IN THE HIGH COURT OF SOUTH AFRICA /ES

(GAUTENG DIVISION, PRETORIA)

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES / NO
(3) REVISED

DATE 28/11/2014 SIGNATURE

CASE NO: 65139/2012
28/11/2014

IN THE MATTER BETWEEN

AFRICAN DAWN PROPERTY TRANSFER FINANCE 3 (PTY) LTD	APPLICANT
AND	
TUSCALOOSA 37 (PTY) LTD	1ST RESPONDENT
CONNIE MYBURGH N.O.	2ND RESPONDENT
THE COMPANIES & INTELLECTUAL PROPERTY COMMISSION	3RD RESPONDENT
THE MASTER OF THE HIGH COURT, PRETORIA	4TH RESPONDENT
HERTZOG ODENDAAL N.O. (In his capacity as trustee for the time being of the Harsaheinmar Trust, with Master's reference IT1414/08)	5th RESPONDENT
SUSANNE HELENA ODENDAAL N.O. (In her capacity as trustee for the time being of the Harsaheinman Trust, with Master's reference IT1414/08)	6th RESPONDENT
GATE INVESTMENTS	7TH RESPONDENT
HERTZOG ODENDAAL	8TH RESPONDENT

JUDGMENT

LEGODI, J

[1] In this application the applicant, African Dawn Property Transfer Finance 3 (Pty) Ltd, initially approached the court seeking relief against eight respondents in the following terms:

"PART A:

1. Setting aside the resolution purportedly taken by Tuscaloosa 37 (Pty) Limited ('Tuscaloosa') on 10 September 2012 in terms of section 129 of the Companies Act, Act 71 of 2008 ('the Companies Act (2008)'), in terms of which Tuscaloosa resolved voluntarily to begin business rescue proceedings and to be placed under supervision;

alternatively,

Declaring the resolution purportedly taken by Tuscaloosa on 10 September 2012 in terms of section 129 of the Companies Act (2008), in terms of which Tuscaloosa resolved voluntarily to begin business rescue proceedings and to be placed under supervision, a nullity and to the extent necessary directing the Companies & Intellectual Property Commission to record same;

2. Directing that the costs of this application be paid by any person who may oppose this application, jointly and severally, the one paying the other to be absolved;

PART B:

3. Declaring the so-called agreement of sale, dated 20 March 2012, and purportedly entered into between Tuscaloosa and Gate Investments, and all other such agreements, null and void.

4. Declaring the so-called agreement of cession, dated 20 March 2012, and purportedly entered into between Tuscaloosa and Gate Investments, and all other such agreements, null and void;

5. Interdicting Gate Investments from in any way dealing with Tuscaloosa's claim against the Member of the Executive Council for Finance of the North West Province, prosecuted out of the North West High Court, Mafikeng, under case number 1729/2010;

6. Interdicting Hertzog Odendaal from in any way dealing with Tuscaloosa's claim against the Member of the Executive Council for Finance of the North West Province, prosecuted out of the North West High Court, Mafikeng, under case number 1729/2010;

7. Authorising the sheriff to attach the claim of Tuscaloosa against the Member of the Executive Council for Finance of the North West Province, which claim is being prosecuted out of the North West High Court, Mafikeng, under case number 1729/2010, as described in the special notarial covering bond, which has been registered with the Registrar of Deeds at Pretoria on 21 June 2011, with bond registration number BN000025822/2011;

8. Directing that the costs of PART B of this application be paid by any persons who may oppose this application, on the scale as between attorney and client, jointly and severally, the one paying the other to be absolved; and

9. Further and/or alternative relief.

PART C:

10. That Tuscaloosa be wound up and placed in the hands of the Master of the above Honourable Court;

11. The costs of the application be costs in the liquidation.

12. Further and/or alternative relief."

[2] The main characters in these proceedings are the first respondent; Tuscaloosa 37 (Pty) Ltd, seventh respondent, Gate Investments and eighth respondent, Hertzog Odendaal.

