year), Bonfrut's 2018 financial statements would have reflected that it was commercially insolvent, which would have been a major cause for concern for Challenger and likely would have resulted in it refusing to provide Bonfrut with any further funding.

[71] Paragraph 51.6 to 51.7.3 is information contained in Bonfrut's financial statements. The financial statements served before the Enquiry. There is no basis to strike out the contents of these paragraphs.

Paragraph 51.8

51.8 a further material loan was obtained from Matthys Grobler ("Mr Grobler") in the amount of R275 578.00, this loan was reflected as a long-term liability but should have been reflected as a current liability given that it was payable on demand (and was, in fact repaid over the next 12 months) thereby creating the impression of a strengthened balance sheet;

51.9 a loan from Ms van Niekerk in the amount of R571 000.00 is recorded (being the balance of the R700 000.00 loan amount described which was owing as at 31 May 2018);

51.9.1 as aforesaid, this loan was obtained in order to allow Bonfrut to pay salaries to its staff members, given it's dire financial situation in late 2017 and prior to the conclusion of the Challenger Agreements; and

51.9.2 again, this loan was reflected as a long-term liability given that it was repayable on demand (and was in fact, repaid over the next 12 months period) thereby creating the impression of a strengthened balance sheet.

[72] Paragraphs 51.8 to 51.9.2 is information in the financial statements which have already been admitted in evidence in the present proceedings.

52. Having regard to the comments above, it is evident that Bonfrut's financial statements for the year ended May 2018 created a vastly improved impression than was factually the case. By way of example, if 1) Charl had demanded repayment of his R5 million loan account (as he did) and 2) even half of the increase in its trade receivables was not, in fact recoverable (as was also the case) Bonfrut's current liabilities would have far exceeded its current assets, and the financial statements would have reflected that Bonfrut was, in fact commercially insolvent.

53. Whilst it must have been clear that there was, at least, a significant risk that Bonfrut would become commercially insolvent, it was specifically confirmed by Mr Uys Senior in the aforesaid financial statements that he was "satisfied that [Bonfrut] had or has access to adequate resources."

54. Evidence obtained during the Enquiry indicates that it was well known by some of Bonfrut's staff members that Mr Uys Senior intentionally made changes to Bonfrut's financial statements so as to create a favourable impression, thereby allowing Bonfrut to obtain further funding as well as credit insurance on the basis of an inflated and materially misstates balance sheet.

55. Given the aforesaid, it is clear that the financial statements of Bonfrut were intentionally materially misstated, so as to mislead Challenger, amongst others.

56. Having regard to the aforesaid, it is clear that even prior to May 2018 Bonfrut's directors must have been aware that there was serious risk of the liquidation of Bonfrut, which risk would surely materialise in the event that it could not timeously collect the amount owed to it from its debtors or in the

event that the loan accounts which were repayable on demand, were in fact, called up.

59. It appears that, in order to ensure that Bonfrut would be in a position to make repayment of the existing substantial loan accounts which were owing to Mr Uys Senior, as well as his brother Charl. (per financial statements) and Bonfrut's employees, Mr Uys Senior and Mr Uys Junior engaged in a stratagem to misrepresent Bonfrut's financial position in order to obtain finance from Challenger, so as to generate income and create cash flow to allow repayment of these loan accounts, and in addition, later misappropriated funds collected by Bonfrut on Challenger's behalf, in order to make payment of other Bonfrut expenses, so as to continue with the business of Bonfrut through the guise of Bonex.

60. It appears that, following Mr Uys Junior's appointment as director, there was no change in Bonfrut's stratagem to continue to source further finance from Challenger (on the basis of fraudulent misrepresentations as to Bonfrut's financial position) so as to ensure that Bonfrut could continue trading and could further repayment and could further make repayment of loans obtained from Mr Uys Senior and other family members, despite the fact that , given the above conduct as reflected in Bonfrut's 2028 annual financial statements, a reasonable person in their shoes would have foreseen that there was a strong chance that Bonfrut would have foreseen that there was a strong chance that Bonfrut wouldn't be able to repay Challenger as payment fell due.

[73] In paragraphs 52 to 59, the deponent to the founding affidavit presents argument and conclusions based on his own opinion. This is impermissible. Paragraphs 52 to 59 must be struck out.

63.3 The value of trade receivables increased from R7.3 million in the previous financial year to R8.3 million in the current financial year:

[74] This is a statement of a fact as evidenced by the financial statements; there is no basis to strike it out.

63.3.1 as appears from annexure “FA20” hereto, a mere three months after signing these financial statements Gerhard conceded that “the debtor’s book is a mixture of bad debt, disputed/litigation and an unresolved dispute still in negotiation. In any event, it is unrealistic to expect that these debtors will turn into quick cash ... however, litigation is a long and costly process as advised by Werkmans, which I certainly can’t carry anymore”;

63.3.2 given the aforesaid, and what is contained in paragraph 51.5.1 above, the amount reflected as trade receivables should have been written off prior to signature of the financial statements. Had this been done, the 2019 annual financial statements would have reflected that Bonfrut was both factually and commercially insolvent;

63.3.2 it is plain that this was not attended to in order to inflate Bonfrut’s balance sheet and to create the incorrect impression that it remained a viable concern, so as to ensure that Challenger, on the basis of this misrepresentation, would continue to provide funding to Bonfrut, and to allow

for the further repayment of the loan accounts of Mr Uys Senior and his family members.

63.3.4 given Mr Uys Junior's position in Bonfrut, he must have been aware (and a reasonable person in his position would have been aware) of the significant risk that Bonfrut would be unable to repay Challenger, but nonetheless knowingly participated in the procurement of further funding from Challenger and authorise use of these funds to repay the loan accounts of his family members as aforesaid.

[75] Paragraphs 63.3.2 to 63.3.4 must be struck out as it constitutes conclusions reached by the deponent upon analysis of the financial statements. This is impermissible.

63.4 in regard to the "bank overdraft" in the amount of R7 405 403.00, the amount reflected as "bank overdraft" was, in fact the amount owing by Bonfrut to Challenger. I assume that this was reflected as bank account to create the impression to credit insurance (amongst others) that Bonfrut had access to revolving credit facilities.

[76] The last paragraph of paragraph 63.4 speaks to assumptions made by the deponent. Without further ado, it must be struck out.

63.5 Loans from shareholders and other financial liabilities (which had included the loans from Charl, Ms van Niekerk and Mr Grobler), had decreased by over R8,5 million whilst the "bank overdraft" i.e. funding from Challenger, had increased by 7.4 million. By way of further explanation:

[77] This information is derived from the financial statements which have already been admitted as evidence in these proceedings, thus there is no justification to strike out paragraph 63.5 and 63.5.1.

63.5.1 Charl, Ms van Niekerk, and Mr Grobler's loan accounts, in the total value of R5 846 578.00 had been repaid in full;

63.5.2 the aforesaid, considered in conjunction with the payments described above, reflects most starkly the fact that Challenger funds were being utilised to repay Bonfrut's existing loan accounts to friends and family members before it was placed in liquidation;

[78] In paragraphs 63.5.1 and 63.5.2, the deponent impermissibly draws inferences from facts. These paragraphs must be struck out.

63.5.3 in fact, as appears from the transcript of the Enquiry, it was conceded by two employees of ECAT who had assisted in the preparation of the financial statements, Mr Blignaut and Mr Dyer, that prima facie that the aforesaid indicates that Challenger's funds were used to repay the aforesaid loan accounts.

[79] Inasmuch as it is true that Mr Blignaut and Mr Dyer testified that on the face of it appeared as if Challenger funds were used to pay the main account, their views cannot be elevated to evidence. This paragraph is not struck out as this is the evidence given by the two witnesses at the enquiry.

63.6 VAT decreased from R747 518.00 in the previous year to a mere R77 115.00. Whilst there was a significant drop in revenue (by over R30 million), I am advised that the reflected VAT amount appears to be impossibly low. It appears that VAT liability must have been intentionally understated so as to understate Bonfrut's expenses and create the impression of a stronger financial position;

[80] The last sentence of paragraph 63.6 is struck out. It is impermissible for the Applicant to draw this inference.

63.7 Other income in the inflated of R1.2 million was reflected in the Statement of Comprehensive Income. The aforesaid amount was incorrect and was restated in the annual financial statements for the year ended February 2020 to be R754 091.00. In this regard, it was confirmed in the Enquiry that:

63.7.1 such rental income had never been received (Mr Uys Junior and Mr Uys Senior having resided in Bonfrut's immovable property rent free);

63.7.2 the aforesaid entry created the impression of a more favourable financial position and would have enabled Mr Uys Senior and Mr Uys Junior to hide this fringe benefit from SARS (same having not been declared); and

63.7.3 after the liquidation of Bonfrut this entry was reversed, resulting in an increase in Mr Uys Senior's loan account (to his obvious intended benefit),

63.8 as appears in the prior period errors note in the 2020 financial statements interest expenses were understated in the 2019 annual financial statements by R278 163.00 and motor vehicle expenses were understated by R147 658.00.

63.8.1 insofar as the motor vehicle expenses are concerned, evidence given at the Enquiry was to the effect that these expenses had initially been excluded on the basis that these expenses had initially been excluded on the basis that Mr Uys's personal expenses as he made use of Bonfrut's vehicle (resulting in the impression

of a strengthened income statement) but that this was later reversed in the 2020 year such that Bonfrut would again carry these costs and Mr Uys Senior's loan account would increase accordingly) (to his benefit and to the detriment of Bonfrut);

63.8.2 insofar as interest expenses are concerned, evidence obtained at the Enquiry was to the effect that , although Mr Uys Senior's loan account was specifically recorded as having been interest free, interest was in fact levied on same and this was reflected in the 2020 financial statements by way of an increase in Mr Uys Seniro's loan account to his benefit;

63.8.3 the overall result of the aforesaid was that the 2019 financial statements reflected a stronger financial position when it suited Bonfrut to show a strengthened position to enable it to procure further funding) and that, once Bonfrut when into liquidation, it suited Mr Uys Senior better to show a weaker financial position and higher loan account owing to him, this was revised.

63.9 Share capital increased by R3 million. In this regard, evidence obtained at the enquiry from Mr Uys Senior, Ms Blignaut and Mr Dyer. As well information obtained through the liquidation process, allowed Challenger to verify the following:

63.9.1 Mr Uys Senior was at all times the sole shareholder of Bonfrut;

63.9.2 in order to create the impression of strengthened balance sheet, Mr Uys Senior issued further shares in Bonfrut to himself (despite the fact that, as he was already the sole shareholder, he would obtain absolutely no benefit);

[81] The first portion of paragraph 63.9.2 (*"in order to create the impression of a strengthened balance sheet"*) is struck out as it constitutes the deponent's opinion.

