IN THE HIGH COURT OF SOUTH AFRICA,
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 2014/28470

NOT REPORTABLE

NOT OF INTEREST TO OTHER JUDGES

REVISED

In the matter between:-

REGINALD NGWATO (ID NO: …) First Applicant

NATIONAL UNION OF METALWORKERS OF SOUTH AFRICA Second Applicant

and

LIEBENBERG DAWID RYK VAN DER MERWE N.O. First Respondent

SEGOPOTJE SHEILA MPHAHLELE N.O. Second Respondent

ANNEKE BARNARD N.O. Third Respondent

PETZETAKIS AFRICA (PTY) LIMITED (IN LIQUIDATION) Fourth Respondent

THE MASTER OF THE HIGH COURT,

JOHANNESBURG Fifth Respondent

JUDGMENT

INTRODUCTION

1. The first applicant is an erstwhile employee of Petzetakis Africa (Pty) Ltd (in liquidation) *("the Company')* which is the fourth respondent.

2. The second applicant is a union, NUMSA, representing at least 400 ex-employees of the Company.

3. The respondents are in essence the liquidators of the Company.[1]

4. The applicants seek an order in the nature of a declaratory order to resolve a dispute about the correct interpretation of s38 of the Insolvency Act, 24 of 1936 *("the Insolvency Act')* as read with s339 of the Companies Act, 61 of 1973 *("the 1973 Companies Act')* which remains of application by virtue of item 9 of schedule 5 of the Companies Act, 71 of 2008 *("the 2008 Companies Act').*

5. The crux of the dispute is from what date the suspension of an employment contract takes effect in the case of the liquidation of a company. Is it the date of the provisional order (or if a final order is granted without a provisional order, the final order) or the retrospective date of the presentment of the application in terms of s348 of the 1973 Companies Act?

6. The applicants contend for the later date and the liquidators contend for the retrospective date, that is, the date of the presentment of the application in

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[1] The fourth respondent is the Company, cited effectively as the nominal respondent. The fifth respondent is the Master who has not intervened. The second respondent has been removed from office by the Master and the remaining liquidators are the first and third respondents. See answering affidavit at page 106 paras 4 to 6.

terms of s348 of the 1973 Companies Act.

7. The effect will be, if the applicants are correct in their submission, that the employees will be entitled to remuneration for an additional period of nearly three months in principle.

BACKGROUND

8. The Company was placed in provisional liquidation due to its inability to pay its debts by Order of Court on 3 February 2012. This Order was made pursuant to an application for its winding-up presented to the Court on 1O November 2011. The Company remains unable to pay its debts. A final order was made on 23 October 2012.

9. The Company ceased permanently to carry on its business with effect from 1 May 2011, that is some 7 months prior to the presentation of the application for its winding-up. This being so, the respondents contend that Ngwato and 487 other employees of the Company were not required to, and they did not render any service to the Company after 30 April 2011.

10. Ngwato alleges they tendered their services to the Company even though the Company did not require this from 1 May 2011 to 3 February 2012. He alleges also that their contracts of employment were suspended on 3 February 2012 by virtue of the operation of s38(1) of the Insolvency Act.

11. The liquidators dispute this, both on the facts and on the law. They contend that Ngwato did not render any services nor did he tender to do so to the Company after 1 May 2011.

12. Whereas the liquidators initially took the view that Ngwato's contract of employment is deemed to have been suspended with effect from 10 November 2011. They now contend that the obligation to pay Ngwato his salary in the period 10 November 2011 to 3 February 2012 constitutes a disposition within the meaning of s341(2) of the Companies Act (read with section 2 of the Insolvency Act) and as such that it cannot be enforced unless

a Court orders otherwise.