[3] African Dawn Capital Ltd ("ADC") is a holding company of African Dawn Property Transfer Finance 2 (Pty) Ltd ("PTF2"). PTF2 is also a credit provider. ADC manages the applicant.

[4] By way of background, the applicant is also a credit provider. It provided loans to various entities directly or indirectly owned by Harsaheinmar Trust or the eighth respondent who was the Trust's trustee. Amongst these entities there was

Bestworks Property Development (Pty) Ltd ("Bestworks"). Both PTF2 and applicant provided loans to Bestworks.

[5] The Harsaheinmar Trust holds 100% of the shares in Bestworks. It also holds 60% of the shares in the first respondent. On 7 July 2009 Bestworks concluded an agreement with PTF2 and the applicant in terms of which all the loan amounts were consolidated and the parties agreed that the consolidated amounts totalled R14 732 435,20 and R30 429 645,23 respectively. At the same time Harsaheinmar Trust resolved, amongst others, that its trustee, the eighth respondent was authorised to transfer 30% of the total shares in the first respondent to PTF2. The other 30% shares in the first respondent were to be transferred to the applicant.

[6] The transfer of the shares in the first respondent held by Harsaheinmar Trust to PTF2 and the applicant was made as a security for the indebtedness of just over R45 million owed by Bestworks to PTF2 and the applicant. On 3 September 2009, an addendum to the consolidation agreement was concluded between Bestworks and the applicant. In terms of the addendum, Bestworks' indebtedness to the applicant was increased to over R32 million. The amount was payable by 31 May 2010. That never happened.

[7] On 25 February 201, a settlement agreement was reached between PTF2, the applicant and ADC, on the one hand, and the first respondent, the Harsaheinmar Trust and other two trusts on the other hand. The first respondent, eighth respondent and Harsaheinmar Trust wanted to be released from the security which they had put up in respect of the consolidated money, which amount was

principally owed by Bestworks. The eighth respondent and Harsaheinmar Trust were to be released from their various securities in respect of the indebtedness of R30 million to the applicant by the first respondent, eighth respondent and Harsaheinmar Trust.

[8] The R30 million was to be paid as a first charge out of the amount realised in a judgment or settlement from the claim which the first respondent had instituted against MEC for Finance North West Provincial Government. That claim is the subject of the dispute in these proceedings. The first respondent had sued the MEC for damages in an amount of well over R200 million. The claim is based on an alleged breach of contract. Of importance, is clause 4 of the settlement agreement which provides as follows:

> "4. CESSION OF CLAIMS
>
> 4.1 PTF2 hereby cedes its claims against Tuscaloosa and [the Harsaheinmar Trust and Mr Odendaal] to [PTF3], who accepts such cession.
>
> 4.2 Each of the Harsaheinmar Trust and Mr Odendaal hereby cede any and all of their claims, including but not limited to any claims to a dividend or any other form of distribution from Tuscaloosa, and all future claims of whatsoever nature and howsoever arising against Tuscaloosa and one another to [PTF3]. This cession shall endure until the settlement amount has been paid in full. [PTF3] accepts such cession.
>
> 4.3 Both the [Harsaheinmar Trust and Mr Odendaal] and Tuscaloosa hereby cede their right, title and interest in and to the receipt of any income and/or monies from the NWHC

settlement to [PTF3] up to the maximum amount as per clause 2 above, and [PTF3] accepts such cession."

[9] The effect of the cession is that the applicant acquired all the rights of PTF2 as well as those of first respondent, the Harsaheinmar Trust and the eighth respondent. The right from PTF2 included its rights under suretyship given in its favour, amongst others, by the first respondent, eighth respondent and Harsaheinmar Trust and the 30% shares in the first respondent which had been ceded to Harsaheinmar Trust.

