**REPUBLIC OF SOUTH AFRICA**

**GAUTENG HIGH COURT**
**Johannesburg Local Division**
**CASE NO: 00674/2015**

(1) REPORTABLE: Yes
(2) OF INTEREST TO OTHER JUDGES: Yes
(3) REVISED.

..... .....
DATE SIGNATURE

In the matter between:

| | |
|---|---|
| **Danny Phillip Mncube and 55 Others** | **Applicants** |
| And | |
| **Eugene Januarie N.O.** | **1st Respondent** |
| **Johannes Zacharias Human Muller N.O.**<br>**In their capacities as joint provisional liquidators of**<br>**Cida City Campus NPC (in provisional liquidation)** | **2nd Respondent** |
| **Master of the High Court** | **3rd Respondent** |
| **Joffe Charitable Trust** | **4th Respondent** |
| **City of Johannesburg** | **5th Respondent** |
| **Absa Bank Ltd** | **6th Respondent** |
| **Cida Empowerment Trust** | **7thRespondent** |
| **SRC of Cida City Campus NPC** | **8th Respondent** |

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**JUDGMENT**

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Introduction

1. The applicants approached this Court on an urgent basis seeking the following relief:

> "1 Directing that the matter be heard as one of urgency and that the applicants non-compliance with the rules of the court relating to compliance with time limits and the service of documents be condoned on account of such urgency.
>
> 2 Directing that the first and second respondents convene an urgent meeting of all creditors of CIDA City Campus NPC (in provisional liquidation) and at such meeting:
>
> 2.1 allow the creditors to consider and vote on all offers that have been made to purchase CIDA City Campus, including but not limited to the most recent offer made by Africa Integras LLC; and,
>
> 2.2 allow the creditors to consider and vote on any compromises in accordance with section 155 of the Companies Act 71 of 2008.
>
> 3 Directing that the first and second respondents be bound by the majority vote of the meeting and take the necessary steps to execute the relevant sale and purchase agreement within seven (7) days of the date of the meeting.
>
> 4 Directing that the usual rules relating to notice requirements for the calling of such a creditors meeting, in accordance with the Companies Act, be set aside on account of the urgency and that the meeting be convened within seven (7) days of the date of the order
>
> .
>
> 5 Interdicting the first and second respondents from disposing of any moveable or immovable assets of CIDA City Campus and/or entering into any agreement to dispose of such assets pending the outcome of the creditors meeting referred to in prayer 2 above.
>
> 6 Permitting any party subsequently to set the matter down for hearing on reasonable notice on these papers, duly supplemented as appropriate.
>
> 7 The first and second respondents are ordered, jointly and severally, to pay the applicants' costs, including the costs of two counsel."

2. The relief sought was really directed at the first and second respondents only. The application was opposed by them. The fourth and eighth respondents

made common cause with the applicants. The other respondents were neutral to the application. Hence reference to the respondents in this judgment will be a reference to the first and second respondents only.

3. After hearing full argument from the applicants as well as the respondents I gave the following order and indicated that my reasons would follow:

1 The applicants' non-compliance with the rules of the court relating to compliance with time limits and the service of documents is condoned and this application is to be heard on the grounds that it is urgent.

2 The third respondent is ordered to convene a meeting of CIDA's creditors on an urgent basis. The failure to comply with the usual rules relating to notice requirements for the calling of such a creditors meeting, in accordance with the Companies Act, is condoned.

3 The meeting envisaged in paragraph 2 above will take place on Friday 13 February 2015 at 10h00 hours at the offices of the third respondent in Johannesburg.

4 The third respondent will preside over the meeting and allow the creditors to consider and vote on all offers that have been made to purchase CIDA, including but not limited to the most recent offer made by Africa Integras LCC, and to allow the creditors, if necessary, to consider and vote on any compromise in accordance with the provisions of section 155 of the Companies Act.

5 The first and second respondents are ordered to:

5.1 give notice to all CIDA's known creditors by way of prepaid registered post or via email on Friday 30 January 2015; and,

5.2 publish a notice of the aforementioned meeting in the Government Gazette on 6 February 2015.