13. Ngwato has approached this Court to resolve the legal dispute. He asks for a final order to declare that his contract of service with the Company was suspended on 3 February 2012. He also asks for an order that he is entitled to claim his salary and other benefits which he says accrued to him in the period from 10 November 2011 to 3 February 2012. I shall henceforth refer to the collective workers and the second applicant as *"Ngwato"* or *"the first applicant".*

14. It is therefore common cause that:

14.1 the Company was the first applicant's employer;

14.2 the application for liquidation of the Company was presented to Court on 10 November 2011;

14.3 the Company was placed under provisional liquidation on 3 February 2012 pursuant to its inability to pay its debts;

14.4 a final liquidation order was granted on 23 October 2012;

14.5 the first applicant and other workers are entitled to remuneration until at least 10 November 2011;

14.6 that all the employees employed by the Company and who are entitled to remuneration are those set out on annexure "FA3", being the list of employees and their monthly salaries;

14.7 that 488 workers were employed and that some 400 of those workers are members of the second applicant;

14.8 all the abovementioned 488 employees of the Company lodged and proved claims for the relevant amounts in terms of the Insolvency Act.

ISSUES FOR DETERMINATION

15. The applicants seek a declaratory order to resolve a dispute about the correct interpretation of s38 of the Insolvency Act, 24 of 1936 *("the Insolvency Act')* as read with s339 of the 1973 Companies Act.

16. Two issues of interpretation arise for determination. The first concerns the meaning of s38 of the Insolvency Act. The second concerns the proper interpretation of s341(2) of the Companies Act.

17. Ngwato contends that the effect of s38(1) of the Insolvency Act is that his contract of employment was suspended with effect from the date of the grant of the provisional order, and that the obligation to pay his salary incurred in the period between the presentation of the application for winding-up and the provisional order is not void as a consequence of the provisions of s341(2) of the Companies Act).

18. The liquidators contend that the provisions of s38 of the Insolvency Act do not mean that Ngwato is entitled to payment or a claim for payment of his salary for the period between the presentation of the application and the provisional liquidation order. What is required, they contend, is an Order of Court to say that he is entitled to continued payment in terms of s341(2) of the Companies Act. Further, the liquidators contend that no final order should be made without giving all interested parties, that is, creditors and all erstwhile employees of the Company an opportunity to be heard.

19. The liquidators contend also that the legal issue must be preceded by resolving the alleged disputes of facts.

DISPUTE OF FACT

20. There is a dispute as to which employees including Ngwato may have taken up employment with Marley Pipe Systems (Pty) Ltd *("Marley')* prior to 3 February 2012, if any. Ngwato's contention is that the dispute need not be resolved at this stage as the main dispute is the principle.

21. The respondents contend that if it is found in favour of the respondents that Ngwato had left the Company to work for Marley instead, then the declaratory order that is sought would be moot.

22. The respondents deny that Ngwato's *"services remained available"* to the Company in the period of 10 November 2011 to 3 February 2012. Ngwato states that he and the other employees *"rendered services required from us or at least tendered to do so and make ourselves available until the date of the provisional winding up order on 3 February 2012".* In his replying affidavit he is more emphatic of the fact that he and the others tendered their services from 1 May 2011 and denies mainly that his category of fellow employees were employed by Marley prior to 3 February 2012.

23. The respondents' fullest answer to this allegation is that:

> *"10 The Company (i.e. according to its record) had 488 workers in its service as at 30 April 2011. It appears that some 400 of these workers (including Ngwato) are members of the Second Applicant ("NUMSA'J. The workers had not been paid since 1 May 2011 ... This being so the workers were not required to (and they did not) render any service to the Company after 30 April 2011.*
>
> *11 A number of NUMSA workers took up employment with Marley Pipe Systems (Pty) Limited prior to 3 February 2012. Other than this the liquidators do not know if the remaining workers remained available to render services to the Company in the period from 10 November 2011 to 3 February 2012. The liquidators also do not know if any of the remaining workers obtained employment elsewhere and if so from what date.*

24. The respondents therefore seek an order which will determine the factual dispute and which, if resolved in favour of the respondents, they submit will avoid the necessity to determine the declaratory order sought by the applicants.

25. The issues that need consideration which it is alleged cannot be resolved on the papers alone are whether:

25.1 Ngwato's services remained available to the Company in the period 10 November 2011 to 3 February 2012;

25.2 Ngwato rendered or tendered to render his services from 1 May 2011 when the Company ceased permanently to carry on its business;

25.3 Ngwato and others took up employment with another company, Marley prior to 3 February 2012.

26. Whereas the respondents contend that there are disputes of facts as aforesaid, it is common cause that Ngwato and other workers are entitled to remuneration until at least 10 November 2011 when the provisional liquidation papers were launched.