63.9.3 payment in respect of these shares was made by way of a reduction in Mr Uys Senior/Charl's loan account, so as to reduce the liabilities reflected on Bonfrut's balance sheet, to ensure that same reflected a more favourable financial position.

[82] The last portion of paragraph 63.9.3 constitutes a drawing of an inference. It is struck out.

63.10 in order to conceal that Bonfrut had been trading recklessly and was insolvent, the director's report confirmed that. "Bonfrut has access to adequate financial resources to continue in operational existence for the foreseeable future".

[84] Paragraph 63.10 is struck out as it is speculative.

64 In continuance of the aforesaid strategy, in June 2019, payment of R110 000.00 was made to Mr Uys Senior, in reduction of his loan account. In the same month, additional finance in excess of **USD170 000.00** was sought and obtained from Challenger.

65 Mr Uys Junior and Mr Uys Senior, having ensured that all available funds were used to repay amounts ostensibly owing to made to them, their family members and associates. As various other creditors which were viewed as critical Bonfrut/Bonex's business going forward, it is unsurprising that on or about 20 August 2019, Bonfrut first fell into arrears in respect of the amounts owing to Challenger in respect of the Discounting Agreement. As a result, the last date on which funds were made available by Challenger to Bonfrut was 4 September 2019.

[85] The last sentence of paragraph 65 is struck out as it is speculative and argumentative,

66. When one has regard to what is set forth above, it becomes immediately clear that Bonfrut, through Mr Uys Junior and Mr Uys Senior, was preferring certain creditors over Challenger.

[86] Although Paragraph 66 is analytical and constitutes views and opinions of the deponent the conclusion is premised on preceding facts.

67. Furthermore, evidence obtained at the Enquiry confirms that, despite knowing that Challenger was entitled to all funds received in respect of Offtaker invoices, these funds were in fact paid to other creditors of Bonfrut.

68. On 26 September 2019, Mr Uys Senior resigned as a director of Bonfrut.

69. Despite Mr Uys Junior's resignation from his position as a director, testimony obtained during the course of the Enquiry reflects that he retained transactional authority on its bank accounts and continued to perform the same duties as those previously performed by him in that he:

69.1 participated in the exercise of executive control over the management of the whole, or a significant portion of Bonfrut and the activities of Bonfrut;

69.2 participated in the running of the day-to-day business of Bonfrut; and

69.3 was one of the controlling minds behind Bonfrut.⁷⁰ I am advised that Mr Uys Junior thus remained a prescribed officer of Bonfrut for purposes of Regulation 38 of the Companies Regulations, 2011.

[87] Paragraph 69 .1, to 69.10 is retained in its entirety as constitute conclusions drawn from financial statements and Mr Uys Junior's own evidence which have already been admitted in these proceedings.

71. Around the same time as Mr Uys Junior's resignation as a director of Bonfrut, a new entity. Bonex, was formed on Mr Uys Senior and Mr Uys Junior's instructions, with an intention to shift Bonfrut's business to corporate opportunities to into Bonex, thereby avoiding liability to Bonfrut's creditors. A copy of the aforesaid correspondence (and the translation thereof) is attached hereto, marked "**FA21**".

72. Just over two months after his resignation as a director of Bonfrut, and as appears from annexure "**FA22**" hereto, on 28 November 2019, Mr Uys Junior was appointed as directors of Bonex.

[88] Reference to the annexures already admitted as evidence is permissible.

73. On or about 11 November 2019 (a mere week after a further R800 000.00 was paid by Bonfrut to Charl in reduction of Charl's loan account as reflected in Bonfrut's financial statements) Mr Richard Hart ("**Mr Hart**") of Challenger, met with Mr Uys Senior regarding the amount owing by Bonfrut to Challenger. During this meeting Mr Uys Senior:

73.1 indicated that Bonfrut was unable to settle the amount owing to Challenger due to a marked decline in fruit prices and many of Bonfrut's debtors falling into arrears. It is evident that at this stage Bonfrut was still intentionally concealing the true reasons for its inability to make payment to Challenger, being the repayment of substantial loan accounts to other creditors and the bad debt which existed prior to Challenger having initially been engaged; and

73.2 admitted to receiving payment in respect of at least one of the Offtaker invoices purchased by Challenger in terms of the Discounting Agreement, and having utilised the funds collected on Challenger's behalf to make payment to Bonfrut's other creditors. Of course, given his position within Bonfrut, payment of these funds to other creditors would have been signed off by Mr Uys Junior and attended to by him or at least with his knowledge and therefore his tacit consent.

74. Despite the aforesaid clear admission of Bonfrut's blatant insolvency, Mr Uys Junior and Mr Uys Senior then continued to dispose of Bonfrut's funds, wrongfully and in contravention of its obligations to Challenger, as more fully explained below, and continued to misrepresent its financial position to Challenger, in attempt to conceal that it had been trading recklessly.

[89] Paragraph 74 constitutes factual conclusions drawn from the evidence.

75. In this regard, I refer to Bonfrut's provisional balance sheet dated 31 December 2019, a copy of which is annexed hereto marked "FA23", which reflects the following:

75.1 its current liabilities amounted to R10, 686, 414.02 and its current assets amounted to R7, 333, 389.60. Given Mr Uys Senior's prior advice as to the irrecoverable nature of its debtors' book, the situation was clearly much worse than reflected, as the current assets included a value of R6, 524,897.00 in respect of "*Customer Control Account*" which should, at least to a large extent, have been written off; and

75.2 Its total liabilities amounted to R14,028,873.37 and its assets amounted to R14,568,116.85, such that the balance sheet reflects that Bonfrut was

factually solvent. As aforesaid, total assets include significant irrecoverable debt, which amounted to several million, such that, despite what is reflected on this document, Bonfrut, was, in fact, been both commercially and factually insolvent.

76. I also draw attention to the fact that from 31 May 2029 (by which date it would certainly have been clear to Mr Uys Junior that Bonfrut was hopelessly insolvent, (having regard to the facts described above) Bonfrut continued to make payment to various creditors, despite not effecting any payments to Challenger in the total amount of R15 771 848.92. This is reflected in the spreadsheet attached hereto, marked “FA24”, the aforesaid amount having been calculated by taking the euro and dollar amounts and converting them to Rands.

[90] Reference to the spreadsheet marked “**FA24**” is admissible as all annexures referred to in the section 417 transcript have already been admitted as evidence.

Para: 77 In January 2020, Mr Uys Senior addressed correspondence to Mr Hart, copying me, Ms Potgieter and Mr Uys Junior:

77.1 recording the terms of the December 2020 meetings;

77.2 recording that the rebates figures had been received from Producer Ally and proposing that 50% of the aforesaid amount be paid to Challenger, with the remainder to be retained by Bonfrut for running costs and bridging. This did not occur and no funds were in fact paid to Challenger. These funds were rather applied to payment of various other creditors of Bonfrut, as is reflected in the spreadsheet referred to in paragraph 76 above;

77.3 stating that he was putting “in every effort to cut and reduce overhead cost to get through this tough period....”

77.4 describing his apparent intention to continue with Bonfrut. This is particularly important as it explains why funds available in Bonfrut (which had not been used to settle Mr Uys Senior, Mr Uys Junior and their family members and employees loan accounts) were directed to payment of its suppliers, as this relationship needed to be maintained so that Mr Uys Senior and Mr Uys Junior could continue trading through Bonex. As appears from what is set forth below, when it became clear that Bonfrut's liquidation was inevitable, a further scheme was conceived of by Mr Uys Senior and Mr Uys Junior to shift the business of Bonfrut and its corporate opportunities to Bonex; and

77.5 it was his intention to do consulting work to generate additional income and eventually carry the running cost of Bonfrut.

[91] Refence to Mr Uys Senior's meeting in a subsequent email is admissible as he confirmed this in his own evidence.

79 Despite being aware of its insolvent position, Bonfrut continued to draw significant sums from its Bond Accounts in an amount in excess of R550 000.00 during the period January to March 2020.

80 The annual financial statements for the financial year ended 31 May 2020, a copy of which is attached hereto, marked "FA26", were signed by Mr Uys Senior, in his capacity as director of Bonfrut on 27 September 2020. Similar to the previous financial years, these financial statements were neither audited nor independently reviewed. I draw attention to the following:

80.1 Mr Uys Senior remained listed as the sole director and signed the financial statements on 10 July 2020. This is despite the fact that Mr Uys Junior was the director until 26 September 2019;

80.2 this is the first set of financial statements in which it is confirmed that Bonfrut did not have adequate financial resources to continue in operation for the foreseeable future. The statement of financial position reflects that Bonfrut was both factually and commercially insolvent;

80.3 despite Bonfrut's insolvent status, it had clearly commenced disposing of its assets (likely in order to avoid their attachment by Bonfrut's creditors), as appears from massive decrease in value of its property, plant and equipment, from R936 426 in the 2019 financial year. The VW Polo, VW Amarok and IT equipment in the value of R85 732,00 were also disposed of, despite substantial investment into IT equipment (in the amount of R201 611.00) having been made in the previous financial year. None of the funds received in respect of any asset disposals were paid to Challenger, despite the fact that it was Bonfrut's most significant creditor.

[92] The factual rendition of what is contained in the financial statements by the deponent in paragraph 80.3 is procedurally acceptable. However, conclusion that this was designed to avoid their attachment by creditors is struck out as it is purely speculative.

80.4 Mr Uys Senior's shareholder loan decreased from R961 644.00 to R51, 644.00 reflecting the continued use of funding to repay the loan accounts of Bonfrut's directors;

80.5 the small loan of R40 000 from Mr Uys Junior in the previous financial year appears to have been repaid in its entirety;

80.6 the "prior period errors" as described above were adjusted, resulting in decreased income, increased expenses and an increase in Mr Uys Senior's

loan account in the amount of R920 000.00 in the financial year ending in May 2019; and

80.7 it was finally recorded that the director is also convinced that the trade receivables are irrecoverable’.

[93] Paragraphs 80.1 to 80.7 relates to conclusions drawn from financial statements.

BONEX STARTS TRADING

81 As appears from annexure “**FA21**” hereto, on 20 September 2019, around the time that Bonfrut started to experience financial difficulties and one month after Bonfrut first fell into arrears in respect of the Challenger Agreement, Ms Potgieter instructed ECAT to incorporate a new entity with a similar name to Bonfrut, being Bonex, with her as the sole director.

82. Approximately a week later, and as appears from annexure “**FA27**” hereto, on or about 26 September 2019 Mr Uys Junior resigned as a director of Bonfrut. However, this was not the end of Mr Uys’ involvement in Bonfrut, as mentioned above.

83. On 10 October Bonex was incorporated. It is from this date that Mr Uys Senior and Mr Uys Junior set about the intentional shifting of the business of Bonfrut to Bonex, as set out below.

