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REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, JOHANNESBURG

CASE NUMBER: 2026-018758

AND

CASE NUMBER: 2026-018792

DELETE WHICHEVER IS NOT APPLICABLE

1.REPORTABLE: YES

2.OF INTEREST TO OTHER JUDGES: YES

3.REVISED: NO

3 NOVEMBER 2026 **SNYCKERS AJ**

In the matter between:

LOMBARD INSURANCE COMPANY LTD **APPLICANT**

and

JORGE ALEXANDRE DA COSTA BONIFACIO **RESPONDENT**

AND

In the matter between:

LOMBARD INSURANCE COMPANY LTD **APPLICANT**

and

SERGIO RUI DA COSTA BONIFACIO **RESPONDENT**

JUDGMENT

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by e-mail and uploading it onto the electronic platform. The date and time for hand-down is deemed to be 10h00 on the 3rd of NOVEMBER 2026.

SNYCKERS AJ:

Introduction, context and these applications

[1] There are two separate sequestration applications before me, being heard together. They arise from the same facts, with minimal differences that will be identified below to the extent relevant. The applicant in both applications is the insurer Lombard. The respondents in the two applications are the Bonifacio brothers, Jorge and Sergio.

[2] The matters arise from litigation to which Lombard and the Bonifacios were parties, and judgments that issued from the litigation – a judgment in this court by Strydom J handed down on 20 September 2020[1] and a judgment from the Supreme Court of Appeal handed down on 24 February 2026.[2] The judgment by Strydom J made an order against the Bonifacios, who had been joined as third parties by Lombard,

[1] Case Number 20/4174.
[2] Case Number 247/2023.

under the provisions of Rule 13(1)(a).[3] This order was confirmed on appeal – the Bonifacios' appeal was dismissed.

[3] The nature of the order granted against the Bonifacios lies at the heart of this matter. I revert to this below.

[4] The litigation arose in the context of construction for Eskom's Kusile Power Plant. A subcontractor of the main contractor was DBT. A subcontractor of DBT was TCP, a corporate entity in which the Bonifacios had an interest. TCP had to provide DBT with a performance guarantee. These guarantees are issued by institutions such as Lombard. They allow the beneficiary (DBT) to call on the issuer (Lombard) to pay on the guarantee upon the mere claim by the beneficiary that an event of default on the contract in question had occurred. The liquid value of these guarantees is that the issuer must pay on them, whether or not the claim that an event of default has occurred is correct; this is the beauty of a so-called demand guarantee. There is an exception to this absolute liability to pay, an exception which appears to be invoked more often than the demands of the economy would like, and that is if the issuer can prove that the guarantee was fraudulently called. If the beneficiary makes a default claim it knows to be false, to induce payment on the guarantee, the issuer can set up this fraud as a defence against payment.

[5] The issuer of performance guarantees (also called performance bonds) often, in issuing the guarantee, turns to the party whose performance is at issue to provide it with an indemnity in case the guarantee is called. In the present case, TCP provided such an indemnity to Lombard in respect of the guarantee from Lombard it was providing to DBT in terms of its contract. The Bonifacios were also indemnifiers in favour of Lombard. Often the terms of the indemnity are as absolute, or even more absolute, than the terms of the guarantee. Although the business of the issuer entails making a profit from

[3] As pointed out in the Supreme Court of Appeal judgment, the proceedings in question were motion proceedings, not trial proceedings, and the Third Party Notices '*had to be modified, where required, to provide for the proceedings being pursued on motion*', although Rule 6(14) provided that Rule 13 applied to all applications – SCA judgment footnote 9.

issuing guarantees, such indemnities avoid a situation for the issuer where it has to pay on the guarantee but cannot have recourse to those responsible for its having to pay.