27. In view of this common cause fact the respondents concede that upon the realisation that the Company could not carry on its business after 30 April 2011 it did not terminate the service contracts of the employees for that reason or retrench them in terms of the Labour Relations Act, 56 of 1995. It only considered their services as suspended upon the presentation of liquidation proceedings on 10 November 2011.

28. It appears that the workers who took up employment with Marley did so because they were not being paid by the Company at the time and sought other means to make a living.

29. The only issue is whether Ngwato took employment at Marley.

30. Whilst it may be helpful to have Ngwato subjected to cross-examination on the question whether he had tendered his services after 30 April 2011 and

whether he sought employment elsewhere, the exercise will not detract from the fact that the Company had regarded his and other service contracts to be extant at least until 10 November 2011.

31. The only dispute between the parties therefore is only whether Ngwato is entitled to pay up to 3 February 2012 which is the date that he contends is the correct date of suspension of his service contract consequent to liquidation of the Company.

THE MEANING OF S38(1l OF THE INSOLVENCY ACT

32. S38(1) of the Insolvency Act provides as follows:

"The contracts of service of employees whose employer has been sequestrated are suspended with effect from the granting of a *sequestration order."*

33. By virtue of the transitional provisions in item 9(1) of Schedule 5 of the 2008 Companies Act, chapter 14 of the 1973 Companies Act continues to apply with respect to the winding-up and liquidation of companies under the 2008 Companies Act, as if the 1973 Companies Act had not been repealed.

33.1 In terms of s339 of the 1973 Companies Act:

> *"In the winding-up of* a *company unable to pay its debts the provisions of the Jaw relating to insolvency shall, in so far as they are applicable, be applied mutatis mutandis in respect of any matter not specially provided for by this Act."*

33.2 In the words of Henochsberg:[2]

> *"The effect of s339 is to apply in the winding-up of a company (ie "the process of liquidation which commences once an order of winding-up*

[2] Commentary on the Companies Act 61 of 1973 *("Henochsberg 1973')* at p 667

has been granted [and not] the legal proceedings which lead to the grant or refusal of such an order" (Kalil v Decotex (Pty) Ltd 1988 (1) SA 943 (A) at 961 per Corbett JA (as he then was)) unable to pay its debts, mutatis mutandis, those provisions of the Jaw to insolvency, in so far as they may be capable of application, in respect of any matter not otherwise specially provided for by the Act."

34. The respondents submit that:

34.1 If Ngwato is correct, the effect of a declaration in his favour, will be to increase the value of concurrent claims made against the Company by some R20.8 million to the detriment of the Company's general body of creditors.

34.2 This increase will, moreover, be the result of claims for salaries which arose in the period after the deemed date of the *concursus creditorum* in terms of s340 of the 1973 Companies Act, and the date of the grant of the provisional order.

34.3 The provisions of s38 of the Insolvency Act do not mean that Ngwato is entitled to payment of his salary for the period between the presentation of the application and the provisional liquidation order. What is required is an Order of Court to confirm his entitlement in terms of s341(2) of the Companies Act.

34.4 The solution is to interpret s341(2) of the 1973 Companies Act as having the effect of a suspension unless a Court orders otherwise. It would then be up to either the applicant for a liquidation order to agree in advance that the company may continue to make dispositions in good faith in the ordinary course of its business in the period between the presentation of the application and the date of the probable grant of a winding-up order or the trade unions, employees or management forthwith to

seek such an order.

35. The liquidators contend that the obligation to pay salaries constitutes a disposition by the Company within the meaning of s2 of the Insolvency Act and the common law, which is subject to s341(2) of the 1973 Companies Act.

36. Counsel for the respondents, Mr Limberis SC, states in the heads of argument and in oral argument that the respondents are no longer basing their opposition to this application on the basis of their initial argument that Ngwato's contract of employment is deemed to have been suspended with effect from 1O November 2011, but now contend only that the obligation to pay Ngwato his salary in the period 1O November 2011 to 3 February 2012 constitute a disposition within the meaning of s341(2) of the Companies Act (read with s2 of the Insolvency Act), and as such that it cannot be enforced unless a Court orders otherwise. It is therefore common cause also that the service contracts continued until 3 February 2012 but that the workers are only entitled to payment up to 1O November 2011.