[94] Whereas the incorporation of Bonex is factual, the last sentence in paragraph 83 referring to Mr Uys Senior and Mr Uys Junior’s intentional shifting of the business of Bonfrut to Bonex is purely speculative.

84. As appears from annexure “FA28” hereto, at the time of its incorporation, Bonex’s sole director was Ms Potgieter. Evidence obtained during the course of the Enquiry revealed that:

84.1 Ms Potgieter was chosen to be the sole director because:

84.1.1 Bonex was intended to operate the business of export administration, which is the same work which Ms Potgieter had previously been doing for Bonfrut;

84.2 she had been materially involved in the development of the system which Bonex would use to attend to administration business, which had initially been developed for Bonfrut and which had previously been in Bonfrut’s business, for purposes of its own administration. Given the aforesaid, she knew the system better than anyone else; and

84.1.3 Mr Uys Senior himself felt that he could not be a director of Bonex because same would have constituted a conflict of interest, due to the fact that he was already a director of Bonfrut. Despite the aforesaid, during the Enquiry it was confirmed that Mr Uys Junior never actually had anything to do with its operations, same having been entirely run by Mr Uys Senior. The aforesaid makes it clear that My Uys Junior’s appointment as director of Bonex, in circumstances where, in fact, he was not involved in its business at all, clearly reflects that the incorporation of Bonex was a scheme by which Bonfrut’s corporate opportunities were transferred to Bonex, under the guise that it was a separate entity.

85. On 27 November 2019, Ms Potgieter addressed correspondence to Mr Uys Senior in which she stated that she understands Mr Uys Senior reasons behind and decisions regarding Bonex but that she was not prepared to register it in her name, She further stated that she realised that the company had already been registered in

her name and that the customs leg of Bonex still needed to be registered, however, she indicated that she was not prepared to take on such a big risk in her personal capacity because there was no guarantee that, if there were issues, that she wouldn't sit with a massive burden on her shoulders for which she may be held personally liable, but which she did not create. Ms Potgieter further suggested that Bonex be transferred to any other nominated person and that she would prefer not to proceed with any further registrations (being a reference to the registration of Bonex as an exporter) until transfer was finalised. Finally, she stated that Mr Yus Junior might be a suitable person to take over and offered to compile the customs forms with the new details. A copy of correspondence (and sworn translation thereof) is annexed hereto marked "**FA29**".

86. When questioned during the course of the Enquiry on why she sent the aforesaid correspondence, Ms Potgieter confirmed that Mr Uys Senior had instructed her to register Bonex as an exporter and it was then that she realised that it was Mr Uys Senior's intention to continue the business of Bonfrut through Bonex.

87. Whilst during the Enquiry Mr Uys Senior denied that he had instructed her to do so, he did not mention in his email response to her that she should not attend to such registrations, which would have been expected if his version is to be believed.

88. On 28 November 2019, Ms Potgieter addressed correspondence to ECAT in which she informed them of her intended resignation as sole director of Bonex and that Mr Uys Senior and Mr Uys Junior should be added as the new directors. She further requested for the shares to be transferred to the Gerhard Uys Family Trust. A copy of the correspondence (and the sworn translation thereof) is attached marked "**FA30**".

89. On the same date, Ms Potgieter addressed further correspondence to ECAT in which she corrected her earlier request to the effect that Mr Uys Junior should be appointed as the sole director and shareholder of Bonex. See annexure "**FA31**".

hereto, which contains a copy of the aforesaid correspondence (and the sworn translation thereof). On that same date, Mr Uys Junior was appointed as the sole director of Bonex (despite playing no active role in the business whatsoever, all responsibility having been delegated to Mr Uys Senior) and Ms Potgieter resigned as director. In this regard, I refer to annexure “**FA22**”.

90. On 28 November 2019, Mr Uys Junior was issued 120 Ordinary Non-Par share in Bonex, for an issue price of R120.00, as appears from Share Certificate number 2, a copy of which is annexed hereto marked “**FA32**”.

[95] Paragraphs 85 to 90 constitute the factual background elicited from the evidence at the Enquiry. Those proceedings have already been admitted as evidence.

[96] Paragraphs 91 to 95 is a summary of the evidence given at the enquiry. As previously stated, those proceedings have been admitted as evidence.

Paragraph 96: The link between Bonfrut and Bonex is further clear when one has regard to the following:

96.1 the similarity in the registered names – when asked to comment on the similarity of the names of Bonfrut and Bonex, Mr Uys Junior explained that the reason for that is probably to strengthen the association with Bonfrut, as it is a well-known name in the industry;

96.2 the fact that Bonex was incorporated by one of Bonfrut’s employees and the instruction to incorporate Bonex was given to them in their capacity as such;

96.3 Bonex's registered address was, until 17 November 2021, the Durbanville property owned by the Bonfrut.

96.4 On 18 February 2020, Mr Uys Senior instructed ECAT to include Bonex on Bonfrut's E-Filing 9SARS) profile. A copy of the aforesaid correspondence (and the sworn translation thereof) is annexed hereto, marked "**FA34**" hereto.

96.5 Bonex uses Bonfrut's systems to conduct its business, such system having been specifically designed to be capable of being used by multiple companies. In this regard:

[97] Paragraphs 96.1 to 96.5 is a summary of the evidence.

Attempt to Divert Payments Due to Bonfrut

97. On or about 3 July 2020, Challenger brought a liquidation application against Bonfrut under case number 8359/2020, by virtue of the fact that it had breached the Discounting Agreement and owed Challenger (at the time of launching) **USD 554 993.21**.

98. On 5 July 2020, two days after the liquidation proceedings were launched, Mr Uys Senior sent a WhatsApp message to Ms Potgieter, instructing her to credit the offtaker's accounts with the amounts that was [sic] due to the growers (farmers) by generating credit notes for each of the customer (offtaker) invoices. Mr Uys Seniro stated that the balance that would remain in the offtaker's account would be for the physical costs that Bonfrut incurred. Mr Uys Senior further instructed Ms Potgieter to create a company for each of the growers (farmers) in the export administrative system (i.e. Bonfrut's system which was later used by Bonex) and to generate invoices to the offtakers in the respective growers' (farmers) names. A copy of the

aforesaid correspondence (and the sworn translation thereof) is annexed hereto, marked "**FA37**".

99. A provisional liquidation order was granted on 8 July 2020, and such order was made final on 30 July 2020. Copies of the aforesaid court order are attached hereto, marked as annexure "**FA38**" and "**FA39**" respectively.

[98] Paragraphs 98 to 99 is the factual background based on the evidence given at the Enquiry.

123. As fully explained above, Bonex was used by Mr Uys Senior and Mr Uys Junior:

123.1 such that there was no distinguishable corporate identity between Bonex and Bonfrut;

123.2 for a dishonest and improper purpose;

123.3 as a device or façade to conceal wrongdoing;

123.4 in manner which adversely affects a third party in a way that reasonably should not be countenanced such that it constituted an unconscionable abuse of the juristic personality of Bonex.

[99] Paragraphs 123.1 to 123.4 objected to by the Respondent is a conclusion drawn by the deponent as and it clearly sets out those are based on the explanation already given. They therefore are not struck out.

The striking out of the replying affidavit

[100] As earlier alluded to, the Respondents seek the striking out of certain paragraphs of the Applicant's replying affidavit mainly on the basis that they constitute new matter.

Para 38: In any event, this explanation is simply not good enough, given that it is common cause that Mr Uys Junior was a director of Bonfrut from 16 October 2016 to 26 October 2019 and therefore owed it various fiduciary duties. The answering affidavit is replete with admissions reflecting Mr Uys Junior's complete abdication of his duties.

38.1 "My role, responsibility and duties did not change when I became a director [of Bonfrut] (para 57 of the founding affidavit);

38.2 "Invoices were offered to [Challenger] for discounting in terms of the [Discounting Agreement] upon instructions from my father when it necessary for cash flow purposes ... I did not decide on when or how this was necessary as it was the function that was always fulfilled by father even when I was a director of the company" (paragraphs 34.1 and 34.2 of the Answering Affidavit);

38.3 'I also did not make any decisions as to how the funds obtained [from Challenger] would be spent. In as far as I authorised any payments from these funds it was always done on the instructions of my father" (paragraph 12.3 of the Answering Affidavit".

38.4 "I have never (before I was a director of Bonfrut or thereafter) had any involvement in the preparation of financial statements or making any policy decision regarding the management of Bonfrut ... This was

always the realm of my father who was always in absolute control of the business, was responsible to manage its cash flow, made decisions as to when and how it was necessary to obtain finance (including when to offer invoices to [Challenger] for discounting". (paragraphs 43 to 44 of the Answering Affidavit);

38.5 *"I did not make marketing decisions or prepare budgets, neither was I responsible for the financial planning of Bonfrut. It was never my responsibility to make any decisions regarding financial planning or budgeting"* (paragraph 63 of the Answering Affidavit);

38.6 "I was not involved in projects regarding financial due diligence procedures, calculating of profit margins, financial modelling considering the liability of Bonfrut ..." (paragraph 63 of the Answering Affidavit);

38.7 "It is similarly denied that I played any key role in the financial administration of Bonfrut. Both before and after I became a director, my input was limited for the most part to actioning instructions from my father in the conduct of the business of Bonfrut (paragraph 67 of the Answering Affidavit);

38.8 *"It is correct hat I was appointed as director of Bonfrut on 15 October 2018 and that I resigned on 28 September 2019. However, I never, on a practical level exercised general executive control over the management of any part of the business Not before, during or after my appointment as director"* (paragraph 70 of the Answering Affidavit);

38.9 *“My father was always in full control over the management and executive functions of the business.”*

[101] The conclusions reached by the Applicant in paragraph 38 appear to be drawn from Mr Uys Junior’s answering affidavit and do not constitute new matter.

Para 39: In other words, Mr Uys Junior’s version is that both before, during and after the period in which he was a director of Bonfrut, he had no qualms with:

39.1 actively participating in the procurement of funding amounting to tens of millions of Rands from Challenger (as will be addressed below), absent any knowledge of Bonfrut’s financial position whatsoever;

39.2 releasing payments from the funds received from Challenger in accordance with his father’s instructions and without any consideration as to whether any portion of the funds received should be retained or applied to some other purpose or whether the provisions of the Discounting Agreement were being complied with; and

39.3 releasing payments from the funds received from Offtakers in accordance with his father’s instructions and without any consideration as to how those funds should be applied or to Challenger’s rights in respect of same (it being apparent from the evidence at the enquiry, as described above, that he was aware of and understood the import of the cession and the underlying claim to Challenger).

[102] The conclusions appear to be based on Mr Uys Junior's answering affidavit and evidence at the Enquiry and do not constitute new matter.

Para 41 I can think of no better example of reckless trading than a director assisting with the procurement of extensive funding without any knowledge whether it was required or why, and then blindly following instructions in respect of the use of all funds received. It goes without saying that such conduct is delinquent.