[10] The first respondent, Harsaheinmar Trust and the eighth respondent consented to the registration of a notarial bond over the claim in favour of the applicant as security for payment of the settlement amount. In accordance with the settlement agreement, a notarial bond over movables, a special notarial bond was given by the first respondent in favour of the applicant over the claim mentioned in paragraph 8 of this judgment. On 21 June 2011 the bond was registered with the Registrar of Deeds. It is this bond that the applicant wishes to perfect as prayed for in prayer 7 quoted in paragraph1above. Clauses C and E of the bond provide as follows:

"C. The mortgagor has undertaken to pay to Afdawn the maximum sum of R30 000 000 (thirty million rand) from the amount realised from the action instituted by Tuscaloosa against the members of the Executive Council responsible for financing North West Province under case number 1729/2010 in the North West High Court, Mafikeng ('the claim') as is more fully described in clause 1 hereof.

E. Afdawn requires the said present, a future indebtedness of the mortgagor, to a maximum aggregate amount of R30 000 000 (thirty million rand) for costs to be secured by the hypothecation of the claim as provided for in the special notarial covering bond ('bond')."

[11] Further, of relevance, in clause 1.3 is recorded as follows:

"1.3 The Morgator and Afdawn have agreed that Afdawn's share of the settlement amount received from the NWNC shall be paid from the trust account of De Klerk and Marais, the attorneys of Tuscaloosa, who are responsible for the action, within 7 (seven) days of receipt of the settlement account."

[12] 'Afdawn', in the quotation refers to the applicant. On 20 March 2012 the first respondent sold the claim in question to Gate Investments (the seventh respondent). In terms of clause 2 of that written agreement, the seventh respondent is to pay R60 million within one business day of receipt of the moneys from the MEC in respect of the claim. The entire settlement of the claim is to be paid into a trust account to be appointed by Hertzog Odendaal (the eighth respondent). The agreement was to be kept in the strictest confidence. The agreement contains a suspensive condition clause. It is recorded as follows:

'14. **Suspensive condition**

14.1 This agreement is subject to the suspensive condition that the purchase price is paid in accordance with clause 2 above, and when such condition is fulfilled the agreement will become effective as from the date of the signature of the agreement by the latter of the parties hereto.'

[13] It is this sale agreement that had prompted the present proceedings. Before me the issues are limited only to prayers 3, 4, 5, 7, 8, 9, and 10, prayers 1 and 6 having been granted on the 8 May 2013 and 19 August 2014 respectively. A background post the institution of the present proceedings is necessary.

[14] The present proceedings were issued during November 2012. On 11 November 2012 the seventh respondent served notice to oppose. On 28 March 2013 the eighth respondent deposed to an answering affidavit and the seventh respondent also deposed to one during March 2013. In their answering affidavits, they made reference to certain documents but failed to annex same. This prompted the applicant to serve a notice to discover in terms of rule 35.

[15] On 8 May 2013 a relief sought in terms of prayer 1 of the notice of motion quoted in paragraph 1 of this judgment was granted. In other words, the resolution purportedly taken by the first respondent on 10 September 2012 in terms of section 129 of the Companies Act 71 of 2008 resolving voluntarily to put the first respondent under rescue proceedings, was set aside.

[16] On 9 July 2013 the seventh, eighth and other respondents were ordered to comply with rule 35(12), (13) and (14) notice and to produce all documents referred to in their answering affidavits. The seventh and eighth respondents and other respondents failed to heed to the order.

[17] On 9 October 2013, the seventh, eighth and other respondents' defences set out in their answering affidavits were dismissed. On 19 August 2014 the matter was laid before HASSIM AJ. She made an order as follows:

'1. THAT prayer 6 of the notice of motion is granted.

2. THAT prayer 3, 4, 5, 7, 8, 10 and 11 postponed to the 17th and 18th November 2014.

3. THAT the applicant is to file its answering affidavit on or before 15 September 2014.

4. THAT the papers must be index and paginated within 2 court day of 01 October 2014.

5. THAT the applicant files its head of argument on or before 15 October 2014.

6. THAT the seventh respondent must file its Heads of Arguments by 27 October 2014.

7. The seventh respondent is to file its replying affidavit on or before 29 September 2014.

8. THAT the seventh respondent in the main application to pay the wasted costs of the postponement on an attorney and client scale.