[6] In the instant case, DBT called on the guarantee. Lombard resisted paying on it and raised the fraud defence. The fraud defence related to the question whether, to the knowledge of DBT, certain take-over certificates had been issued in the project that had the effect of reducing the amount owing by TCP, yet DBT still called on the full amount. To establish this defence, Lombard was relying on TCP. So, there was litigation on whether Lombard was liable to pay on the guarantee. DBT was the applicant and Lombard the respondent (it was on motion). Lombard as respondent issued various third party notices under Rule 13(1)(a), *inter alia* against the Bonifacios – seeking an indemnification from them as contemplated in the Rule, should it be liable to DBT. The basis for the indemnification right was the indemnity each Bonifacio had provided to Lombard on the TCP bond to DBT.

[7] The claim by DBT against Lombard was for some R128m. The Bonifacios did not file any affidavits to defend against the third party indemnification asserted against them by Lombard. They sat back and allowed Lombard (and TCP) to do the running.

[8] TCP in the meantime was wound up. Its opposition to the DBT application ended. Lombard decided it was best to settle with DBT – so it settled DBT's claim by agreeing to pay R100m instead of the claimed R128m. After the settlement with DBT, Lombard continued against the third parties on the basis of their indemnities. As the SCA pointed out, the third party proceedings had life independent of the main claim between DBT and Lombard.[4]

[9] The Bonifacios now sought to file affidavits resisting the Lombard claim against them on their indemnities. After contested condonation proceedings (given that they had been entitled to file affidavits from the start and had elected not to do so), they were

[4] SCA para 24, with reference to *ABSA Bank Ltd v Boksburg Transitional Local Council* 1997 (2) SA 415 (W).

allowed to file answers. Their defences to the claim against them were many. Several of them turned on the fact that Lombard had now settled with DBT. For various reasons, it was contended that they should not be liable on the indemnities in the circumstances. I revert below to this alteration in the character of the claim against them, as it formed part of the debate relating to the nature of the order that was ultimately granted against them. Suffice to say all the Bonifacio defences were dismissed, by Strydom J and again in the SCA. They were liable on the indemnities, settlement or no settlement. The basis for their liability remained the same – the indemnities. The amount was reduced by the settlement, but the settlement did not provide them with a defence to the strong terms of the indemnities they had signed.

[10] The relevant order by Strydom J read as follows:

> *74.1 The Seventh and Eighth Third Parties are declared to be liable, jointly and severally, the one paying the other to be absolved, to the First Respondent in the amount of R100m together with interest thereon at the rate of 2% above the prime overdraft rate charged by ABSA Bank from time to time, calculated from date of demand being 15 January 2020 to date of payment.*
>
> *…*
>
> *74.3. The Seventh and Eighth Third Parties are jointly and severally, the one paying the other to be absolved, to pay the costs of the First Respondent on the scale as between attorney and client, such costs to include the cost of two counsel where employed."*

[11] The relevant SCA order read as follows:

> "*The appeal is dismissed with costs, such costs to include the costs of two counsel, where so employed."*

[12] Once the appeal was dismissed, Lombard had writs issued on the strength of the judgment, in July and September 2024.

[13] Attempts to execute on the writs resulted in successive sheriff's returns of non-service, as the sheriff was unable to serve on either brother:

[14] In relation to Jorge,

14.1. the first attempt to serve the writ was at 9B Bothma Rd Bedfordview, and the return indicates that Jorge was '*unknown at the given address, as informed by Mrs Annamarie Maskita the occupier who owns all the assets here';*

14.2. successive subsequent attempts (three in one week in October 2024) were then made to serve at another address in Bedfordview, namely Unit […] of a complex known as A[…] – and the premises were found locked on each occasion and neighbours could not confirm whether Jorge '*was still residing at given address'.*

[15] In relation to Sergio, the identical efforts were made and identical results achieved at the identical addresses.

[16] The founding affidavit in the case of Jorge explains that the first address was the *domicilium* address and the second the residential address appearing from a Windeed search. In the case of Sergio, the founding affidavit says the first address was the residential address and the second an alternative residential address according to a Windeed search.

[17] These applications for sequestration of Jorge and Sergio were then launched.