Para 50: On a best case scenario for him, he was duty bound to properly consider the terms of the Challenger Agreements during the period in which he was a director, given the extent of the funding which was provided to Bonfrut to by Challenger. (last sentence),

53 Mr Uys statement that "There is accordingly nothing strange/reckless/untoward that the funds from Challenger were used to pay creditors and loan accounts" is difficult to understand, given that the funds were provided on the basis that they would be used to purchase fruit, rather than to fund Bonfrut's cash flow requirements generally and to allow it to make repayment of any and all amounts owing by it to the Uys Family, its employees and their friends.

54 In fact I am advised that Bonfrut's conduct in seeking funding from Challenger on the basis that the funds would be applied to advance purchase of fruit whilst actually intending to utilise the funds to repay loan accounts and pay creditors, and then implementing that intention constitutes fraud in itself.

55 To the extent that Mr Uys Junior denies that he had knowledge of the limited purpose to which the funds could be applied (given that he denies

having knowledge of all the terms of the Challenger Agreements in detail) this makes his conduct all the more negligent.

56 To be clear, during the period in which Mr Uys was a director of Bonfrut, Bonfrut acquired funding valued at R20 million from Challenger, and it therefore goes without saying that Mr Uys Junior was duty bound at the very least, to obtain knowledge of the purpose for which these funds were provided and to apply them for that purpose. he common cause fact that funding from Challenger was acquired

65 Mr Uys was a director at the time that Bonfrut first defaulted in its payment obligations to Challenger. Having regard to his fiduciary duties, one would expect him to be in a position to provide some explanation as to how it came about that Bonfrut was not able to make payment to Challenger of the amounts owing. Of course, having regard to his version, he is apparently unable to do so because he had no idea whatsoever what was going on with the finances of the business, his role having been limited to follow his father's instructions without question or concern.

[103] Paragraph 65 is struck out as it constitutes the opinion of the deponent to the replying affidavit.

66 Mr Uys Junior's extreme negligence is obvious.

[104] Paragraph 66 is struck out; the conclusion constitutes the deponent's opinion.

69.14 It therefore appears that whoever actioned the repayment (being on the common cause facts, either Mr Uys Senior or Mr Uys Junior) did not even care to check that any amount was owing at all.

[105] Paragraph 69.14 is not new evidence but rather a conclusion drawn from the common cause fact that either Mr Uys Junior or Mr Uys Senior would attend to payments.

74 The reason is that the numbers very obviously don't make sense.

74.1 Challenger makes payment to Bonfrut of 80% of the value of an Offtaker Invoice;

74.2 With these funds, Bonfrut;

74.2.1 must pay the producer 50% (in advance) in respect of its invoice for the fruit which Bonfrut will export and sell;

74.2.2 must make payment of all the costs associated with exporting the fruit as well as its own internal business costs; and

74.2.3 according to Mr Uys Junior, repay accounts of Charl Uys loan account.74.3 Bonfrut then receives from an Offtaker (i.e. 100%) and at this point must:

74.3.1 pay Challenger 80% of the amount received plus interests and costs.

74.3.2 pay producer 50% of the cost price of the fruit. It would never have been possible to pay the amount from the (less than) 20%

remaining of the amount received unless, of course Bonfrut 's profit margins were astronomically high³high clearly wasn't the case given:

74.3.2.1 Bonfrut's insolvency; and

74.3.2.2 The contents of the financial statements, on Mr Uys Junior's version are correct, and reflect that in the 2018 financial year, Bonfrut s total profit was R598 000.00 and in the 2019 financial year, Bonfrut's total profit was R33 486, such that it would never have been able to recover the repayment to Challenger. Of course, for the reasons stated above, its financial position was clearly considerably worse that what was reflected in the financial statements.

[106] Flowing from the foregoing, and for the reasons already stated, the following paragraphs of the founding affidavit are struck out:

Paragraphs: 51.5.2; 52 to 59; 63.3.2 to 63.3.4; 63.4; 63.5.1 to 63.5.2 and the last sentence of paragraph 63.6.

Paragraphs: 63.9.3, 63.10 and the last sentence of 63.5.

Paragraphs: 70.3 and 96.1.

[107] Regarding the replying affidavit, I have found that none of the paragraphs sought to be struck out constitute new matter. To this end, the application to strike out must fail.

[108] The determination of the foregoing applications delineates the evidence from which the court may assess whether the Applicant has

made out a case for the relief sought in terms of section 424 of the Companies Act, 1973, as well as section 20(9) of the Companies Act, 2008.

Issues for determination

[109] As discernible from the factual matrix, the following issues for determination arise:

109.1 Whether the First and the Fourth Respondent knowingly conducted the business of Bonfrut whilst it was trading in insolvent circumstances and with the intention to defraud the creditors of Bonfrut.

109.2 Whether the First Respondent incurred Bonfrut's liability to the Applicant and then used these funds to repay significant loan accounts and other creditors of Bonfrut, knowing that the result would be that Bonfrut would not be able to satisfy the liability owed to the Applicant.

109.3 Whether the Fourth Respondent was established as a shell company to take over Bonfrut's business, allowing inter alia the First Respondent to divert assets and evade liability for the debts owed to the creditors of the, and in particular, the Applicant;

109.4 Whether the conduct of the First Respondent in shifting Bonfrut's financial liabilities, manipulating financial statements and concealing its insolvency, amounts to reckless or dishonest conduct in terms of section 424 of the 1973 Act;

109.5 Whether the First Respondent should be declared personally liable for all the debts of Bonfrut due to reckless or fraudulent trading in terms of section 424 of the 1973 Act.

109.6 Whether the First Respondent should be declared a delinquent director based on his conduct in relation to Bonfrut.

109.7 Whether the Fourth Respondent was used inter alia the First Respondent:

109.7.1 such that was no distinguishable corporate identity between Bonex and Bonfrut;

109.7.2 for a dishonest or improper purpose;

109.7.3 as a device to conceal wrongdoing;

109.7.4 in a manner which adversely affects a third party in a way that reasonably should not be countenanced;

109.7.5 such that it constitutes an unconscionable abuse of the juristic personality of the Fourth Respondent.

109.8 Whether the Bonfrut and the Fourth Respondent should be treated as a single entity under section 20(9) of the 2008 Act.

109.9 Whether the Fourth Respondent should be declared to be jointly and severally liable with the First Respondent for the debts of Bonfrut to the Applicant in terms of section 20(9);

109.10 Whether the evidence obtained at the Commission of Enquiry into Bonfrut's business dealings and affairs, in terms of section 417 and 418 of the 1973 Act read with Item 9, Schedule 5 to the 2008 Act can be admitted and relied upon by the Applicant,

Analysis

[110] The Applicant alleges that the First Respondent, as a director of Bonfrut carried on its business in a reckless manner with intent to defraud Challenger by continuing to operate it whilst knowing very well that it was insolvent and was incurring new debts whilst it could not pay existing ones and failing to place it under business rescue when circumstances were demanding that course of action. It will be recalled that in Claim A, the Applicant seeks that the First Respondent be declared liable for the debts of Bonfrut (Pty) Ltd (in Liquidation) as contemplated in section 424 of the Companies Act 61 of 1973 read with Item 9, Schedule 5 to the Companies Act 71 of 2008. In Claim B the

Applicant seeks an order as contemplated in section 20(9) of the 2008 Companies Act that:

110.1 the Fourth Respondent, Bonex be deemed not to be a juristic person separate from Bonfrut;

110.2 pursuant to the declaration in paragraph 101,1 above, that Bonfrut and Bonex shall be regarded as a single entity by ignoring their separate legal existence and treating Bonfrut as if it were the only company;

110.3 that Bonex is liable to Challenger in the amount owed by Bonfrut to Challenger.

[111] Liability of a director is governed by section 76 (3) of the Companies Act, 2008 which provides as follows:

“... a director of a company when acting in that capacity, must exercise the powers and perform the functions of a director –

- (a) in good faith and for a proper purpose;
- (b) in the best interests of the company; and
- (c) with the degree of care, skill and diligence that may reasonably be expected of a person:-
 - (i) carrying out the same functions in relation to the company as those carried out by the director; and
 - (ii) having the general knowledge skill and experience of that director.”

[112] Section 77(2) (a) provides that a director of a company may be held liable in accordance with the principles of the common law relating to breach of fiduciary duty, relating to any loss, damages or costs sustained by the company as a result of any breach by the director of a duty

[113] The Applicant is seeking final relief in motion proceedings on the basis that the facts as stated by the respondents together with the admitted facts in the Applicant's affidavit justify the orders sought. Furthermore, where facts are denied by the Respondents, it nonetheless is clear that the facts, though not formally admitted, cannot be denied and must be regarded as admitted.

[114] I first deal with Claim A. Section 424 of the 1973 Companies Act provides as follows:

“When it appear ... that any business of [a] company was or is being carried on recklessly or with intent to defraud creditors of the company or creditors of any other person or for any fraudulent purpose, the Court may, on the application of ... any creditor ... of the company, declare that any person who was knowingly a party to the carrying on of business in the manner aforesaid, shall be personally responsible without any limitation of liability, for all or any of the debts or other liabilities of the Company as the Court may direct.”

[115] In *Ebrahim and Another v Airport Cold Storage (Pty) Ltd* 2008 (6) SA 585 (SCA) at para [15] Cameron JA outlined the policy considerations behind section 424 thus:

“[T]he function of the statutory provision also shapes its application. Although juristic persons are recognised by the Bill of Rightsit is an apposite truism that close corporations and companies are imbued with identity only by virtue of statute. In this sense their separate existence remains a figment of law, liable to be curtailed or withdrawn when the objects of their creation are abused or thwarted. The section retracts the fundamental attribute of corporate personality, namely separate legal existence, with its corollary of autonomous and independent liability of debts, when the level of mismanagement of corporations s affairs exceeds the merely inept or incompetent and becomes heedlessly gross or dishonest. The provision in effect exacts a quid pro quo: for the benefit of immunity from liability for debts, those running the corporation may not use its formal identity to incur obligations recklessly, grossly negligently or fraudulently. If they do, they risk being made personally liable.”

[116] Counsel for the Applicant contended that the First Respondent and Bonex have knowingly conducted the business of Bonfrut whilst it was trading in insolvent circumstances and with intent to defraud creditors of Bonfrut, specifically Challenger in that:

116.1 the First Respondent used the proceeds from the purchased invoices which were ceded to Challenger in terms of the

Challenger Agreements to pay company expenses and other creditors, instead of paying Challenger;

116.2 the First Respondent intentionally shifted Bonfrut's business to Bonex, to avoid Bonfrut's liability to Challenger and other creditors;

116.3 payments actually due to Bonfrut were intentionally redirected to growers/farmers to defraud Challenger and other creditors of Bonfrut.