37. In this regard the two Acts provide as follows:

37.1 S341(2) of the 1973 Companies Act provides:

"(2) Every disposition of its property (including rights of action) by any company being wound-up and unable to pay its debts made after the commencement of the winding-up, shall be void unless the Court otherwise orders."

37.2 S2 of the Insolvency Act defines *"disposition"* as follows:

" *'disposition' means any transfer or abandonment of rights to property and includes* a *sale, lease, mortgage, pledge,delivery, payment, release, compromise, donation or any contract therefor but does not include* a *disposition in compliance with an order of Court; and 'dispose' has* a *corresponding meaning."*

38. The question that arises is whether the payment of salaries in this case would constitute a disposition as defined and whether, if so, it should be back dated to 10 November 2011.

39. The respondents contend that in terms of s348 the *concursus creditorum* is *ex post facto* deemed to have commenced at the time of the presentation to Court of the winding-up application if a winding-up is made. Put differently the *concursus creditorum* is backdated.[3]

40. In the case of a liquidation this, so the liquidators contend, is dealt with in s341(2). The object of s341(2) is to ensure that the company's financial position does not change in the interim period and that creditors are paid *pari passu.* It deems that the presentation of the winding-up application to the Court will correspond to the grant of a sequestration order in insolvency but his is if a winding-up order is made. Blackman states in this regard:[4]

"... *the date the application for the winding-up is presented to the court is in terms of s340(2)(a) of the Companies Act deemed to correspond with the date of sequestration."* (per Viver JA in **Cohen v Saphi (Pty) Ltd** 1996 (1) SA 1190 (A) at 1192).

41. Ngwato counters this argument by submitting that:

"This means that in the ordinary scenario after the winding-up application is presented to court, i.e. when it has been duly lodged with the Register of the Court,[5] the company will continue to operate until such time as a *liquidation order is actually granted, if it is granted. This means that on the liquidators' approach, employees who would have continued to render services and been*

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[3] Blackman: Commentary on the Companies Act, Vol 3, 14-194
[4] Blackman: *(ibid)* Vol 3, 14 - 50 to 14 - 51
[5] **Wolhutel Steel (Welkom) (Pty) Ltd v Jatu Construction (Pty) Ltd** 1983 (3) SA 815 (0) at 816; **Venter NO v Farley** 1991 (1) SA 316 (W) at 320; **The Nantes Princess** 1997 (2) SA 580 (D) at 584-586; and see also **Rennie NO v South African Sea Products Ltd** 1968 (2) SA 138 (C) at 141-142; **Meaker NO v Cambell's New Quarries (Pvt) Ltd** 1973 (3) SA 157 (R) at 159-160 and **Storti v Nugent** 2001 (3) SA 783 (W) at 794

paid, would now no longer be entitled to have been paid retrospectively. This is not only illogical and unbusiness like but would be grossly unfair to the workers who would be left in a *position of grave uncertainty as soon as any winding-up application is launched. They would be obliged to bring proceedings in terms of section 341(2) of the 1973 Act to regularise their position. This could never [be]* a *burden that the legislature would have contemplated placing on the employees."*

42. S38(1) of the Insolvency Act provides that the contracts of service of employees are *"suspended with effect from date of granting of* a *sequestration order".* The clear meaning of this provision has been commented on as meaning exactly that by Hennochsberg[6] in relation to the provisions of R339 of the Companies Act which provides that:

"In the winding-up of a *company unable to pay its debts the provisions of the law relating to insolvency shall, in so far as they are applicable, be applied mutatis mutandis in respect of any matter not specially provided for by this Act."*

43. As stated above, Hennochberg[7] states that:

"The effect of s339 is to apply in the winding-up of a *company (ie "the process of liquidation which commences once an order of winding-up has been granted [and not] the legal proceedings which lead to the grant or refusal of such an order' (Kalil v Decotex (Pty) Ltd 1988 (1) SA 943 (A) at 961 per Corbett JA (as he then was)) unable to pay its debts, mutatis mutandis, those provisions of the law to insolvency, in so far as they may be capable of application, in respect of any matter not otherwise specially provided for by the Act."*