9. THAT the eighth respondent in the main application is to pay the costs of the application from inception to date of the order.

10. THAT the seventh respondent application for security for costs was withdrawn.'

[18] On 19 August 2014 the matter was postponed as indicated in paragraph 2 of Hassim AJ's judgment. That morning of the 19 August 2014, the seventh respondent, in court, handed over to the presiding judge a notice of application

dated 14 August 2014 and a founding affidavit. In the notice of application a relief is sought as follows:

"1. TAKE NOTICE THAT when the main application is to be heard, alternatively, on a date as directed by the court, applicant will apply for an order in the following terms:

1.1 To set aside the order, annexure 'RN4' to the founding affidavit, striking out applicant's answering affidavit;

1.2 applicant's answering affidavit be supplemented with the facts set out in the founding affidavit to this application;

1.3 to consolidate the application under case number 2013/48287 of this court with this application;

1.4 to stay the main application pending the hearing of applicant's application for first respondent to furnish security for the costs of the main application;

1.5 to order first respondent to make discovery;

1.6 to allow applicant to call for cross-examination the deponent to the main application and Mr Harry Odendaal;

1.7 to grant condonation insofar as may be necessary for any non-compliance by applicant with any court order or the rules of court;

1.8 to give directions for the further conduct of the main application as the court may deem just;

1.9 the costs of this application be costs in the main application, save in the event of it being opposed, in which event any

party opposing this application be ordered to pay the costs thereof;

1.10 for further and/or alternative relief."

[19] I must mention that, there were other several interlocutory applications launched by either the eighth or seventh respondents since the institution of the main application. I do not find it necessary to deal with those applications. But, it is of great concern that the seventh and eighth respondents conducted themselves in a manner that point to unwillingness to ensure that the matter is finalised expeditiously. For example, the application referred to in paragraph 18 above was not properly enrolled; but was meant to be moved on 19 August 2014. Coming back to the order made on 19 August 2014, the seventh respondent was required to do two things: One, to file its replying affidavit on or before 29 September 2014. That was meant to be a replying affidavit to the answering affidavit in the application referred to in paragraph 18 above. Two, the seventh respondent was required to file written heads of argument by not later than the 27 October 2014. The seventh respondent refrained from complying with any of the two orders.

[20] Instead, the seventh respondent's attorneys contacted the applicant's attorneys on 10 November 2014. Certain proposals were made without prejudice. The proposals were branded by the applicant's attorneys in a letter dated 12 November 2014 as 'disingenuous' and 'a fatuous attempt at manufacturing another postponement'. 'Your client's previous conduct in this matter certainly doesn't indicate otherwise and accordingly your client's offer of settlement is rejected', so it was further stated in the response. The response was "WITH

PREJUDICE". Therefore, there was no legal impediment to the disclosure of the response.

[21] Paragraphs 3 and 4 of the response are telling to the seventh respondent. It is recorded:

> '3. On 10 November 2014, you telephonically advised us that you would be filing your clients replying affidavit and your counsel's heads of argument the same day. As at the time of writing this letter we have still not received your client's papers. In any event, your client is hopelessly out of time and it seems has chosen to wilfully ignore the order handed down by Hassim AJ on 19 August 2014, which conduct is entirely consistent with your clients past conduct. We remind you that it was at your insistence (in order to achieve yet another postponement for your client at the last hearing of this matter) that DJP Ledwaba specified time periods for the filing of papers. Our client complied with these time limits, but your client has contemptuously ignored this order and continues to abuse the rules of court. We attach a copy of that order for your convenience.
>
> 4. We have marked this letter with prejudice for the simple reason that should your client again attempt to deceive the court, then we shall hand this letter up to the presiding officer and seek an appropriate punitive cost order against your client.'