[18] The Notice of Motion in each application for sequestration states, “in accordance with section 9(3)(a) of the insolvency Act”, the following:

> “*iii. The claim is based on a judgment handed down against the Respondent, in favour of the Applicant, in the amount of R100m….*
>
> *iv. The debtor has committed an act of insolvency by failing to satisfy a court judgment granted.”*

[19] The founding affidavit in each case goes a little further. In each case, the affidavit says the following:

> *“Moreover, the Respondent has committed an act of insolvency as envisaged in terms of sections 8(a) and (b) of the Insolvency Act, in that the Respondent is actively evading the Applicant and has departed from his dwelling/s or otherwise absents himself, with intent by so doing to evade or delay the payment of his debts and the Respondent has failed to satisfy a judgment granted against him on 20 September 2022.*
>
> *The aforesaid conduct appears from the fact that despite the Sheriff of this Honourable Court has been unable to find the Respondent and his publically* [sic] *known addresses as mentioned above.*
>
> *A copy of the aforementioned judgment which gives rise to the Applicant's liquidated claim against the Respondent is attached hereto marked "FA3.*
>
> *Additionally, is it just and equitable for the Respondent to be placed into final, alternatively, provisional sequestration.”*

[20] I should immediately note that the notion that a sequestration order can or should be granted if it is *"just and equitable*" to do so appears to confuse the provisions of the 1973 Companies Act,[5] applicable to compulsory liquidations of companies under the 2008 Companies Act,[6] with the provisions of the Insolvency Act.[7] Section 10 of the Insolvency Act allows a court to grant a sequestration order when the petitioner has a relevant debt owing to them, the debtor has committed an act of insolvency (these are listed in section 8) *"or is insolvent"*, and there is reason to believe sequestration would be to the advantage of creditors of the insolvent. I should also mention that the insolvency referred to in section 10 of the Insolvency Act is what is known as factual insolvency – a state where one's liabilities exceed one's assets, whereas section 345 of the Companies Act is concerned with what is called commercial insolvency – an inability to pay debts as and when due.

[21] Note that invocation of the act of insolvency in section 8(a) referred to in the founding affidavit does not feature in the Notice of Motion where, in compliance with s9(3) of the Insolvency Act, the "*failure to satisfy a court judgment granted*" is identified as the relevant act of insolvency on which the petition is based.

[22] It should also be noted that the act of insolvency set out in s8(b) is not a 'failure to satisfy a court judgment granted'. The relevant acts of insolvency referred to in the founding affidavits set out in section 8(a) and (b) are stipulated as follows by the Legislature:

> *A debtor commits an act of insolvency-*
>
> *(a) if he leaves the Republic or being out of the Republic remains absent therefrom, or departs from his dwelling or otherwise absents himself, with intent by so doing to evade or delay the payment of his debts;*
>
> *(b) if a court has given judgment against him and he fails, upon the demand of the officer whose duty it is to execute that judgment, to satisfy it or to indicate to that*

[5] Act 71 of 1963.
[6] Act 71 of 2008.
[7] Act 24 of 1936.

> *officer disposable property sufficient to satisfy it, or if it appears from the return made by that officer that he has not found sufficient disposable property to satisfy the judgment;*

[23] The notice of motion, read generously, is referring shorthand to the act of insolvency set out in s8(b).

[24] In argument before me, Ms *Mitchell*, who appeared for Lombard, sought to make out a case on s8(a) as well as s8(b). Mr *Mastenbroek,* who appeared for the Bonifacios, submitted that Lombard should be confined to the act of insolvency it expressly identifies for purposes of s9(3) in its Notice of Motion. I have some sympathy for Mr *Mastenbroek*'s submission. Nevertheless, despite its absence from the notice of motion where the relevant act of insolvency is expressly mentioned for the purposes of compliance with s9(3)(v), had a case under s8(a) been made out properly in the founding affidavits, I would probably have allowed it to form the basis for an order as the act of insolvency invoked under s10.

[25] But the unsuccessful efforts of the sheriff to serve the writs, as set out in his returns, come nowhere near to making out a case under section 8(a), in my view.