44. This seems to be contradicted by the provisions of S348 of the 1973 Companies Act which states that:

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[6] Commentary on the Companies Act 61 of 1973 at 667

' *winding-up of* a *company by the Court shall be deemed to commence at the time of the presentation to the Court of the application for the winding-up."*

45. The respondents contend that whereas s38 of the Insolvency Act applies to sequestrations, the situation is different when dealing with liquidations because s348 of the 1973 Companies Act provides for the claims of employees to be fixed on the date of the *concursus creditorum.* They contend that in liquidations the *concursus creditorum* is backdated to the date of presentation of winding-up application. Authority for this submission is sought in Blackman[8].

46. Further reliance was placed on the English cases[9] and the English Practice Directive [10] which have held that consistent with s227 of the English Companies Act that "... *in* a *winding-up by the Court, any disposition of the property of the company ... made after commencement of the winding-up shall, unless the Court otherwise orders, be void"* if a Company does pay its employees during the period when paying its debts has become difficult, *"the payments if derived from the funds of the company are prima facie void"* unless the Court *"extend[s] indulgence to any disposition by a company designed to ensure that its employees are paid their wages ..."*[11]

47. Simply put, they contend s341(2) of the 1973 Companies Act has the effect of temporarily suspending contracts of service from the date of the presentation of the application to the date when a winding-up order is made unless the Court orders otherwise.

48. The respondents submit therefore that after the presentation of the winding-up papers on 10 November 2011 it was up to the employees and/or the employer to make an application to Court for an order that the employees may

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[7] Commentary on the Companies Act 61 of 1973 *("Henochsberg 1973')* at p 667
[8] Commentary on the Companies Act, Vol 3, 14 -194
[9] Mond & Another v Hammond Suddards & Another [1996] 2 BCLC 470 at 472 and re Clifton Place Garage Ltd [1970] 1 All ER (CA} 353 at 359
[10] [1990] 1 All ER 1056

continue to work and to receive their salaries up to the date of the order of liquidation being granted.

49. In the South African context, s38 of the Insolvency Act is clear about what happens to contracts of service from the date of their suspension as a result of the granting of a sequestration order. Subsection (4) significantly provides that a trustee or liquidator may continue or terminate contracts of employment after consultation with relevant parties, including employees and trade unions.[12]It means therefore that contracts of service remain extant until then. As stated above the respondents accepted that the employees' contracts remained valid and admit to an obligation to pay them up to at least the date of presentation of the winding-up papers on 10 November 2011. Their submission seeks to backdate the suspension of these contracts from date of provisional liquidation to 1O November 2011.

50. The ordinary meaning of s38 of the Insolvency Act, and in the context of the Labour Relations Act, 66 of 1995 *("the LRA')* was confirmed in **Richter v Bloempro CC[13] , Van Zyl NO** & **Others v Commission for Conciliation, Mediation and Arbitration** & **Others[14]** and **Ndima** & **Others v Waverley Blankets Ltd.[15]**

51. Section 1978 of the LRA seeks to protect the rights of employees.[16] It will clearly be offensive to the Constitution were the workers' rights which are

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[11] Re Clifton Place Garage at 359
[12] Insolvency Act, s38(4) and (5)- (8)
[13] 2014 (6) SA 38 (GP) at [11], [12] and [14]
[14] (2012) 33 ILJ 2471 (LC) at [24]
[15] (1999) 20 IJ 1563 (LC) at [46]
[16] S197B of the LRA reads:

"1978 Disclosure of information concerning insolvency

(1) An employer that is *facing financial difficulties that may reasonably result in the winding up or sequestration of the employer must advise a consulting party contemplated in section 189(1).*

(2) (a) An employer that applies to be wound up or sequestrated, whether in terms of the Insolvency Act, 1936 or any other law, must at the time of making application, provide a *consulting party contemplated in section 189(1) with* a *copy of the application.*