[22] What is quoted above landed on deaf ears. I say so, because the seventh respondent elected not to do anything. On 17 November 2014 a recently briefed counsel appeared for the seventh respondent apparently accompanied by a

candidate attorney. Counsel for the seventh respondent came to court empty handed and in defiance of the court order by the seventh respondent. No replying affidavit and no written heads of argument as ordered by the court on 19 August 2014. Counsel was given an opportunity to decide whether is prepared to argue the matter without a replying affidavit and without written heads of argument, not only on interlocutory application, but also on the main application. When the court resumed it was placed on record that the attorney for the seventh respondent and their recently briefed counsel were forthwith withdrawing from acting for the seventh respondent.

[23] The sudden withdrawal brings back one to restate one of the oldest tricks in the book. That is, 'the practice of some legal practitioners, whenever the shoe pinches, to withdraw from the case, and more often than not to reappear at a later stage; or of clients to terminate the mandate, more often than not at the suggestion of the practitioner, to force the court to grant a postponement because the party is then unrepresented. Judicial officers have a duty to the court system, their colleagues, the public and the parties to ensure that this abuse is curbed by, in fruitless cases, refusing a postponement. Mere withdrawal by a practitioner or the mere termination of a mandate does not, contrary to popular belief, entitle a party to a postponement as of right'.[1]

[24] The newly briefed counsel suggested a stand down until the following day. The suggestion was made as he was apparently told that the court was intending to stand down the matter until the following day. By the way, the court did not start at 10:00 as there was no appearance for the seventh respondent. When the matter was called at 10:30, there was still no appearance. The court then

[1] Take and Save Trading v Standard Bank of SA Ltd 2004 4 SA 1 (SCA) at 4H-5B

indicated that it intends to stand down the matter until the following day and call upon the seventh respondent's attorneys and senior counsel who appeared on 19 August 2014 to explain why they were not in court on 17 November 2014 and why they cannot proceed with the matter. The court then directed counsel for the applicant to prepare a draft order to this effect. When the court resumed, the newly briefed counsel pitched up. The explanation being that he was late because he had been trying to look where the court was sitting.

[25] Be that as it may, the withdrawal was noted and counsel for the applicant in the main application was called upon to address the court on the seventh respondent's application and on the main application. There are three issues before me.

WHETHER THE SEVENTH RESPONDENT'S NOTICE OF APPLICATION DATED 14 AUGUST 2014 SHOULD BE STRUCK OFF OR DISMISSED.

[26] The issue was prompted by the court. Counsel for the applicant in the main application prefers a dismissal of the seventh respondent's application. In the same vein, he contended that I do not have to consider the merits of the seventh respondent's application.

[27] Dismissal of an application in the absence of the applicant or his or her legal representative has the same effect as a decision in favour of the respondent.[2] However, res judicata does not always follow upon the dismissal of an application, for many applications are interlocutory. Indeed the reliefs sought as per notice

[2] Purchase v Purchase 1960 3 SA 383 (D) at 383A

dated the 14 August 2014 are interlocutory. In the circumstances, the seventh respondent's application ought to be dismissed in its absence.

WHETHER THE APPLICANT IS ENTITLED FOR A RELIEF SOUGHT IN PRAYER 10?

[28] In prayer 10, the applicant wants compulsory winding-up of the first respondent. The question under discussion was prompted by the following set of facts: On 9 May 2013 the first respondent by way of a special resolution decided to voluntarily wind up itself. The special resolution was registered on 22 May 2013. On 23 July 2013 the Master of this court appointed two persons as liquidators. These are Christian Frederik de Wet and Khathazile Simon Mahlangu. On 6 August 2013 the eighth respondent launched an application *inter alia* to set aside the decision to wind up the first respondent by way of special resolution. The application never proceeded to its final conclusion. Similarly, in a notice of motion dated 2 December 2013, the seventh respondent sought *inter alia* to set aside the winding up of the first respondent. The application was set down for hearing on 9 December 2013. On 11 December 2013 the application was postponed *sine die* and the seventh respondent was ordered to pay the costs.