[26] Jorge, in his answer, says his residential address is Unit 4[…] Corner of v[…] d[…] L[…] & S[…] Rds, Bedfordview, and not Unit […] A[…], which is Sergio's residential address. He says that, on the first attempt to serve, he would have been at his place of work, and his housekeeper, Annabela, would have attended to the doorbell call. As for the other attempts at Unit […] A[…], that is Sergio's residential address, not his. In reply, this is simply denied, and one is told *'the sheriff's returns of service constitute prima facie evidence on the attempts made to execute the writ of execution'.*

[27] Sergio, in his answer, says both his *domicilium* and residential addresses are Unit […] A[…], and that his business address is in Meadowdale. He would have been at

work, not at the A[…] address, on all occasions of attempted service. The gated estate is access controlled by security guards, who grant access only when residents give permission. "*Therefore, I would have been notified of any attempted service*". In reply, the reply to Jorge's answer in this regard cited above is repeated *verbatim*.

[28] I have some difficulty in reading the relevant sheriff returns as being *nulla bona* returns on the strength of which s8(b) may be triggered. All one has, in reality, are unsuccessful attempts to serve writs of execution on the Bonifacios. They were never asked to point out any assets to satisfy the writs and never failed to do so upon demand. This was not a point taken by Mr *Mastenbroek*, who appeared content to treat the returns as if they were *nulla bona* returns of the kind envisaged in s8(b).

[29] For purposes of this application, I shall assume in Lombard's favour that the returns in question may be regarded as *nulla bona* for the purposes of section 8(b).

[30] This brings me to the nub of the dispute before me.

[31] The Bonifacios adopted the attitude that the writs were invalid. They said that the judgment of Strydom J was a declarator only, of the kind one sought and got in a joinder under Rule 13(1)(a). This declarator, that the Bonifacios were liable to indemnify Lombard, was not a money judgment ordering the Bonifacios to pay anything, and no writ of execution could be issued on the strength of this judgment. The writs, accordingly, fell to be set aside.

[32] In answer to the sequestration applications, each Bonifacio brought a counter-application to stay the sequestration proceedings pending an application each had instituted to have the writs set aside. The set aside application was brought as an 'interlocutory' in the original litigation, under the same case number as yielded the Strydom J judgment. A date for the hearing of the set-aside application has in the meantime been obtained, for February 2027.

[33] There followed a paper skirmish on what was properly before the court hearing the sequestration application. Lombard said the stay should not be considered. The Bonifacios in effect said only the stay should be considered.

[34] After perusal of the papers, I notified the parties along the following lines –

34.1. It appeared impossible to determine the sequestration applications without determining the stay application. It appeared in turn impossible to determine the stay application without considering the merits of the set-aside application.

34.2. The set-aside application seemed to turn exclusively on a crisp question of law – whether the judgment of Strydom J could properly yield writs of execution. If the point is good, it is good for purposes of the sequestration applications. If it is bad, there would be no point in holding up the sequestration applications and staying them to have this point serve before a court in February.

[35] Both Ms *Mitchell* and Mr *Mastenbroek* accepted the above propositions before me.

[36] Demands for a condonation application in relation to the late filing of answering papers fortunately did not survive the commencement of the application.

[37] In resisting the applications, Mr *Mastenbroek* relied on his point relating to the nature of the judgment. He also asked the court to exercise its discretion against sequestration, based essentially on the cogency of defences the Bonifacios had unsuccessfully advanced before Strydom J and the SCA.

Writs and judgments – assess the former; respect the latter

[38] Before considering the proper interpretation of the order of Strydom J, confirmed by the SCA, it is appropriate to consider some founding principles.

[39] An important case in point is *Sachs v Katz* 1955 (1) SA 67 (T) at 72F-G. The decision confirmed that a writ that purported to extend beyond the confines of the judgment on which it was based could not be used to create an act of insolvency for purposes of section 8(b). That means that, if the orders of Strydom J could not found an entitlement to have writs of execution issued, then the writs that were issued cannot competently create a *nulla bona* return for the purposes of section 8(b). I have no reason to find the judgment in *Sachs* to have been wrongly decided and I am accordingly bound to follow it.