(b) An employer that receives an application for its winding up or sequestration must supply a copy of the application to any consulting party contemplated in section 189(1), within two days of receipt, or if the proceedings are urgent, within 12 hours."

protected under the Bill of Rights to be limited or obliterated without due process as envisaged in s189(1) of the LRA.[17]

17 S189(1) of the LRA reads:

"189. Dismissals based on operational requirements

(1) When an employer contemplates dismissing one or more employees for reasons based on the employer's operational requirements, the employer must consult-

(a) any person whom the employer is *required to consult in terms of a collective agreement;*

(b) if there is no collective agreement that requires consultation -

(i) a workplace forum, if the employees likely to be affected by the proposed dismissals are employed in a workplace in respect of which there is *a workplace forum; and*

52 Reference by counsel for the applicants, Mr Botha, to the case of **Stratford & Others v Investec Bank & Others[18]** is apposite. It was held in that case that:

> *"[33] The parties agree that where s38(1) of the Insolvency Act refers to 'employees', it envisages all employees, including domestic employees. Thus the section suspends the employment contracts of all*

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(a) any person whom the employer is *required to consult in terms of a collective agreement;*

(b) if there is no collective agreement that requires consultation -

(i) a workplace forum, if the employees likely to be affected by the proposed dismissals are employed in a workplace in respect of which there is *a workplace forum; and*

(ii) any registered trade union whose members are likely to be affected by the proposed dismissals;

(c) if there is no workplace forum in the workplace in which the employees

likely to be affected by the proposed dismissals are employed, any registered trade union whose members are likely to be affected by the proposed dismissals; or

(d) if there is no such trade union, the employees likely to be affected by the proposed dismissals or their representatives nominated for that purpose."

employees upon a *provisional sequestration order being granted. This means that the contracts of domestic employees are effectively suspended without notice while their business counterparts who could conceivably be doing the same kind of work in the insolvent employer's business will receive notice.*

[34] Notice prevents a *situation where employees would show up at work and suddenly find out that they can no longer render their services or receive remuneration. Notice at an earlier stage, before* a *provisional sequestration order, will not only warn an employee of the tumultuous financial state of the employer, but also meaningfully enable employees to find alternative jobs or make alternative arrangements.*

These are the virtues of being informed of the possibility of a sequestration. Notice, ultimately, signifies respect for the human dignity of employees.

[35] The interconnection between the right to dignity and work has long been articulated by this Court. In Affordable Medicines it held:

> *"One's work is part of one's identity and it is constitutive of one's dignity. ... And there is a relationship between work and the human personality* as *a whole. 'It is a relationship that shapes and completes the individual over a lifetime of devoted activity, it is the foundation of the person's existence'." (Footnote omitted.)*

The impact of a narrow reading of "employees" on their right to dignity, so *illustrated, tilts the interpretive balance decisively in favour of* a *wider reading. And this is indeed required by section 39(2) of the Bill of Rights."*

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[18] 2015 (3) S 1 (CC) at [33] - [35]

53. I am satisfied therefore that the relevant sections in the LRA ensure the protection of fair labour practices in terms of s23(1) of the Constitution, which shall not be limited unless the limitation is reasonable and justifiable in terms of s36 of the Constitution.

54. Having come to the conclusions that the respondents have not shown a genuine dispute of fact regarding whether Ngwato and other workers' contracts of service:

54.1 continued to be valid until the date of the provisional order of liquidation, that is, 3 February 2012; and

54.2 that Ngwato and other workers tendered their services from 1 May 2011;

54.3 which employees may have taken up employment with Marley Pipe Systems;

the question that remains is whether payment of their salaries for the period of 11 November 2011 and 3 February 2012 constitutes a disposition in terms of s341(2) of the 1973 Companies Act, read with s2 of the Insolvency Act.

55. I have already found that the English law is not applicable to the South African situation regarding how an employee's salary must be treated between the period of presenting winding-up papers and liquidation order, whether provisional or final. In the South African context the salary is not to be paid contingent on the employer or employee seeking a Court order to that effect pending the finalisation of winding-up proceedings. It is paid up to the date of liquidation when the contract of service is suspended in terms of s38(1) of the Insolvency Act.