[29] It suffices to mention that the winding up of the first respondent by voluntary sequestration was never set aside. The applicant in the main application is not asking for the setting aside of the first respondent's voluntary liquidation. It, however, prefers a compulsory liquidation than a voluntary one.

[30] The liquidation order that was granted by the Registrar of this court on the basis of a special resolution took effect from 22 May 2013 being the date on which it was registered. It has not been set aside. Two liquidators have been appointed.

Their appointment too have not been set aside, neither is the applicant seeking for the setting aside thereof. Therefore, both the liquidation and appointment remain to be of force and effect.

[31] For his submission, counsel for the applicant relies on the decision in *King Pie Holdings (Pty) Ltd v King Pie (Durban) (Pty) Ltd.*[3] I find it necessary to set out in brief the facts in *King Pie Holdings*' case. Compulsory winding-up proceedings were instituted against the respondents on 19 February 1998. On 28 May 1998 members of the respondent filed a special resolution to voluntarily wind-up the respondent. The resolution was registered on 1 June 1998. On 3 June 1998 the presiding judge granted provisional winding-up in the compulsory winding up proceedings. Paragraph 3 of the provisional liquidation order stated:

> '3. That the respondent and all other interested parties be and are hereby called upon to show cause, if any, to this honourable court on the 8 July 1998 at 9:30 or as soon thereafter as the matter may be heard, as to why any voluntarily winding-up, implemented in terms of s 351 of the Companies Act 61 of 1973, in respect of the respondent, should not be set aside.'

[32] Paragraphs 1 and 2 of the order in the *King Pie Holdings*' matter dealt with the granting of provisional winding-up and the *rule nisi.* Finally, the court in the *King Pie Holdings'* case wound-up the respondent and order 3 as quoted above was also confirmed, effectively setting aside the voluntary winding-up order. That is not the case here. Such an order has never been granted and is not sought by the applicant in the main application.

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[3] 1998 4 SA 1240 (D&CLD)

[33] The other thing, in the *King Pie Holdings's* case, the contention was that in fact as on 3 June 1998 when the provisional winding-up order was granted, the court was not competent to do so by virtue of section 359(1)(a) and (2)(a). It provides as follows:

> '**Subsection 1(a)** - When a special resolution for the voluntary winding-up of a company has been registered in terms of s 200(a) and civil proceedings by or against the company concerned, shall be suspended until the appointment of a liquidator.
>
> **Subsection 2(a)** - Any person who, having instituted legal proceedings against a company which were suspended by a winding-up, intends to continue the same, and every person who intends to institute legal proceedings for the purpose of enforcing any claim against the company which arose before the commencement of the winding-up, shall within four weeks after the appointment of the liquidator give the liquidator not less than three weeks' notice in writing before continuing or commencing the proceedings.'

[34] The court in *King Pie Holdings* held that winding-up proceedings are not civil proceedings where a claim is instituted against or by the respondent. I find nothing wrong with this finding. This, however, was not the issue before me. The issue before me is that the applicant is seeking compulsory winding-up of the first respondent without seeking an order to set aside the voluntary winding-up. In my view, this cannot be done.

[35] I was also a bit worried whether compulsory winding-up in the face of final voluntary winding-up is not an abuse, especially where liquidators had already

been appointed. Such a winding-up is cheaper than a compulsory winding-up. Secondly, the ability of the liquidators in the present case has not been questioned.

[36] In my view, substituting a final voluntary winding-up with compulsory winding-up must be for good reasons. Prejudice will be the deciding factor. I had difficulties in understanding the basis for the substitution in the present case. Counsel suggested an advantage to the applicant. For example, he expressed the view that compulsory winding-up will take effect from November 2012 being the period during which the compulsory winding-up proceedings were commenced. Therefore, any action that might have been taken by or against the first respondent during November 2012 to May 2013 when special resolution was registered would be invalid, so it was contended.