[40] Mr *Mastenbroek* wanted to take this further. He submitted, on the basis of law I consider below, that a joinder under Rule 13(1)(a) could not competently result in a money judgment against the relevant third party. He said if this was so, and if I were to interpret the relevant order of Strydom J as anything other than a declaratory order of liability, then the order of Strydom J was incompetently made and could be regarded as a nullity. There is some authority for the proposition that a court order that is incompetently made is a nullity. In *Motala,*[8] the SCA held that a court order that had purported to appoint judicial managers, when this was the function of the Master, could be treated as a nullity by a subsequent court. This decision created some understandable confusion regarding comity of courts, and it has since been made clear that subsequent courts, even when faced with court orders they believe could not competently have been granted, are nevertheless bound to respect them as court orders if not set aside on appeal or rescission.[9]

[41] I have little hesitation in rejecting Mr *Mastenbroek*'s invitation to assess the competence of the Strydom J order, save in the limited respect of aiding in its proper

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[8] *The Master of the High Court (North Gauteng High Court, Pretoria) v Motala NO & Others* 2012 (3) SA 325 (SCA)

[9] See for example *Municipal Manager OR Tambo Municipality & Another v Ndabeni* 2023 (4) SA 421 (CC) and the full court decision in *Van Dyk & Another v Rhodes* 2025 (4) SA 313 (GJ).

interpretation. If I am persuaded that, on a proper construction of the order given by Strydom J, it was a money judgment against the Bonifacios, then I shall treat it as such, whether or not I believe it could not competently (or appropriately) have been given on the strength of a Rule 13(1)(a) joinder. It is one thing to follow *Sachs v Katz* and not to give effect to a writ that departs from the authority of the judgment on which it is based, at least for the purposes of allowing it to create an act of insolvency. It is quite another to adopt the attitude that, whatever the actual nature of the order of Strydom J, I should ignore it to the extent that it does more than it should have done.

[42] Nevertheless, if the legal position is that joinders under Rule 13(1)(a) cannot competently give rise to money judgments, then this would be a relevant factor in interpreting the order, to the extent that there is any ambiguity in it, as more likely to be in line with the legal position than contrary to it.

[43] It is therefore time to consider this question of law and the nature of the order of Strydom J.

Rule 13(1)(a) orders and the order of Strydom J

[44] I have cited the order of Strydom J above. I can quickly get out of the way the matter of the cost order. No costs have been taxed or agreed. This means that the cost order against the Bonifacios cannot sustain a writ.[10] Ms *Mitchell* correctly did not seek to argue the contrary.

[45] The order reads like a declaratory order. On its face, that is what it is. It declares the Bonifacios to be liable to Lombard in the amount of R100m, jointly and severally, the one paying the other to be absolved. It specifically uses the declaratory form and term. It refrains from ordering anyone to pay anything.

[10] See for example *Administrateur, Transvaal v JD Van Niekerk & Genote BK* 1995 (2) SA 241 (A).

[46] This is not surprising. The order was the result of a third party notice under Rule 13(1)(a). The third party notice sought a declarator of liability to indemnify. That is what these notices do.

[47] Ms *Mitchell* sought to make something of the qualification "*the one paying the other to be absolved'* as indicating a money judgment. This qualification simply describes the joint and several nature of the declared liability. It does not alter the declaratory nature of that declared liability to become an order to pay.