116.4 the true state of Bonfrut's financial affairs was intentionally concealed through inaccurate and false accounting records, which were given to Challenger and other Creditors of Bonfrut;

116.5 Bonfrut was incorporated and used in a manner such that there was no distinguishable corporate identity between Bonex and Bonfrut, to avoid or conceal Bonfrut's liability to Challenger.

[117] According to the argument, this conduct constitutes a further ground which warrants a declaration of personal liability on the part of the First Respondent and Bonex for the debt owed to Challenger. Accordingly, the First Respondent and Bonex ought to be liable for the debts of Bonfrut, jointly and severally, the one paying the other to be absolved, as contemplated in section 424 of the 1973 Act.

[118] With regard to Claim B, It was contended on behalf of the Applicant that Bonex was used by Mr Uys Senior and the First Respondent:

118.1 such that there was no distinguishable corporate identity between Bonex and Bonfrut.

118.2 For a dishonest purpose

118.3 As a device or façade to conceal wrongdoing ;

118.4 in a manner which adversely affects a third party in a way that reasonable should not be countenanced such that it constituted an unconscionable abuse of the juristic personality of Bonex.

[119] For the Applicant to succeed in Claim A of this application, it must prove on a balance of probabilities that the First Respondent had knowledge of the facts from which a conclusion can be drawn that Bonfrut's business was being carried recklessly or with intent to defraud. As formulated in *Philotek (Pty) Ltd and Others v Snyman and Others* 1998 (2) SA 138 (A)M at 143 G-H, the test for recklessness is objective and the defendant's objectives measured against the standard conduct of the notional reasonable person and is subjective insofar as one has to postulate that notional being as belonging to the same group or class as

the defendant, moving in the same spheres and having the same knowledge or means to knowledge.

[120] Counsel for the First and Fourth Respondents argued that the evidence tendered does not establish that Bonfrut's business was carried recklessly or with intent to defraud or for a fraudulent purpose. According to this contention, no proof of subjective intent to defraud creditors has been established because where a director incurs a transaction on behalf of a company subjectively believing that a company will be able to honour it, it cannot be said that he/she carries on with intent to defraud, no matter how unreasonable the belief was. That said, Challenger has not shown that Mr Uys Junior was knowingly a party to the carrying on of the business in a manner to defraud creditors. Neither can it be inferred that Mr Uys Junior was aware of the facts from which the conclusion can be drawn that the business of Bonfrut was carried on in the manner set out in section 424(1), and that he participated in respect of the carrying out of the business in such a manner by either taking positive steps with the requisite knowledge. This, according to the argument is so because one cannot impute knowledge to a director who did not have it but should have, had he been diligent as was held in *Fourie v Braude and Others* 1996 (1) SA 610 (T) at 614 G-J to the following effect:

“In my view, ... a director may well be regarded as a party to reckless or fraudulent conduct where he does nothing, provided his supine attitude can on the facts be interpreted as a condonation of and concurrence in the conduct complained of. In such a case, he knows of the conduct and does nothing.

It is a far cry, however, from this situation to one where the director 1.has knowledge at all of the conduct complained of. By knowledge I do not mean detailed knowledge but at least a knowledge that something fishy is being perpetrated and the refusal or wilful neglect to make enquiries. One cannot however, in my view, go one step further and impute knowledge to a director who did not have it but should, had he been diligent, have acquired it. That situation cannot be brought home under the wording of s 424 of the Companies Act”

[121] Against this backdrop, in determining the issues and analysing the evidence in this application I recap the factual matrix. I have already stated that the agreements entered into between Challenger and Bonfrut on 23 January 2018 were the following:

11.1 a Full Recourse Invoice Discounting Agreement;

11.2 a Cession in Security Agreement;

[122] The terms of the Challenger Agreements are not in dispute. They are that:

122.1 Challenger would purchase Bonfrut's right, title and interest to Bonfrut's claims against a particular Offtaker, in respect of a particular invoice relating to the sale of specified fruit ("Commodities") by Bonfrut to that Offtaker. In the papers, this is referred to as the "Sale Transaction". Bonfrut would cede its right to payment in respect of each Offtaker Invoice to Challenger;

122.2 Payment of the purchase price by Challenger to Bonfrut in respect of each Sale Transaction would be made on a specific date, which was referred to as the "Purchase Date";

122.3 The purpose of the transaction was to generate cash flow for Bonfrut to purchase the Commodities in advance of harvest, the Purchase Date would be earlier than the due date for payment to Bonfrut by the Offtaker, in terms of the relevant Offtake Invoice;

122.4 Challenger would recover the Purchase Price, plus additional amount specified in the Discounting Agreement, from the amount paid to Bonfrut by the relevant Offtaker in terms of the relevant Offtaker Invoice;

122.5 In the event that the Offtaker Invoice was not paid by a particular date, as specified in the relevant Sale Transaction, Bonfrut would become liable to make payment to Challenger of the

amount specified in the relevant Offtaker Invoice, plus an additional amount as specified in the Discounting Agreement.

[123] It is undisputed that Bonfrut has gone into liquidation and Challenger's claim against Bonfrut has been proven in Bonfrut's insolvent estate, in the amount of R9 583 692.00.

[124] In order to fully comprehend the basis for the relief sought by the Applicant, it is necessary to record how the terms of how the agreements were implemented. According to the evidence of witnesses at the Enquiry, the Challenger agreements operated in the following manner:

124.1 a Supplier would invoice Bonfrut for various Commodities ("the Supplier Invoice");

124.2 as soon as a Supplier's Commodities were loaded, Bonfrut would invoice the Offtaker (purchaser of the fruit);

124.3 that Offtaker Invoice, together with supporting documentation, was then sent to Challenger, who would then make payment to Bonfrut of an amount equal to 80% of the Offtaker Invoice value;

124.4 these funds would then be used by Bonfrut to pay the Supplier 50% of the Supplier Invoice;

124.5 as soon as the Offtaker paid the Offtaker Invoice amount into Bonfrut's forex account (who received same on behalf of Challenger, Challenger having taken cession of the right to payment of the Offtaker Invoices), the amount owing to Challenger in terms of the Discounting Agreement would fall due to be paid from Bonfrut's US Dollar Forex account and the balance owing to the Supplier in terms of the Supplier Invoice would be paid.

[125] Taking the contractual context into account, I turn to examine the First Respondent's role in Bonfrut.

[126] With regard to Claim A, it is undisputed that the First Respondent was employed by Bonfrut for a couple of years. More specifically, his LinkedIn profile reflects that he was employed by Bonfrut for a period of 7 years and 11 months as a "Marketing and Financial Analyst and assistant to the CEO. His role and responsibilities are defined as follows:

"Responsible of [sic] all marketing decisions regarding reports to the UK, European and Middle Eastern Markets.

Responsible for key financial tasks in assistance to the CEO regarding budgeting, financial planning and financial analysis.

On a secondment basis, worked on projects relating to financial due diligence procedures by calculating profit margins of essential sales products, short to long term liabilities, financial modelling and integrating VBS into the database enhancing the data input and output efficiency."

[127] As to Bonfrut's reckless trading, Ms Ferreira, an operational and administrative employee, testified that she administered payments to creditors under the direct instruction of Mr Uys Junior and Mr Uys Senior. In her evidence, she explained how the funds from Offtaker invoices, ceded to Challenger, were instead used to pay other creditors, in violation of Bonfrut's agreement with Challenger. In the same vein, Ms Potgieter, a former procurement/sales employee, confirmed that the payments made by Bonfrut were often applied to other creditors whereas Challenger had a priority right to the proceeds from Offtakers Invoices. She also confirmed that the funds were applied to Bonfrut's own expenses before payments to Challenger were made. Mr Charl Uys confirmed that reckless financial strategies were employed by the company's directors. Put in another way, he confirmed the overall financial mismanagement at Bonfrut. The upshot of the evidence of the witnesses referred to above is that it was tendered to demonstrate the financial mismanagement and reckless trading engaged in by Bonfrut's directors and employees.

[128] This is further supported by the fact that Mr Uys (Junior)'s evidence, which unequivocally establishes that Challenger, notwithstanding being a priority creditor of Bonfrut, was not paid in accordance with the agreements whilst other creditors were preferably

paid, and this is what led to Challenger seeking the liquidation of Bonfrut. In his evidence, Mr Uys Junior confirmed that he attended to the calculations on payments to be made to Challenger based on Bonfrut's cash flow.

[129] In his evidence before the Enquiry, the First Respondent confirmed that he had access to Bonfrut's financial systems and was able to see the amounts owed to Bonfrut creditors at all times, inclusive of the amounts owed to Challenger. This is confirmed by Ms van Niekerk, Ms Potgieter and Mr Uys Senior. Ms Potgieter further confirmed that the First Respondent was responsible for creditor payments and in particular, payment to and the administration of Challenger. Likewise, Ms Ferreira and the First Respondent himself confirmed that Challenger was the First Respondent's responsibility. According to the Applicant, the First Respondent exercised general executive control over and management of the whole, or a significant portion of Bonfrut activities even before and after he was appointed as a director. Thus, he was a prescribed officer of Bonfrut as envisaged in Regulation 38 of the Companies Regulations, 2011,¹ before 17 October 2018 as well as after

¹ Section 66(10) of the Companies Act provides that the Minister may make regulations designating any specific function(s) within a company to constitute prescribed office for the purpose of the Act. m m Regulation 38 provides that despite not being a director of particular company, a person is a prescribed officer of the company for all purposes of the Act if that person:

3.1 exercises general executive control over and management of the whole, or a significant portion, of the business and activities of the company;

3.2 regularly participates to a material degree in the exercise of general executive control over and management of the whole, or a significant portion, of the business activities of the company.

his resignation as director thereof on 26 September 2029. To this end, Mr Uys Senior confirmed during his evidence that even after his resignation as director of Bonfrut, the First Respondent continued to render the same services to Bonfrut, although these services diminished over time. The Applicant suggests that because prescribed officers have precisely the same fiduciary duties and duty of care, skill, and diligence as directors, he carried the same responsibilities as those of a director.