6 The third respondent is ordered to prepare a report and to provide it to the parties and this Court in relation to the decisions or resolutions adopted by the meeting referred to in paragraph 2 above, on the return day, which is 24 February 2015.

7 The first and second respondents shall be bound by the majority vote of the meeting and, in the event that the majority of creditors resolve that CIDA should accept any offer to purchase, the first and second respondents are directed to take the necessary steps to execute the relevant sale and purchase agreement within seven (7) days of the date of the meeting.

8 The first and second respondents are interdicted from disposing of any moveable or immovable assets of CIDA City Campus NPC (in provisional liquidation) and/or entering into any agreement to dispose of such assets pending the outcome of the creditors meeting referred to in paragraph 2 above.

9 Any party may subsequently set the matter down for hearing on the urgent roll on reasonable notice on these papers, duly supplemented as appropriate.

10 Each party is liable for its own costs occasioned by this application.

4. These are my reasons.

The factual narrative as relayed in the answering papers of the respondents

5. The CIDA City Campus NPC (in provisional liquidation) (the university) was established to provide persons from very poor backgrounds with an opportunity to obtain a tertiary education. It was hoped that this would assist them and their families in their quest to overcome their poverty. Unfortunately, commercial factors, omnipresent as they are in our social order, impacted negatively on the operations of the university. The operations of the university did not harvest sufficient income for it to meet its financial obligations. In such circumstances of distress, the directors of the university took advantage of the statutorily offered solution of placing the university under business rescue.[1]This was done by virtue of a resolution adopted by the board of directors of the university on 7

[1]This solution is an innovation of the Companies Act No 71 of 2008 (the new Companies Act). See chapter 6 of this Act.

December 2012. The applicable statutory requirements were complied with and the university was able to operate until 4 March 2014, when the fourth respondent, who is a creditor of the university, succeeded in an application in this Court for the provisional liquidation of the university. Consequently, the university was placed in provisional liquidation in the hands of the third respondent. The respondents were duly appointed by the third respondent as joint provisional liquidators of the university.

6. The order of 4 March 2014 placing the university in provisional liquidation was issued in the form of *rule nisi* returnable on 22 April 2014. The *rule nisi* has been extended on various occasions for various reasons. The most recent extension caters for a return date of 24 February 2015 when the *rule nisi* will either be extended, discharged or confirmed. In the event that it is confirmed the third respondent will be at liberty to appoint final liquidators in accordance with the provisions of s 367 of the Companies Act No 61 of 1973 (the old Companies Act).

7. After being appointed as joint provisional liquidators the respondents applied to this Court for an extension of their powers so that they could ensure that the university continued with its trading activities, and that they could obtain further funding for the continued operations. The relevant part of the order, which was granted on 1 April 2014, reads:

> "2 The first and second applicants (the respondents in our case) are granted leave:-
>
> 2.1 in terms of section 386(4)(f) of the Companies Act 61 of 1973 (the Act) as read with item 9 of Schedule 5 of the Companies Act 71 of 2008 to continue the business of CIDA City Campus NPC (in liquidation) ("CIDA").

2.2 In terms of section 386(5) of the Act to raise R 7,5 million (Seven and a half million rand) on the security of the assets of CIDA so as to continue its business."

8. They continued to perform their functions after taking advantage of the extended powers granted to them by this Court. They did so by, amongst others, obtaining funding from a bank, *viz*, Absa, against the assets of the university. This was done in order to ensure that the tuition of learners commenced as soon as the necessary funding from Absa was made available.

9. By this stage they were involved in extensive negotiations with an entity styled Africa Integras LLC (Africa Integras) for the acquisition of the university as a going concern. They entered into a Memorandum of Understanding (MOU) with Africa Integras. The MOU was focused on the importance of the university surviving this difficult financial period that it found itself in, and hopefully prospering thereafter. Africa Integras made a formal offer to acquire the university, which offer was to expire at the end of July 2014.