[48] Mr *Mastenbroek* relied on the view of the authors of *Herbstein & Van Winsen,* who say the following in relation to Third Party Joinders under Rule 13(1)(a): [11]

> *"As between the defendant and a third party whom the defendant has joined in terms of rule 13(1)(a), all that can be claimed (where the relief empowered by the Apportionment of Damages Act is not sought at the same time) is a declaratory order apportioning the degree of fault between the various wrongdoers, no order requiring the making of payment being competent. The defendant, having obtained such a declaratory order, cannot execute upon it and will, if the third party is recalcitrant, have to sue the latter specifically in terms of the Act."*

[49] The cases cited by the authors bear them out. The important decision is that of Claassen J in *IPF Nominees.*[12] Claassen J draws a distinction between joinder under Rule 13(1)(a) and joinder under Rule 13(1)(b). In the former case, joinder under Rule 13(1)(a), which includes the case where indemnification is sought (not only cases of joint wrongdoers), the only order that can issue is a declarator. The cases cited by Claassen J include cases where an insurer is held liable to indemnify. In the latter case, joinder under Rule 13(1)(b), the joinder is broader – it is based on the fact that the joining party seeks to join a *lis* between themselves and a third party to the main *lis* –

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[11] Dendy & Loots *Herbstein & Van Winsen: The Civil Practice of the Superior Courts of South Africa* 6th Edition RS 3 2025 p7-61 to 7-62.
[12] *IPF Nominees (Pty) Ltd v Nedcor Bank Ltd (Basfour 130 (Pty) Ltd Third Party)* 2002 (5) SA 101 (W).

where the facts in the two *lites* are sufficiently similar to make this appropriate. In such cases, the relief sought against the third party may include a money judgment.

[50] Ordinarily, and this is a relevant point for present purposes, the indemnification right asserted against the third party under Rule 13(1)(a) is contingent upon a finding of liability against the defendant issuing the third party notice. The indemnification is also often contingent upon payment or discharge of the primary liability by the defendant. The defendant is resisting the plaintiff's claim (or the respondent resisting the applicant's claim), but in issuing the third party notice is saying "to the extent that I be held liable on the plaintiff (or applicant)'s claim, you should declare the third party liable to me".

[51] This was the form that the third party notices issued against the Bonifacios took in the instant case. Lombard was resisting the claim against DBT. Hence it was in the main saying there was no liability by anybody to anybody. The third party notices sought declaratory relief to the extent that Lombard were held liable to DBT.

[52] This changed when Lombard settled with DBT. Its liability to DBT had now crystallised – and in the lesser amount of R100m. The settlement agreement was made an order of court and Lombard was ordered to pay the R100m to DBT. The Bonifacios now moved into action and filed answering affidavits in what had now become proceedings purely on the third party notices, which remained unamended. In reply, Lombard said it was no longer necessary for there to be a finding of liability against it before the Bonifacios could be held liable, as the settlement had settled its liability. As explained in the Strydom J judgment, the Bonifacios then argued that Lombard had illegitimately sought to make out a different case against them in reply. Strydom J rejected this:[13]

[13] Strydom J para [19].

> *"In my view, the cause of action against the Third Parties remained their liability in terms of the Indemnity and the fact that the trigger event for payment changed from a court finding liability in terms of the Guarantee to a settlement reached between the parties to the Guarantee makes no difference."*

[53] The SCA upheld this reasoning and found that *"[Lombard]'s claim throughout remained based on the indemnity contract, not the settlement agreement. The only impact of the settlement agreement was that the amount to be paid was reduced. When the relevant terms of the settlement agreement were incorporated by the high court in its order of 1 February 2021, the issue of the respondent's liability to DBT, including that it was not affected by any fraud or any other defence as between the respondent and DBT, had become* res judicata."[14]

[54] In respect of the argument that Lombard's asserted right against the Bonifacios as third parties had moved from a claim contingent to a finding that Lombard was liable to DBT to a claim on the settlement without this contingency, the SCA rejected this argument. It held the indemnity to found liability on the part of the Bonifacios with or without a finding against Lombard and found that the settlement agreement *"simply quantified the amount of the claim".*[15]

[55] The reason all of this is relevant to the instant dispute is that Ms *Mitchell* sought to argue that the shift from contingent liability to direct liability as against the Bonifacios was decisive in altering what would have been a declarator in the order of Strydom J to being a case that fell in the second category considered by Claassen J in *IFP Nominees*, making the Strydom J order a money judgment.