[130] The nub of the Applicant's case seems to be that even at the stage the Challenger agreements were concluded, Bonfrut was recklessly trading in that it was carrying on business and incurred debts when in the opinion of a reasonable man there was no prospect of the creditors receiving payment when due and that directors were aware that creditors money was being unreasonably risked for the following reasons:

130.1 Pursuant to the Challenger Agreements, and just five days after the conclusion of the Sale Transaction:

130.1.1 Bonfrut lost significant volume in both citrus and grapes resulting in a dramatic decrease of its turnover;

130.1.2 Bonfrut needed to incentivise its staff to increase volume through a commission structure;

130.1.3 Bonfrut was not profitable (despite the 2017 financial statements reflecting differently); and

130.1.4 Attaching a proposal through which the salary structure applicable would be changed.

[131] Accordingly, in my view, on this basis alone, both Mr Uys Senior and the First Respondent must have been aware that there was a significant risk that Bonfrut would be unable to repay its indebtedness to Challenger, particularly if one or more of the Offtakers did not make payment to it of an Offtaker Invoice on or before the due date, therefore. This finding is fortified by the fact that the First Respondent, according to his own evidence, was very much aware of the terms of the Challenger Agreements, and more particularly the cession of the claim to payment of the Offtaker Invoice to Challenger, yet he had no qualms with:

131.1 actively participating in the procurement of further funding from Challenger amounting to millions of Rands whilst knowing full well the precarious financial position Bonfrut was in;

131.2 released payments from the funds received from Challenger in accordance with Mr Uys Senior's instructions without any consideration of whether the Discounting Agreement was being complied with. Clause 2.1. of the Discounting Agreement provides that *"Bonfrut requires finance which will enable it to finance the*

purchase of the Commodities [fruit] from the Suppliers [Producers] (“the Purpose”) and Challenger is desirous of providing financial assistance to Bonfrut on an uncommitted basis for this Purpose.”

The First Respondent confirms in his affidavit that *“the funds obtained from [Challenger] in terms of the agreement were used to [pay] creditors and loan accounts.”*

131.3 released payments from the funds received from Offtakers in accordance with Mr Uys Senior’s instructions and without any consideration as to how those funds should be applied to Challenger’s rights in light of his awareness of the cession agreement.

[132] To be more specific to the period in which the First Respondent was a director, the common cause facts establish that:

132.1 Bonfrut obtained funding from Challenger in the amount of USD 130 000,00;

132.2 Bonfrut paid out over R1.3 million in respect of loans obtained by it from the Uys family, its employees and friends of the Uys family; and

132.3 Bonfrut fell into arrears in respect of the amounts owing to Challenger during the period in which the First Respondent was a director.

[133] The foregoing facts show that Bonfrut was trading recklessly. This I say advisedly, bearing in mind that not every inability by a company to pay its debts may be construed as reckless trading. However, the facts in casu establish that Bonfrut consistently failed to honour its financial obligations to Challenger whilst securing more financing whilst knowing that it would not be able to pay back Challenger. This finding resonates with what was said in *Ex Parte de Villiers and Another NNO: In re Carbon Developments (Pty) Ltd (In liquidation)* 1993(1) SA 493 (A) at 504 A – C:

“In my judgment, there is nothing wrong in the fact that directors incur credit at a time, when to their knowledge, the company is not able to meet all its liabilities as they fall due. What is manifestly wrong is if directors allow a company to incur credit at a time when the business is being carried on in such circumstances that it is clear that the company will never be able to satisfy its creditors . however, there is nothing to say that directors who genuinely believe that the clouds will roll away and the sunshine of prosperity will shine on then again Abd disperse the fog of their depression are not entitled to incur credit to help them get over the bad time.”

[133] In the matter at hand, it must have been clear to the directors, more particularly the First Respondent that the depression was not going to clear at any time soon, hence resorting to incorporating Bonex to raise funds to meet Challenger contractual obligations as attested to by Mr Uys Senior.

[134] The Applicant also alleges that recklessness or subterfuge of Bonfrut is also borne out in statements, which were presented to Challenger which were materially misstated and misleading. I now turn to consider these issues.

The Financial Statements

[135] According to the Applicant, although the 2018 financial statements (neither audited nor independently reviewed), duly signed by Mr Uys Senior paint a picture of a commercially solvent Bonfrut, the factual reality is that Bonfrut was trading recklessly. In assessing this contention, the following facts from the 2018 Bonfrut financial statements is recorded:

135.1 there was a significant decrease in revenue from R85 million to R75 million in the 2018 financial year;

135.2 despite the decrease in revenue of almost 9million as reflected above, the gross profit increased by over R1.5 million;

136.3Mr Uys Senior's loan account had increased from R531 993.00 to R1 862 068.00

135.3.1 it is recorded that this loan was unsecured, interest free and that it was not expected that same would be repaid within the next 12 months. According to the Applicant, allowed the loan to be categorised as a long-term liability rather than a current liability, thereby creating the impression of a more favourable balance sheet. And, this impression was false as this loan was largely repaid over the next financial year.

135.4there was an increase in trade and other receivables, from R515 046.00 in the previous year to R7 368 306.00;

[136] The evidence of Ms Potgieter is that a significant portion of this amount constituted bad debt and ought to have written off. The Applicant contends that the write off of trade receivables would have made Bonfrut's balance sheet look weaker with the result that Challenger would have been less likely to provide it with finance.

136.1Mr Uys's loan account increased from R531, 993.00 in the previous financial year to R1 862 068.00.

136.2 A substantial loan in the value of R5 million was obtained from Mr Charl Uys:

136.2 both Mr Uys Senior and Mr Charl Uys testified at the Enquiry that the aforesaid loan was not, in fact made by Charl to Bonfrut but was rather made by Mr Charl Uys to Mr Uys Senior and then by Mr Uys Senior to Bonfrut, but:

136.2.1 over the course of the years, Bonfrut's annual financial statements consistently reflected separate (material) balances owing to each Mr Uys Senior and Mr Charl Uys; and

136.2.2 despite the loan being recorded as "payable on demand", it (is similar to Mr Uys Senior's loan) was reflected as a long-term liability on Bonfrut's balance sheet. According to the Applicant this recording in the financial statements was designed to mislead Challenger for if it had been reflected as a current liability, Bonfrut's financial statements would have been shown that it was commercially insolvent.

136.3 Likewise, a loan in the amount of R275 578.00 from Mr Matthys Grobler was reflected as long term liability whereas it should have been reflected as a current liability as it was payable

on demand and was in fact repaid over the next 12 months period) thereby creating an impression of a healthy balance sheet.

136.4 It will be recalled that Bonfrut obtained a loan in the amount of 700 000.00 from Ms van Niekerk in order to enable Bonfrut to pay salaries to its staff members. This loan too was reflected in the financial statements as a long-term liability. The Applicant contends that Mr Uys Senior's confirmation in the 2018 financial statements that he was "*satisfied that [Bonfrut] has or has access to adequate resources to continue in operational existence for the foreseeable future*" is based on a false premise as the status of the loans was deliberately misstated in the financial statements with the intention to create a healthy balance sheet for Bonfrut to secure more funding.

[137] Notwithstanding what is reflected in the financial statement of 2018, it is clear from the uncontroverted evidence elicited at the Enquiry that at the time the Challenger Agreements were signed, Bonfrut was already experiencing significant financial difficulties for the following reasons:

137.1 on 14 September 2017, Bonfrut had borrowed a sum of R700 000,00 from Ms van Niekerk in order to pay salaries as it did not have sufficient funds to do so; and

137.2 over the period 18 to 29 December 2017, (a month prior to the conclusion of the Discounting Agreement) Bonfrut had borrowed an additional R5 million from Mr Charl Uys .

[138] Through the course of the Enquiry and by virtue of information obtained through the liquidation process the following facts emerged:

138.1 in July 2018, payment in the amount of R800 000, 00 was made in reduction of Mr Uys Senior's loan account whilst in the same month finance in the amount of USD 450 000,00 was sought and obtained from Challenger;

138.2 in August 2018, payment in the amount of R1 000 000,00 was made in reduction of Mr Uys Senior's loan account in the same month finance in excess of USD 300 000,00 was sought and obtained from Challenger;

138.3 similarly, in September 2018, payment in the amount of R5 048 219,00 was made with reference 'Charl Uys', presumably in reduction of the loan owing by Bonfrut to Mr Charl Uys in accordance with the financial statements. In the same month, finance more than USD350 000,00 was sought and obtained from Challenger;

138.4 in October 2018, payment of R490 000,00 was made in reduction of Mr Uys Senior's loan account.

[139] The above pattern, according to the financial statements continued after the appointment of Uys Junior as director of Bonfrut on or about 16 October 2018. To this end:

139.1 in December 2018, a payment in the amount of R1million was made in reduction of Mr Uys's loan account subsequent to Bonfrut's seeking and obtaining finance in excess of USD 150 000,00 from Challenger;

139.2 in 2019, in breach of its obligations in terms of the Discounting Agreement, Bonfrut withdrew R400 000,00 from the bond accounts in respect of Bonfrut's Wellington and Durbanville Properties clear indication that funds sought and received from Challenger in excess of USD 80 000,00 were insufficient to sustain Bonfrut's business;

139.3 in February 2019, payment in the amount of R52 000, 00 was made reflected as having been made to the First Respondent and payment of R50 00, 00 was made in reduction of Mr Gobler's loan account in the same month finance in excess of USD 250 000,00 was sought and obtained from Challenger;

139.4in April 2019 payment in the amount of R40 000,00 to the First Respondent. The amount is reflected as being backpay of cell phone expenses and an amount of R159 165.00 was made to Mr Grobler in reduction of his loan account and a sum of R100 000,00 was paid to Ms VAN Niekerk whilst in the same month finance in excess of USD170 000.00 was sought and obtained from Challenger.

[140] It is clear from the evidence elicited at the Enquiry that at the time the Challenger Agreements were concluded on 23 January 2018, the financial difficulties experienced by Bonfrut alluded to above were not disclosed during the signing of the Challenger Agreements and the financial statements presented to the latter reflected a healthy financial status of Bonfrut. Furthermore, the payments effected after the appointment of the First Respondent as director as shown above, were made contrary to the terms of the Discounting Agreements. It is my judgment that the misleading financial statements constituted reckless trading.

The 2019 financial statements

[141] Similar to the 2018 financial statements, the 2019 financial statements for the year ended 31 May 2019 were signed by Mr Uys Senior and were neither audited nor independently reviewed. Thy were

not signed by the First Respondent, who, as i have already indicated was appointed as director on 16 October 2018. As to the 2019 financial statements. In this regard, the First Respondent gave evidence at the Enquiry to the effect that whilst he was aware of the financial statements, he had no real knowledge as to the information they contained. According to the information contained therein, Bonfrut remained factually and commercially solvent. To this end:

141.1 the value of trade receivables had increased from R7.3 million in the previous year to R8.3 million in the current financial year.

[142] The Applicant contends that the evidence at the Enquiry shows that a significant portion of the trade receivables constituted bad debt and should have been written off prior to signature of the financial but that was not done because in order for Bonfrut to secure further financing, an impression of Bonfrut 's commercial solvency had to be created. In addition, because of the First Respondent's position at Bonfrut, he must have been aware (as a reasonable person in his position should have been) that Bonfrut would be unable to pay its debts to Challenger but nonetheless knowingly participated in the procurements of further funding from Challenger and authorised the use of these funds to repay the loan accounts of his family members.