10. In the meantime on 23 June 2014 the respondents applied, once again on an *ex parte* basis, for a further extension of their powers. Their application was successful and the following order was made:

"1. Leave and permission is granted to the Applicants to institute these proceedings (this application), in accordance with the provisions of Sections 386 and 387 of the Companies Act, No 61 of 1973, as amended, read together with the provisions of the New Companies Act, No 71 of 2008 (hereinafter referred to as "the Act");

2. Leave and permission is granted to the Applicants to dispose and/or to sell and/or to alienate the immovable properties, referred to and contained in the valuation reports prepared by Mr. J.J du Toit, attached hereto marked **Annexures "X1" and "X2"** respectively, either by way of public

auction, or by way of private treaty, in accordance with the provisions of Sections 386 and 387 of the Act, and to utilize the proceeds derived from the sale of the aforementioned immovable properties to effect payment of the debts and/or expenses of CIDA City Campus NPC (in provisional liquidation) (hereinafter referred to as "CCC") as and/or when they become due and payable;

3. The powers of the Applicants in respect of CCC are extended, in accordance with the provisions of Section 386(5) of the Act, as follows:

3.1 to compromise and/or admit any reasonable claim, of whatever kind and form whatever cause, and to accept payment of any part of a debt due in settlement thereof or to grant an extension of time for the payment of any debt due;

3.2 to terminate and/or negotiate and/or conclude agreements with, but not limited to, end users and service providers of CCC;

3.3 to bring or defend in the name of CCC any action, arbitration or other legal proceedings of a civil nature, including any action or legal proceedings for the collection of all outstanding debts due (*including, but not limited to, demanding payment of debts due to CCC in terms of section 345 of the Act*) or the setting aside of any apparent or suspected voidable and/or undue preference and/or disposition of property and to take steps to have these set aside;

3.4 to exercise the same powers as provided for in Sections 35 and 37 of the Insolvency Act, No 24 of 1936, conferred upon a trustee or trustees, in accordance with the provisions of the Insolvency Act, on the same terms and conditions as provided for herein;

3.5 to carry on or to discontinue any part of the business of CCC insofar as may be necessary for the beneficial winding-up thereof;

3.6 to sell or in any other manner dispose of any movable and immovable property which belong to CCC, whether as a going concern or otherwise, by public auction or public tender or private treaty and to give delivery thereof, with the mode and terms and conditions of the sale to be determined by the Applicants in their sole and absolute discretion;

3.7 to appoint service providers, including attorneys, auditors, accountants, counsel, consultants, auctioneers, valuers, investigators, forensic auditors, engineers, quantity surveyors and other persons (including service providers who may be appointed by creditors or who may have rendered estate related services to creditors) to assist the Applicants in the exercise or execution of their duties in the administration of the winding-up of the insolvent estate of CCC,

including but without limitation to take any legal action, institute or defend on behalf of CCC any action, arbitration or legal proceedings and to proceed to the final determination of any such action or proceedings, conduct enquiries and examination into the affairs of CCC, investigate any apparent or suspected voidable and/or undue preference and/or disposition of property, and collect all amounts due to;

3.8 to pay all legal fees on an attorney and own client scale, provided that the Applicants may at any time call for a detailed bill of costs to be prepared as if for taxation and such fees are to be taxed by the Master of this Court in the event that the Applicants are not satisfied with the costs. Subject to the availability of funds the agreed or taxed fees and charges may be paid as and when the services are rendered and against the obligation of the attorneys to repay the estate any amounts are allowed upon taxation or excluded from a confirmed liquidation and distribution account;

3.9 to appoint and employ any employees of CCC to assist with the affairs of CCC including the collection of any outstanding income due to CCC, compiling an inventory of the assets of CCC, tracing of assets and provision of any other assistance required by the Applicants in the administration of winding-up CCC;

3.10 to investigate any apparent voidable and/or undue preference, and/or any dispositions of property, and take any steps which they in their discretion may deem necessary, including the instituting of legal action and the employment of Attorneys and/or Counsel, to have these preferences and/or dispositions set aside, and to proceed to the final end or determination of any such legal actions or to abandon same at any time as they in their sole discretion may deem fit, all costs incurred in terms thereof to be costs in the winding-up of CCC on the scale referred to in paragraph 3.8 *supra*;

3.11 to call for tenders for the purchase of the business and/or assets of CCC; and

3.12 to sign all the necessary documents as may be required to effect transfer of the ownership of assets, including immovable property, to the purchasers thereof.

