SUMMARY – PETER GAIN V MAWELA PROPERTIES PTY LTD

1. Aplication for the provisional winding-up of the respondent in terms of section 344(f) of the Companies Act – no dispute that respondent is indebted to applicant or that respondent is unable to pay this debt – instead respondent has raised two technical defences: that *a pactum de non petendo* with a third party precludes applicant's initiation of these proceedings and that the matter is *lis pendens.*
2. The first defence is that the debt is not due since applicant had entered into a *pactum de non petendo* with one of the directors of the respondent, Khumalo, that the applicant would *"not claim or institute the amounts in view of the financial constraints of the defendant"* and that applicant undertook not to institute an action against respondent *"pending the successful sale of the foreign mines in which Mr Mzilikazi Godfrey Khumalo had an interest*" it being *"anticipated that the mines would be sold by the end of 2013".*
3. The terms of the alleged *pactum* are neither consistent with past commercial and legal practice concerning this loan nor in accordance with commercial common sense: In the past applicant was at pains to procure the loan agreement comprising some nine pages detailing terms and dates of repayment suggesting applicant would hardly be prepared to subject the fate of this agreement to an informal, verbal, unrecorded and entirely open-ended *pactum* as alleged; the terms of the alleged *pactum* allege that applicant agreed that he would not litigate for repayment on an indefinite basis, ie that he would undertake to wait patiently for an infinite period dependant upon the "success" of the *"sale of foreign mines"* all of which are undefined.
4. The answering affidavit opposing this winding-up liquidation is noticeably silent on the details of this alleged *pactum;* There is no mention of exactly when or where it was concluded and why it was not recorded in writing, the nature and value of the of the "*interest*" which Khumalo has or had in these mines, the location and status of these mines, why (if the mines are in Zimbabwe) they are exempt from any threats of indigenisation, what steps have been taken to procure a sale of these interests as 2013 approaches the calendar year end, whether potential purchasers have indicated any interest or made any offers, the possible sale price which may be achieved for such interests, the terms of any sale. In short, there is no indication whatsoever that there every was or is any prospect of funds emanating from the possible sale of these mining interests which would have induced applicant to agree that he would never pursue his claim against respondent.
5. The second defence raised by the respondent is that of *lis alibi pendens* on the grounds that applicant, as plaintiff, issued summons against respondent, as defendant, under another case number for repayment of the R 15 million. The action is defended

and the parties apparently await a trial date. The principle underlying the *lis pendens* defence is to preclude the vexation to a defendant/respondent and to the court of a duplication of litigation in respect of the same subject matter. Either court has a discretion whether or not to uphold such a plea. In the earlier action there is no more than an action for payment of a sum of money whilst in the present application there is an application for the provisional sequestration of the debtor. The relief sought is very different. The consequences of success in the two cases are significantly disparate. The civil action can do no more than bring satisfaction in a monetary amount for this one creditor while the liquidation application may result in an investigation into the affairs of the company and complete or partial satisfaction for a number of as yet unknown creditors. In any event there is authority that *lis pendens* cannot be raised in every case but only where claim is laid to a specific res - that is the position in the civil action but not in the liquidation application.