According to the Applicant this assertion is bolstered by the fact that two employees of ECAT who had assisted in the preparation of the financial statements and gave evidence at the Enquiry, Ms Blignaut and Mr Dyer, conceded that prima facie the Challenger funds were used to pay family loans.

[143] The 2019 financial statements reflect that Bonfrut remained both factually and commercially solvent. This is largely based on the fact that the value of trade receivables had increased from R7.3 million in the previous financial year to R8.3 in the current financial year. The Applicant argues that these trade receivables ought to have been written off as bad debts prior to the signing of the financial statements. This was not done because the intention was to inflate Bonfrut's balance sheet and to create an impression that it remained a viable concern to ensure that Challenger, on the basis of this misrepresentation would allow for further repayment of the loan accounts of Mr Uys and his family members. The reality is that the 2019 financial statements reflect that loans from shareholders and other financial liabilities (including the loans from Mr Charl Uys, Ms van Niekerk and Mr Grobler had been paid in full.

[144] According to the 2019 financial statements, VAT decreased from 747 518 .00 to a paltry sum of R77 115.00. The Applicant states that an inference that can be drawn from the is that the VAT liability was

understated to create an impression of a stronger financial position for Bonfrut.

[145] In the Statement of Comprehensive Income an amount of R1.2 million was reflected whereas the amount was incorrect as evidenced in the 2020 financial statements for the year ended February 2020 shown to be R754 091.00 largely due to rental reduction. However, the evidence in the Enquiry confirmed that:

145.1 such rental income had never been received (the First Respondent and Mr Uys Senior having resided in Bonfrut's immovable property rent free);

145.2 the aforesaid entry created the impression of a more favourable financial position; and

145.3 after the liquidation of Bonfrut this entry was reversed, resulting in an increase in Mr Uys Senior's loan account.

[146] It also transpired at the enquiry that certain other expenses were understated, for example, motor vehicle expenses, interest which had an effect of increasing Mr Uys Senior's loan account. The upshot of all the foregoing undisputed financial facts is that through the Challenger finance, payment was made to certain creditors in contravention of the Discounting Agreement.

[147] This in essence suggests that Bonfrut made payments to certain preferred creditors whereas, Challenger was entitled to all funds in respect of Offtaker Invoices.

The 2020 financial statements

[148] It is common cause that the First Respondent resigned as Director at Bonfrut on 26 September 2019. However, the Applicant contends that despite his resignation, testimony obtained at the Enquiry reflects that he retained transactional authority and continued to perform the same duties as those he had performed as director in that he:

148.1 participated in the exercise of executive control over the management of the whole or a significant portion of Bonfrut and/or its activities;

148.2 participated in the running of the day-to-day business of Bonfrut;

148.3 was one of the controlling minds behind Bonfrut.

[149] Thus, he remained a prescribed officer of Bonfrut for the purposes of section 38 of the Companies Regulations 2011. According to the Applicant, the First Respondent ought to be found liable for Bonfrut's debts on this basis alone.

The First Respondent's defence

[150] The First Respondent denies that proceeds from invoices which were ceded to Challenger were paid to other creditors other than Challenger. The denials must be assessed in the light of the common cause facts which are the following:

150.1 It is not in dispute that the funds provided by Challenger to Bonfrut are no longer with Bonfrut.

150.2 Bonfrut's financial statements for the year ending 31 May 2017 purport to show a healthy financial picture as Bonfrut's assets exceeded its liabilities by approximately R5,5, its revenue had increased to from R82million in the previous year and its gross profit from R5.2 million to R6 million.

150.3 despite this apparent healthy balance, by 14 September Bonfrut was unable to make payment of salaries owing to staff and a loan in the sum of R700 000.00 was procured from Ms van Niekerk. In addition, a further loan in the amount of R5million was obtained from Mr Charl Uys in December 2017.

150.4 a month later Bonfrut entered into a Discounting Agreement and the first Sale Transaction was concluded on 14 February 2018. Five days after the conclusion of the first sake transaction

and on 19 February 2018, Mr Uys addressed correspondence to all Bonfrut staff members advising that:

150.4.1 Bonfrut had lost considerable volume over the 2017 season, both in citrus and grapes;

150.4.2 Bonfrut was conducting business at a loss and could not continue in that manner indefinitely;

150.4.3 overheads had to be reduced and drastic action needed to be taken by way of moving staff onto a commission structure.

[151] The First Respondent contends that he did not make any decisions concerning Bonfrut's business both prior to his appointment as director and during the term of his appointment as such. Even on this score I find the First Respondent's denials as being untenable as his own evidence shows that he was well aware of the intended operation of the Challenger Agreements and in fact loaded some of the payments to Challenger on his own accord. The scope of his operation as a director is quite vast, as attested to by his own LinkedIn profile and his role and functions as someone responsible for the Challenger accounts demanded that he, at least be well versed of the of the obligations Bonfrut had to discharge, the amount of the debt. The evidence is overwhelming that he participated in the day-to-day management of the

affairs of Bonfrut and the extent of Bonfrut's financial difficulties ought to have been obvious to him when the company could not meet its basic obligations of paying salaries to its employees and repeatedly took loans from staff members. In my opinion, the First Respondent knew the factual situation, namely that Bonfrut in addition to obtaining loans, it was not honouring the Discounting Agreement with Challenger, yet more finance was required. In other words, Bonfrut continued to incur debts in circumstances where it could not meet its basic obligations, and the First Respondent was a party to conduct that went beyond the realm of just poor judgment and crossed into gross negligence. In my view, therein lies the recklessness in Bonfrut's trading. The First Respondent also admitted that the funds obtained from Challenger were used to pay other creditors much against the purpose for which they were obtained.

[152] The First Respondent also challenges the contents of the accounting records and avers that they should be treated with circumspection as the conclusions drawn by Challenger from the financial statements were largely speculative as Bonfrut never experienced any financial difficulty and it was expected that it would meet its financial obligations towards Challenger. According to him, the financial statements presented a true account of Bonfrut's financial position.

[153] It is indeed so that the financial statements were completed and signed off by Mr Uys Senior. However, the duties assigned to the First Respondent as director of Bonfrut were of such a nature that he knew the relevant facts pertaining to Bonfrut's trading as he was responsible for tendering payments to Bonfrut which, as a reasonable business person he would have effected after reviewing Bonfrut's financial affairs. I am satisfied that on the facts of the present matter, Bonfrut was trading recklessly and this was known to the First Respondent who in my view, was not only fully aware of that conduct but acquiesced or concurred with it. I am further fortified in this finding by the dictum in *Ozinsky NO v Lloyd and Others* 1992(3) SA 396 (C) at 414 G-H where the court held that:

“If a company continues to carry on business and incur debts when, in the opinion of reasonable businessman, standing in the shoes of the director, there would be no reasonable prospect of creditors receiving payment when due, it will in general be a proper inference that the business is being carried on recklessly.”

[154] In my judgment, the First Respondent's defence that at all times whilst being a director he was acting on the instructions of Mr Uys Senior and can thus not be held liable for the debts of Bonfrut is untenable. The First Respondent was instrumental in disbursing the funds received from by Bonfrut from Challenger whilst being aware of the terms and purpose

of the funding. I find that his reliance on his father's instructions is a ruse to simply avoid liability. He was a director in his own right and had played a key role in the financial administration of Bonfrut. The First Respondent is in my judgment not only liable for the period in which he was a director, he is also liable on the basis as Bonfrut's prescribed officer. In his evidence at the Enquiry, he confirmed that at the very least, he had basic knowledge of accounting procedures and prior to the engagement with Challenger, he had been employed at Bonfrut and was responsible for key financial tasks, financial planning and financial analysis. Furthermore, the evidence obtained at the Enquiry shows that:

154.1 the First Respondent himself admitted that he had access to Bonfrut's financial system and could at all times see the amounts owed to Bonfrut creditors. (This would have been necessary in order for him to execute his budgeting and making payments on behalf of Bonfrut).

154.2 The First Respondent was responsible for the Challenger account as he attended to the calculation of payments that were to be made to the latter, based on Bonfrut's cash flow and further that he approved payments made to Challenger.

154.3 Ms Potgieter also confirmed that the First Respondent was responsible for the administration of the Challenger account.

I therefore conclude that the First Respondent must be held liable for the debts of Bonfrut as he knew and foresaw that there was no reasonable prospect that the debt owed by Bonfrut to Challenger would not be paid.

[155] I now turn to consider Claim B.

[156] To recap, in Claim B, the Applicant seeks a declaration that the fourth Respondent, Bonex, be deemed not to be a juristic person separate from Bonfrut.

[157] It is common cause that on 20 September 2019, Ms Potgieter, at the instance of Mr Uys Senior, instructed ECAT to incorporate a new entity known as Bonex. Bonex was incorporated on 10 October 2019, and Ms Potgieter was its sole director. Its business was export administration. The evidence elicited at the enquiry establishes that Ms Potgieter was chosen as Bonex's sole director because:

157.1 She had experience with export administration as she had been doing the same work in her capacity as employee at Bonfrut;

157.2 She had been materially involved in the development of the system Bonex would use to attend to the administration of business, which had initially been developed for Bonfrut's business for the purpose of its own administration and knew the system very well.

157.3 Mr Uys Senior was of the view that he could not be a director of Bonex as that would have constituted a conflict of interest since he was already a director of Bonfrut.

[158] It will be recalled that the First Respondent resigned as director of Bonfrut on 26 September 2019. On 28 November 2019, he was appointed as the sole director of Bonex pursuant to Ms Potgieter renegading from executing functions as a director of Bonex on the basis that she was reluctant to take on a responsibility that carried personal liability. On the same day, the First Respondent was issued with 120 Ordinary Non-Par shares in Bonex, for an issue price of R120.00.

[159] At the Enquiry, Mr Uys explained the business model of Bonex as follows:

159.1 Bonex would assist farmers with their export administration, utilising a digital export administration system created by Bonfrut and previously used in Bonfrut's business. It facilitates data entry, processing and invoicing;

159.2 the system would reflect, amongst other things, a grower's export documentation, loadings, stock in containers, release of fruit, prices and payments;

159.3 upon loading of a farmer's fruit, Bonex would present to the farmer data of what it is in each container, more specifically, the split sizes, variants, classes and destination;

159.4 based on the volume of fruit, Bonex would charge a fee, either per pallet or per carton; and

159.5 initially, the idea was for Bonfrut to remain an exporter and for Bonex to facilitate Bonfrut's administration.

[160] The First Respondent in his evidence at the Enquiry confirmed that Bonex makes use of the system, which was developed within Bonfrut, and which was previously used by Bonfrut's administration. He also explained that Mr Uys Senior is doing consultation work for farmers through Bonex, which includes advice on exporting, farming and other operational matter. According to his evidence, Ms Potgieter was made a director of Bonex because (in her capacity as employee of Bonfrut) she wrote the system which Bonex uses and because she has always used it, she had a better understanding of how it works. He further stated that initially Bonex was not meant to do consultations, but the idea was that producers be allowed to access the system developed by Bonfrut (and which was paid for by Bonfrut for the purposes of its business).