4. Leave and permission is granted to the Applicants to ratify and finalise the sale agreement which was entered into and/or concluded between THE RA WELFARE DEVELOPMENT TRUST (Reg No. IT2646/97) and CCC, whereby CCC agreed to sell a Portion of Portion 368 of the Farm Syferfontein 51, Registration Division IR, Province of Gauteng, measuring approximately 1,7317 hectares, to TE RA WELFARE DEVELOPMENT

TRUST (Reg No. IT2646/97) in accordance with the terms and conditions of the sale agreement, dated 27 November 2007.

5. The costs of this application are costs in the administration of CCC."

11. After this order was obtained the respondents concluded an agreement with an entity styled Barclays Africa (Barclays) wherein they sold to Barclays an exclusive right to conduct a due diligence investigation of the affairs of the university at the price of R2.3m. Barclays bought this right on the understanding that they would consider acquiring the university. The exclusive due diligence right expired in September 2014 at which point Barclays indicated that it had no interest in acquiring the university. On 26 September 2014 the Department of Higher Education and Training (DHET) gave notice to the university that it was considering cancelling its registration for want of compliance with health and safety regulations. Around this time negotiations with Africa Integras resumed. The fourth respondent (at whose instance the university was placed in provisional liquidation) supported the efforts of Africa Integras. Africa Integras submitted a new offer which entailed creditors writing down their debts. Another offer was also received from a public company, Curro Holdings Ltd (Curro), which offer was subject to Curro being satisfied with a due diligence conducted by itself. There is no indication that Curro paid for a right to conduct a due diligence. Nevertheless, Curro made an offer to acquire the university, which offer was open until 16h00 on 31 October 2014. The offer was made known to Africa Integras. The offer was accepted, but on 11 November 2014 Curro advised the respondents that it would no longer be proceeding with the acquisition of the university.

12. An informal meeting between the respondents and creditors of the university was held on 14 November 2014. The meeting was focused on salvaging the operations of the university. A decision was taken to give Africa Integras an opportunity to provide funding in the amount of R2.3m before 28 November 2014 so that the university could continue with its operation in January 2015. Africa Integras failed to comply with this decision. It was further agreed that Africa Integras would furnish the respondents with an acceptable offer with a 10% non-refundable cash deposit. Africa Integras failed to comply with this too. On 17 November 2014 a further notice of intention to cancel the registration of the university was received from DHET.

13. The respondents have decided to close the university pending the final adjudication of the winding-up application on 24 February 2015. This despite the fact that Africa Integras has placed an offer to acquire the university as a going concern.

The application

14. The university is, at present, indebted to various entities in the amount of R41 700 000.00. It is common cause that the university is unable to pay these debts and that if it is finally liquidated the creditors will not recover all of the monies owed to them. The applicants, who are all employees of the university and who have not been paid their salaries for some time now, may have to suffer the fate of not recovering all that is owed to them. With the explicit support of the fourth and eighth respondents they bring this application in the quest to rescue the

university and have its operations resume. Whether they succeed in salvaging the operations of the university or not is dependent upon a decision to be taken by the creditors. But for the creditors to take that decision they need to be afforded an opportunity to consider the proposal the applicants believe to be in the best interests of themselves, the creditors, the students of the university and of the creditors. Hence, they asked for this Court to compel the respondents to call such a meeting and to be bound by the decision taken there. They also ask that in the meantime the respondents be interdicted from disposing of any assets of the university. The respondents agreed to the latter and had no difficulty in this Court making it an order. The grounds upon which the applicants rely are three-fold:

14.1. as employees and creditors they have a real interest in protecting the operations of the university and, more importantly, the offer from Africa Integras carries with it the prospect of their employment being rescued;

14.2. they wish to protect the interests of the learners, all of whom are indigent and are at risk of losing their education if the respondents' refusal to allow the creditors to consider the offer from Africa Integras stands, and the university is wound-up. They invoke s 29 of the *Constitution of the Republic of South Africa Act 108 of 1996* (the Constitution) as a basis for bringing the application;

14.3. the third ground they rely upon is the public interest in ensuring that the university be sold as a going concern, as it not only protects their

employment but also serves to increase the number of qualified persons available to serve the public once the learners graduate from the university.