56. S341(2) envisages the situation where a Company, in anticipation of the consequences of being wound-up, makes dispositions of its property in order to advantage other creditors to the potential prejudice of others. These are

impeachable dispositions in terms of the Companies Act. Payment of salaries arising out of a valid and binding contract of service does not fall within this provision. This is so whether the salaries continued to be paid or whether they are claimed in arrears at the time of liquidation.[19] Payment of salaries is to be construed as part of the continuation of operations until such time as a liquidation order is granted, if it is granted. To delegitimise a payment of a salary by declaring it a disposition in terms of s341(2) will be in conflict with the judgments of the South African Courts that have interpreted the provisions of s38 of the Insolvency Act in line with the LRA and Constitutional protections of workers. S348 of the Companies Act (1973) finds no application in this kind of transaction because it is not intended to *"avoid transactions that may have been perfectly legitimate at the time they were entered into".*[20]

57. From the above it is clear that I do not agree with the respondents' submission that the claims of the employees are fixed on the date of the *concursus creditorum,* being 3 February 2012 and backdated to 10 November 2011 in this case. The employees had to be paid regularly in the normal course of the carrying out of the business of the fourth respondent. Seeing that they were not paid for a certain period they have a claim over that period.

58. The payment of the relevant arrear salaries, although a disposition as defined in s2 of the Insolvency Act, is not a disposition to be voided under s348 of the 1973 Companies Act.

59. The backdating of the *concursus creditorum* that the respondents contend for is to ensure that the illegitimate dispositions made in anticipation of the winding-up process may be reversed should they favour one or more creditors over another or others. That rule does not apply to continued payments of salaries or payment thereof in arrears.

CONCLUSION

[19] Venter NO v Farley 1991 (1) SA 316 at 320C-E
[20] Development Bank of Southern Africa Ltd v Van Rensburg 2002 (5) SA 425 at [8

60. This finding resolves the dispute in principle. However, not all the fourth respondent's employees will be entitled to claim in terms of this judgment if they had obtained alternative employment during varying periods between 1 May 2011 when the fourth respondent ceased carrying out business and the date of provisional liquidation on 3 February 2012. Since it is common cause that all workers have a claim up to 10 November 2011 for all the periods that they were not otherwise employed, such workers each have a further claim for the periods that they were not employed between 10 November 2011 and 3 February 2012. Each claim has to be proved separately with the liquidators.

61. Accordingly, I make the following order:

1. It is declared that section 38(1) of the Insolvency Act, 24 of 1936, as read with section 339 of the Companies Act, 61 of 1973, as read with item 9 of schedule 5 of the Companies Act, 71 of 2008 means that the contracts of service of employees whose employer, which is a company, has been liquidated, are suspended with effect from the date of the granting of a provisional or final liquidation order (if no provisional order was granted).

2. It is declared that the first applicant's contract of service with the fourth respondent was accordingly suspended in terms of section 38(1) of the Insolvency Act, 1936, on 3 February 2012, subject to the first applicant proving in his claim to be admitted to proof in the insolvent estate of the fourth respondent, that he had duly tendered or otherwise made available his services until that date.

3. It is declared that subject to the first applicant proving in his claim to be admitted to proof in the insolvent estate of the fourth respondent, that he had duly tendered or otherwise made available his services until 3 February 2012, that the first applicant is accordingly entitled to claim the sum reflected as being due to him in annexure "FAS" to the founding affidavit for the period until

3 February 2012, that is, the higher claim b amount in the total sum of R177 374.28, or a lesser proven claim if he obtained alternative employment for any period between 1 May 2011 and 3 February 2012.

4. The applicants' costs of this application are costs in the winding up of the fourth respondent

MALINDI AJ

ACTING JUDGE OF THE GAUTENG

DIVISION OF THE HIGH COURT

APPEARANCES:

FOR APPLICANTS	AC Botha
INSTRUCTED BY	Hogan Levells Inc as Routledge Modise Inc
COUNSEL FOR FIRST TO FOURTH RESPONDENTS	E A Limberis SC
INSTRUCTED BY	Fluxmans Inc
DATE OF HEARING	16 February 2016
DATE OF JUDGMENT	6 May 2016