[161] As to the actual business Bonex conducted, Ms Potgieter testified that during 2020 Bonex had various clients for whom it did

administration. Touwskaroo Agri was one such client whose export was facilitated by Bonfrut and Bonex did administration for it for one container. She further testified that Bonfrut attended to Touwskaroo Agri export free of charge and as marketing for Bonex. Touwskaroo had previously been a client of Bonfrut.

[162] Ms van Niekerk also gave evidence relating to the incorporation of Bonex and stated that Mr Uys Senior intended to liquidate Bonfrut before Challenger could do so, in the hope registering Bonex. and Bonex had been trading as Bonfrut. Clearly no evidential value can be placed on Ms Potgieter's opinion as to what the Mr Uys Senior intention to liquidate Bonfrut so that he could continue trading with Challenger.

[163] Counsel for the Applicant argued that the evidence establishes that Mr Uys Senior and the First Respondent intended to continue conducting the business of Bonfrut through Bonex and the link between the two companies is obvious when regard is had to the following:

163.1 the similarities of the names. Ordinarily, nothing much can be assessed from the use of similar names, neither can any inference be drawn solely therefrom. However, in the present matter, the First Respondent explained that the reason for the use of somewhat similar names is probably to strengthen association with Bonfrut, as it is a well-known name in the industry.

163.2 Bonex was incorporated by one of Bonfrut's employees on the instructions of Mr Uys;

163.3 Bonex's registered address was, until 17 November 2021, the Durbanville property owned by Bonfrut;

163.4 it is undisputed that on 18 February 2020, Mr Uys Senior instructed ECAT to include Bonex on Bonfrut's E-Filing (SARS) profile.

163.5 Bonfrut's export system was used by Bonex;

163.6 Ms Potgieter used the Bonfrut system for Bonex's operations;

[164] The Applicant contends that Mr Uys Junior and Bonex knowingly participated in the business of Bonfrut with intent to defraud creditors of Bonfrut, specifically Challenger. The Applicant contends that Mr Uys Junior and Bonex knowingly conducted and/or participated in the business of Bonfrut to defraud the latter's creditors in that:

164.1 Mr Uys used the proceeds from the purchased invoices which were ceded to the Challenger Agreements to pay company expenses and other creditors instead of paying Challenger.'

[165] The next question to consider is whether the evidence shows that incorporation of Bonex constitutes, use or actions showing an

unconsciable abuse of the company as a separate entity such that it may be deemed not to be a juristic person and whether Bonfrut and Bonex should be considered one single entity.

Section 20(9) provides thus:

“If, on application by an interested person, or any proceedings in which a company is involved, a court finds that the incorporation of the company or any use of the company, or any act by or on behalf of the company constitutes an unconsciable abuse of the juristic personality of the company as a separate entity, the court may:

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

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

[166] The criteria for piercing the corporate veil is summarised in *Ex Parte Gore NO 2013 (3) SA 383 (WCC)* at para 22 as follows:

- “1. Ownership and control of a company are not of themselves sufficient to justify piercing the veil;
2. The court cannot pierce the veil, even when no unconnected third party is involved, merely because it is perceived that to do so is necessary and in the interests of justice;

3. The corporate veil can only be pierced when there is some impropriety;
4. The company's involvement in an impropriety will not by itself justify a piercing of its veil: [furthermore] the impropriety must be linked to use of the company structure to avoid or conceal liability;
5. It follows ... that if the court is to pierce the corporate veil, it is necessary to show both control of the company by the wrongdoer and impropriety in the sense of a misuse of the company as a device or façade to control wrongdoing;
6. A company can be a façade for such purposes even though not incorporated with deceptive intent, the relevant question being whether it is being used as a façade at the time of the relevant transaction(s);⁷. And the court will pierce the corporate veil only so far as is necessary to provide a remedy for the particular wrong which those controlling the company may have done. In other words, the fact that the court pierces the corporate veil for one purpose does not mean that it will necessarily be pierced for all purposes."

[167] In *Cantaur Mining South Africa (Pty) Ltd v Moodliar N.O. and Others* (CCT117/24) ZACC 20 (18 May 2026) the Constitutional Court affirming the interpretation of section 20(9) in *Gore* stated as follows:

"[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* that section 20(9) is supplemental to the common law, rather than substitutive. 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 application in widely varying factual circumstances. The 2008 Companies Act does not define what would constitute unconsciable abuse. It avoids metaphors like fraud, scam and façade. The court must find the relevant wrongdoing on the facts of each case.”

[168] In addition, the Court emphasised that a court is not obliged to invoke section 20(9) even though an unconsciable abuse of a company’s separate personality may be shown. In short, the court has a discretion whether to pierce the corporate veil.

[169] Linked to this question is the allegation made by the Applicant to the effect that Mr Uys Senior attempted to divert payments due to Bonfrut. To recap, Challenger brought the liquidation application against Bonfrut on 3 July 2020. the evidence shows that on 5 July 2020, Mr Uys Senior through a WhatsApp message instructed Ms Potgieter to credit the offtaker’s accounts with the amounts that were due to the farmers by generating credit notes for each one of the customer invoices. Furthermore, Mr Uys Senior further instructed Ms Potgieter to create a

company for each of the growers (farmers) in the export administrative system (i.e. Bonfrut's system which was later used by Bonex) and to generate invoices to the offtakers in the respective grower's names. The effect of the foregoing was that offtakers made payment of amounts owing to Bonfrut to the growers directly and that the payment did not reach Bonfrut's insolvent estate. In this way, the grower's goodwill was retained and the First Respondent and Mr Uys Senior continued to business with Bonex.

[170] According to the Applicant, the only reasonable inference to be drawn from this conduct is that this method of Offtakers paying growers directly (a system that had never been previously used by Bonfrut) is the diversion of funds from Bonfrut which had always received payment from Offtakers and then paid the growers amounts due to them in their capacity as Bonfrut's own creditor. The Liquidators after having received a copy of the correspondence wrote to Prime Orchards advising that Mr Uys Senior's request should not be acceded to. According to the evidence of Ms Potgieter Bonfrut's arrangements with prime Orchards had always been that Bonfrut procures the fruit from the grower and then shipped the fruit to Prime Orchards who would pay Bonfrut and Bonfrut would in turn make payment to the grower.

[171] It is clear from the foregoing that the funds owing to Bonfrut were diverted to various growers to the disadvantage or prejudice of Challenger and other creditors.

[172] According to the Applicant, This conduct persisted with the Tatyana Dan Fruit, a Russian offtaker. Much was made about Mr Uys Senior's WhatsApp message to Tatyana on 15 July 2020 that Bonfrut *"is in the process to change from Bonfrut as an exporter to assisting growers to do their own exports and we run their marketing for them through their own business. This will place us in a much better position for the future to supply fruit. So for the moment we do not want to continue via Bonfrut and rather push for the new model and way of doing exports. So please bear with us and finalise all current business as advised by Mr Potgieter. Thanks for your cooperation and we hope to continue with the model asap."*

[173] Upon a consideration of all the evidence in this application, I have come to the conclusion that the threshold set out in *Ex Parte Gore* has not been met in this case. First, the fact that Bonex 's registered address was at the property owned by Bonfrut and that Mr Uys Senior instructed ECAT instructed ECAT to include Bonex on Bonfrut's E-Filing (SARS) profile does not without more, justify the piercing of Bonex' corporate veil. It may well be that the diversion of the growers' payments would

disadvantage Challenger and Bonfrut's creditors, I cannot on these facts conclude that the redirection of funds to the grower's bank accounts was intended to enable Mr Uys Senior and the First Respondent to maintain a positive relationship with the growers so that they could continue business with them through Bonex as attested to by Ms Potgieter. In the first place Ms Potgieter's evidence of Mr Uys' intentions in this regard is purely speculative and may not be elevated to fact. Equally, the fact that Bonex's registered address was, until 17 November 2021, the Durbanville property owned by Bonfrut, as well as that Bonfrut's export system was used by Bonex belonged to Bonfrut is not indicative of fraud or improper purpose. I cannot on the facts presented find that the incorporation of Bonex was a scheme by which Bonfrut's corporate opportunities were transferred to Bonex under the guise that it was a separate entity and that the latter should be deemed not to be a juristic person in respect of rights and obligations of Bonfrut. It follows that Claim B, must fail. Consequently, in my judgment there is no basis for holding the Fourth Respondent (Bonex) in the amount owed by Bonfrut to Challenger.

Costs

[174] The Applicant has achieved substantial success; there is therefore no reason why costs should not follow the result. It remains to be said

that in the application to strike out portions of the founding affidavit, the Respondents have succeeded albeit on a small scale. I think it is fair in this regard that the Applicant be awarded 80% of the costs of the application to strike out relating to the founding affidavit. Insofar as the replying affidavit is concerned the application failed and the Applicant must be awarded costs. Costs should, in my view be awarded on Scale B.

Conclusion

[175] In conclusion, I have in this judgment found that it is in the interests to admit the evidence tended at the Enquiry in terms of section 417 of the Companies Act. Linked to this finding, I have found that certain paragraphs in the founding and replying affidavits may not be struck out as they constitute hearsay evidence, and I have already found them to be admissible in the interests of justice. Regarding Claim A, I have held that the First Respondent must be declared liable for the debts of Bonfrut (Pty) Ltd (in Liquidation) in terms of section 424 of the Companies Act.

[176] As a consequence of these findings, the following order is issued:

176. The evidence presented at the Enquiry held in terms of section 417 of the 1973 Companies Act is hereby admitted in these proceedings and shall form part of the record herein.

176.2 Paragraphs 51.5.2; 52 to 59; 63.3.2 to 63.3.4; 63.4; 63.5.1 to 63.5.2 and the last sentence of paragraph 63.6; and paragraphs 63.9.3, 63.10 and the last sentence of 63.5 as well as paragraphs: 70.3 and 96.1 are hereby struck out of the Applicant's founding affidavit. The Applicant is entitled to 80% of its costs.

176.3 CLAIM A succeeds. It is hereby declared that the First Respondent, Mr Alwyn Uys is hereby declared to be liable for the debts of Bonfrut (Pty) Ltd (in Liquidation) as a director and as a prescribed officer..

176.4 The application to strike out the Applicant's replying affidavit is dismissed with costs.

176.5 CLAIM B is dismissed with costs.

NDITA, J

Appearances

For the Applicant

Advocate S Mahon SC

Instructed by

Schindler Attorneys

For the 1st and 4th Respondents

Advocate J Muller SC

Advocate L N Wessels

Instructed by

Boshoff Bronn Smit Attorneys