15. The respondents vigorously opposed the application. In so doing they initially claimed that the applicants lacked legal standing to bring the application. However at the hearing they abandoned this claim altogether – apart from accepting that the applicants had standing as creditors and employees, they took no issue with the applicants' right to bring the application on behalf of the learners, whose rights in terms of s 29 of the Constitution may be violated, or the applicants' right to bring the application on the basis that they were acting in the public interest. Their opposition is based on a single premise: they are legally incapable of calling for the meeting of creditors until the university has been wound-up, which according to them will take place on 24 February 2015, i.e. on the return day of the *rule nisi*. Apart from saying that the university is insolvent they lay no basis for their contention that the university will be wound-up. The fact that it is insolvent is no guarantee that it will be wound-up. Nevertheless, the respondents believe that this Court will confirm the *rule nisi* and therefore, they contend, this application should be dismissed with costs. They contend that once the *rule nisi* is confirmed and the university is wound-up the applicants can raise their request for a meeting of the creditors with the liquidator who, according to them, is the only person empowered to accede thereto.

16. In order to assess the contention of the respondents it is necessary to have regard to the general powers conferred by law upon provisional liquidators, and to the specific powers conferred upon the respondents by the two orders of this Court.

The Companies Act (old and new)

17. In regard to the powers of liquidators the new Companies Act has left the old Companies Act intact. The powers are spelt out in sections 386 – 390 of this Act. The relevant portions read:

> "386 General powers
>
> (1) The liquidator in any winding-up shall have power-
>
> (a) to execute in the name and on behalf of the company all deeds, receipts and other documents, and for that purpose to use the company's seal;
>
> (b) to prove a claim in the estate of any debtor or contributory of the company and receive payment in full or a dividend in respect thereof;
>
> (c) to draw, accept, make and endorse any bill of exchange or promissory note in the name and on behalf of the company: Provided that no liquidator shall, except with the leave of the Court or the authority referred to in subsection (3) or (4), or for the purposes of carrying on the business of the company in terms of subsection (4) (f) have power to impose any additional liabilities upon the company;
>
> (d) to summon any general meeting of the company or the creditors or contributories of the company for the purpose of obtaining its or their authority or sanction with respect to any matter or for such other purposes as he may consider necessary;
>
> (e) subject to the provisions of subsections (3), (4) and (5), to take such measures for the protection and better administration of the affairs and property of the company as the trustee of an insolvent estate may take in the ordinary course of his duties and without the authority of a resolution of creditors.
>
> (2) Subject to the consent of the Master, a liquidator may, at any time before a general meeting contemplated in subsection (1) (d) is

convened for the first time, terminate any lease in terms of which the company is the lessee of movable or immovable property.

(2A) At any time before a general meeting contemplated in subsection 1 (d) is convened for the first time the liquidator shall, if satisfied that any movable or immovable property of the company ought forthwith to be sold, recommend to the Master in writing accordingly, stating his reasons for such recommendation.

(2B) The Master may thereupon authorise the sale of such property or any portion thereof on such conditions and in such manner as he may determine: Provided that if such property or a portion thereof is subject to a preferential right, the Master shall not authorise the sale of such property or portion unless the person entitled to such preferential right has given his consent thereto in writing.

(3) The liquidator of a company-

(a) in a winding-up by the Court, with the authority granted by meetings of creditors and members or contributories or on the directions of the Master given under section 387;

(b) in a creditors' voluntary winding-up, with the authority granted by a meeting of creditors; and

(c) in a members' voluntary winding-up, with the authority granted by a meeting of members,

shall have the powers mentioned in subsection (4).