[56] I struggle to follow this reasoning. Whatever the reason the Bonifacios were declared liable to indemnify, and whether such liability was conditional and contingent or unconditional, this could not alter the character of the order against them declaring them

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[14] SCA para [24].
[15] SCA para [30].

to be liable. Whether they are declared liable for as much as Lombard be ordered to pay DBT, or instead liable in the amount of R100m as settled, does not have a bearing on whether they are being declared liable or instead being ordered to pay.

[57] Ms *Mitchell* correctly submitted that, although the order on its face read as a declarator, one had to read the order in the context of the judgment to interpret it properly.[16] But there is nothing about its purpose or context that transforms it into a money judgment.

[58] Ms *Mitchell* referred also to the fact that the judgment of Strydom J twice suggested the order sought and granted was for 'payment':

58.1. In para [2] of the judgment, Strydom J says *"Lombard seeks an order for payment against the Third Parties on the strength of an indemnity…".*

58.2. In para [71], Strydom says *"Lombard asks for payment in the amount of R100,000,000…"*

[59] It must be remembered that the nature of the order to be issued was not at issue before Strydom J. He was formally asked to issue a declarator, and he did so. The fact that he loosely referred to the prayer as seeking "payment" did no more than if he had said something to the effect that *"Lombard is in turn looking to the third parties to pay it".* It did not directly address the nature of the order sought and granted. It did not convert a declarator into a money judgment.

[60] Here the fact that the law is firm that Rule 13(1)(a) joinders must yield declarators only and cannot yield payment orders is relevant. It places the order in the legal context

[16] See *Finishing Touch 163 (Pty) Ltd v BHP Billiton Energy Coal South Africa Ltd & Others* 2013 (2) SA 204 (SCA) paras 13-14 and *Electoral Commission v Mhlophe & Others* 2016 (5) SA 1 (CC), para [33].

in which it was given, to interpret what it was doing.[17] A declarator was formally sought. A declarator was issued. That is what Rule 13(1)(a) allows. That is what Strydom J did.

[61] Ms *Mitchell* also submitted that the SCA interpreted the Strydom J order (which it upheld) as one ordering payment, and that it said so in para [31]. But the last sentence of para [31] in the SCA judgment dealt, not with the order against the Bonifacios, but with the 'order' (in quote marks) against Lombard flowing from the fact that the settlement agreement had been made an order of court:

> *"The settlement amount is the amount the high court 'ordered' the respondent to pay.'*

[62] This is no support for an interpretation of the Strydom J order against the Bonifacios as an order to pay rather than a declaration of liability.

Consequence

[63] I therefore cannot find that the Strydom J order upheld in the SCA was anything other than the kind of declaratory order that issues against a third party joined under Rule 13(1)(a). This means that it could not sustain a writ. This in turn, on *Sachs*, means the writs in question could not be used to embody acts of insolvency under s8(b). And since no other act of insolvency was established (the attempt to rely on s8(a) being bad, as found above), there is no basis to order the (provisional) sequestration of the Bonifacios.

[64] The case in the affidavits on advantage to creditors was thin. Given the conclusion I reach, I need not determine this issue.

[17] See the cases referred to in the previous footnote.

[65] Mr *Mastenbroek* had another string to his bow. He submitted that if a case for sequestration was made out, I should exercise my residual discretion against it. The bases on which this submission rested were insufficiently different from the cogency of the defences rejected in the SCA to be persuasive. As was the distinction that was drawn between declaring the right and enforcing it. None of this, however, needs determining given the conclusion I have reached on the writs and s8(b).

[66] In the circumstances, I make the following order in both cases:

"The application is dismissed with costs on scale C".

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SNYCKERS AJ
ACTING JUDGE OF THE HIGH COURT
GAUTENG JOHANNESBURG

HEARING

DATE OF HEARING : 27 October 2026

DATE OF JUDGMENT : 3 November 2026

APPEARANCES

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