(4) The powers referred to in subsection (3) are-

(a) to bring or defend in the name and on behalf of the company any action or other legal proceedings of a civil nature, and, subject to the provisions of any law relating to criminal procedure, any criminal proceedings: Provided that immediately upon the appointment of a liquidator and in the absence of the authority referred to in subsection (3), the Master may authorise, upon such terms as he thinks fit, any urgent legal proceedings for the recovery of outstanding accounts;

(b) to agree to any reasonable offer of composition made to the company by any debtor and to accept payment of any part of a debt due to the company in settlement thereof or to grant an extension of time for the payment of any such debt;

(c) to compromise or admit any claim or demand against the company, including an unliquidated claim;

(d) except where the company being wound up is unable to pay its debts, to make any arrangement with creditors, including creditors in respect of unliquidated claims;

(e) to submit to the determination of arbitrators any dispute concerning the company or any claim or demand by or upon the company;

(f) to carry on or discontinue any part of the business of the company in so far as may be necessary for the beneficial winding-up thereof: Provided that, if he considers it necessary, the liquidator may carry on or discontinue any part of the business of the company concerned before he has obtained the leave of the Court or the authority referred to in subsection (3), but shall not in that event be entitled, as between himself and the creditors or contributories of the company, to include the cost of any goods purchased by him in the costs of the winding-up of the company unless such goods were necessary for the immediate purpose of carrying on the business of the company and there are funds available for payment of the cost of such goods after providing for the costs of winding-up;

(g) to exercise mutatis mutandis the same powers as are by sections 35 and 37 of the Insolvency Act, 1936, (Act 24 of 1936), conferred upon a trustee under that Act, on the like terms and conditions as are therein mentioned: Provided that the powers conferred by section 35 aforesaid, shall not be exercised unless the company is unable to pay its debts;

(h) to sell any movable and immovable property of the company by public auction, public tender or private contract and to give delivery thereof;

(i) to perform any act or exercise any power for which he is not expressly required by this Act to obtain the leave of the Court.

(5) In a winding-up by the Court, the Court may, if it deems fit, grant leave to a liquidator to raise money on the security of the assets of the company concerned or to do any other thing which the Court may consider necessary for winding up the affairs of the company and distributing its assets.

(6) The Master may restrict the powers of a provisional liquidator.

387 Exercise of liquidator's powers in winding-up by Court

(1) Subject to the provisions of this Act, the liquidator of a company which is being wound up by the Court, shall, in the administration of the assets of the company, have regard to any directions that may be given by resolution of the creditors or members or contributories of the company at any general meeting.

(2) In regard to any matter which has been submitted by the liquidator for the directions of creditors and members or contributories in general meeting, but as to which no directions have been given or as to which there is a difference between the directions of creditors and members or contributories, the liquidator may apply to the Master for directions and the Master may give or refuse to give directions as he may deem fit.

> (3) Where the Master has refused to give directions as aforesaid or in regard to any other particular matter arising under the winding-up, the liquidator may apply to the Court for directions.
>
> (4) Any person aggrieved by any act or decision of the liquidator may apply to the Court after notice to the liquidator and thereupon the Court may make such order as it thinks just.

18. For our present purposes, the most notable aspect of these statutorily conferred powers is sub-section 386(6) which empowers the Master, (the third respondent in our case), to restrict the powers of a provisional liquidator (the first and second respondents in our case). It is common cause that the third respondent has not restricted the powers of the first and second respondents at all. Thus, all the powers conferred by the statute remain within their grasp. The second notable factor is that the sections refer to "*liquidator*" only. The only reference to provisional liquidator is in sub-section 386(6). The respondents contend that these powers do not avail them as they are provisional liquidators and not the liquidators. The liquidator(s) will only be appointed once the Court grants a final winding-up order, which it might do on the return day. Until then, they claim they are paralysed and therefore incapable of acceding to the request of the applicants to host a meeting of the creditors. This contention is without merit. Sub-section 1(1) of the old Act, which defines the common terms found in the Act furnishes the following definition of a liquidator:

> ""*liquidator*" in relation to a company, means the person appointed under Chapter XIV as liquidator of such company, and includes any co-liquidator and any provisional liquidator so appointed."

19. During the hearing, extensive debate on this issue was conducted with counsel for the respondents, and, despite his valiant and admirable efforts to show that the respondents were paralysed in coming to the assistance of the applicants,

he was unable to escape the clear and unambiguous wording of the statute. The words employed leave no doubt that all the statutory powers conferred upon the liquidator remain within the grasp of the provisional liquidator.[2] If this was not the case then sub-section 386(6), which allows the Master to curtail the powers of a provisional liquidator, would not be necessary. It follows then that the respondents are capacitated by the statute to call a meeting of the creditors and such capacity is independent of any person or party requesting for such a meeting to be held.

The order of this Court issued on 1 April 2014

20. As mentioned above, prior to this hearing the respondents were, at their instance, issued with two orders from this Court: the first one being issued on 1 April 2014 and the second one on 23 June 2014.

21. This order was necessitated by the need to ensure that the university remained open and that its most important operations remained active. In particular, it was designed to ensure that the studies of the learners were not compromised. In this regard the respondents were given wide and far-reaching powers to achieve this objective. The respondents took advantage of it by raising capital ("*funding*" as the respondents call it) from Absa and in return pledged the assets of the university as security. By taking this action the respondents, no doubt, compromised the interests of any creditors existing as of the date they accepted the funding from Absa. There is no indication in the papers that this was done

[2] Any controversy resulting from a suggestion to the contrary was settled in *Ex Parte Provisional Liquidators, Pharmacy Holdings* 1962 (2) SA 12 (W), where at 17B Trollip J dealing with the predecessor to the 1973 Companies Act said that the word "*liquidator in s 130(3) undoubtedly includes a provisional liquidator".* See further: *Millman NO and Steub NO v Koetter* 1993 (2) SA 749 (C) at 758D and *Fourie v Le Roux* 2006 (1) SA 279 (T) at 285G-286A

with the approval of the said creditors. Either way, it means that the respondents were confident that they could take this action without the approval of the creditors or they would be able to secure their approval, and to secure the approval of the creditors the respondents would have had to meet, either individually or collectively, with the creditors. Thus, they had no problem with holding a meeting with the creditors, either individually or collectively.

22. At the same time they were actively involved in negotiations with Africa Integras to acquire the university as a going concern because "(t)*his would have ensured that indigent students could continue with their studies*."[3] Two facts are revealed by this approach:

22.1. The respondents were confident that they could dispose of the university as a going concern with or without the approval of the creditors.

22.2. The respondents accepted that the interests of the learners were crucial, if not paramount.

The order of this Court issued on 23 June 2014

23. The breadth and scope of the order of 23 June 2014 is so wide and so extensive that it allowed the respondents to do almost anything they wish with regard to the university assets.

[3]AA, Para 8.8, p 206

24. It allowed them to take decisions and actions that would have a direct impact on the operations of the university. It bears remembering that this order was obtained at their instance. They brought the application on an *ex parte* basis and asked that it be entertained in terms of ss 386 and 387 of the old Companies Act read with the relevant provisions of the new Companies Act. Having obtained the order they were now given leave to "*dispose, sell or alienate*" any immovable properties of the university and to pay any debts or expenses of the university that fell due. Furthermore, in terms of s 386(5) of the old Companies Act the Court extended their powers to such an extent that:

24.1. they can "*compromise any claim*" of the university, to grant any debtor of the university an extension to pay her debts;

24.2. they can "*terminate or conclude*" any agreements on behalf of the university;

24.3. they can launch any legal proceedings on behalf of the university or defend the university in any legal proceedings brought against it;

24.4. they are empowered to exercise the same powers conferred upon a trustee by ss 35 and 37 of the Insolvency Act, 24 of 1936;

24.5. they can "*sell or <u>in any other manner</u> dispose*" (emphasis added) of any property of the university whether " by public auction or public tender or

private treaty" on "*terms and conditions to be determined in their sole and absolute discretion*" (emphasis added);

24.6. they can "*appoint service providers, including attorneys, auditors, accountants, counsel, consultants, auctioneers, valuers, investigators, forensic auditors, engineers, quantity surveyors and other persons (including service providers who may be appointed by creditors or who may have rendered estate related services to creditors) to assist the Applicants in the exercise or execution of their duties in the administration of the winding-up of the insolvent estate of*" the university;

24.7. they can *"pay all legal fees*" incurred by themselves in the course of their duties *on an attorney and client scale*";

24.8. apart from having the power to appoint anyone to assist them, they can "*employ any employees*" (sic) of the university "*to assist them with the affairs*" of the university as well as with the performance of their duties;

24.9. they are empowered "*to call for tenders for the purchase of the business or assets of the university*";

24.10. they are given permission to "*ratify and finalise*" the sale agreement concluded with regard to certain immovable property that belonged to the university;

25. The order is so wide that it certainly allows for the respondents to call for a meeting of the creditors, if they deemed it necessary. The applicants ask that they place the offer before a body of creditors at a duly constituted meeting. They refuse, citing lack of powers to call such a meeting. In this they are wrong. In fact, in the light of the powers conferred upon them by the orders, especially the order dated 23 June 2014, their refusal to accede to the request of the applicants, and their decision to vigorously oppose this application, is difficult to fathom. They were given a full opportunity to explain their stance and they were unable to furnish any explanation that was reasonable or rational. They merely took the stance that they are not empowered to call for a creditors meeting as they are only provisional liquidators. As I have shown above, they err in this regard: they err with regard to the powers conferred upon then in terms of sections 386 and 387 of the old Companies Act and they err in regard to the powers conferred upon them by the two orders of this Court. It is a matter of concern that the respondents have not really advanced any sound reasons for their attitude to the request. This is particularly so when regard is had to the fact that prior to the request their conduct indicated that they were willing to take far more radical action than that called for by the applicants. Throughout the hearing their counsel was pressed to furnish an explanation for this and, valiant as his efforts may have been, he was unable to do so. Under the circumstances, it would not be inappropriate to draw the inference that their intransigence was designed to be obstructive.

26. Finally, before closing it is necessary to deal with the contention of the applicants that the respondents are legally bound to give effect to the rights of the learners as enshrined in s 29 of the Constitution by taking every possible step to avoid closing down the operations of the university. Acceding to the request of the applicants falls within the ambit of this legal duty, so the contention of the applicants goes. This may be so. The applicants' counsel referred to a number of authorities which he claimed support this contention, and asked that a finding on this issue be made as the respondents have indicated that they have decided to close the university and sell its assets to the highest bidder without having to consider the interests of the learners or the public when taking that decision. The finding, according to the applicants, will put a halt to the decision of the respondents to close the university.

27. The contentions of the applicants raise a constitutional issue. It is settled, though often forgotten, law that if a matter can be decided without having recourse to constitutional issues then that is the route to be followed by a court: if a non-constitutional issue is decisive of the case there is no need to engage the constitutional issue(s) that are raised. This rule had been laid down by the Constitutional Court since its infancy and Ackermann J, writing for a unanimous Court, recalls it in the plainest of language:

> "This Court has laid down the general principle that `where it is possible to decide any case, civil or criminal, without reaching a constitutional issue, that is the course which should be followed."[4]

[4] *Motsepe v Commissioner for Inland Revenue* 1997 (2) SA 898 (CC) at [21]; See also *Brink v Kitshoff NO* 1996 (4) SA 197 (CC) at [9] and the line of cases there cited.

28. Thus, tempting as it may be to deal with the constitutionally-directed contentions of the applicants, it is neither necessary nor prudent for me to traverse them.

Conclusion

29. On account of what is said above, the order referred to in paragraph 3 above was issued.

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**Vally J**

Gauteng High Court, Johannesburg Local Division

**Appearances:**

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|---|---|---|
| For the applicants | : | Adv J Brickill |
| Instructed by | : | Legal Resources Centre, Grahamstown |
| | | |
| For the respondents: | | Adv F W Botes SC |
| Instructed by | : | Rorich Wolmarans and Luderitz Inc |
| | | |
| Dates of hearing | : | 29 January 2015 |
| Date of judgment | : | 29 January 2015 |
| Date reasons given: | | 16 February 2015 |