[37] Well, the submission was made without substantiating it. For example, what actions were taken by or against the first respondent during the period November 2012 and May 2013? No facts were given. There was also a suggestion that prejudice will arise from any disposition without value. This was prompted by the court. But, section 26 of the Insolvency Act has a protection up to two years before and/or after sequestration. In any event, averments regarding disposition should be seen in the context of the invalidity and unenforceability averred by the applicant with reference to prayers 3, 4 and 5. I deal with this from paragraph 43 hereunder. I therefore find that the applicant is not entitled to the relief sought in prayer 10.

WHETHER THE APPLICANT HAS MADE A CASE FOR RELIEF SOUGHT IN PRAYERS 3, 4, 5, AND 7.

[38] Prayer 3 seeks to declare null and void the of the first respondent's claim against the Member of the Executive Council for Finance of the North West Province instituted out of the North West High Court Mafikeng under case number 1729/2010. The claim was sold to the seventh respondent. The sale was concluded on 20 March 2012. Prayer 4 relates to cession of such a claim to the seventh respondent, which cession is also dated 20 March 2012. The applicant wants the cession to be also declared null and void. Prayer 5 seeks to interdict the seventh respondent from in any way dealing with the first respondent's claim aforesaid. Prayer 7 on the other hand seeks to perfect the special notarial bond registered in favour of the applicant in respect of the claim in question and prayer 8 relates to a punitive costs order.

[39] In dealing with these prayers, the court has to make a determination based on the applicant's founding affidavit and annexures thereto, the respondents' defences as disclosed in their opposing or answering affidavits having been dismissed by an order of the court on 9 October 2013. The purported supplementary affidavit incorporated in the notice of application dated 14 August 2014 and only handed in court on 19 August 2014, cannot be considered for the reasons of the order of 9 October 2013 dismissing the respondents' defence. The striking-off of their answering affidavits to the main application was never set aside as it was envisaged in the notice of application dated 14 August 2014 referred to in paragraph 18 of this judgment. There appears to be three main grounds upon

which the applicant's cause of action is based for the relief sought in prayers 3, 4, 5 and 7 of the applicant's notice of motion.

FRAUD

[40] The applicant in its answering affidavit brands the agreement as 'open to fraud', 'a mere spes' and '... unenforceable'. I tend to agree. The eighth respondent was involved in the conclusion of the settlement agreement and registration of the special notarial bond in favour of the applicant. He facilitated the conclusion of the settlement agreement and the registration of the notarial bond regarding the first respondent's claim in the North West High Court.

[41] The eighth respondent was also involved in the sale agreement concluded between the first respondent and the seventh respondent. Yet, both in the sale agreement and cession thereof, there is no mention of the settlement agreement entered into between the applicant and the first respondent. There is also no mention of the cession and registration of the special notarial bond regarding the claim against the MEC for Finances North West Provincial Administration. Clearly there was a concealment of the true state of affairs regarding the claim. The sale and cession of the claim to the seventh respondent should therefore be found to be a product of fraud. Similarly, the seventh respondent is not spared from the criticism. It is a worrying factor that the seventh respondent will pay the first respondent R60 million for the claim and in the same breath pay the rest of the claimed amount into a trust account directed by the eighth respondent. In the

founding affidavit, the seventh respondent's participation and or responsibility is described as follows:

"103. Regardless of the status of Gate Investments, PTF3's right to the claim is notarially registered. The notarial bond is a public document. As such, all persons, including Gate Investments, are deemed in law to have knowledge of the contents of the notarial bond and, therefore, have deemed knowledge of PTF3's rights over the claim.

104. Gate Investments could not have acquired any rights in terms of the purported sale agreement and the purported cession agreement, except mala fide with the knowledge of PTF3's right to the claim. In law, the purported sale agreement and the purported cession agreement are unenforceable and stand to be declared null and void'.

The seventh respondent has failed to put a version to these averments.

UNENFORCEABILITY OF SALE AGREEMENT AND CESSION OF 20 MARCH 2012

[42] In its founding affidavit the applicant puts it as follows:

'47. The purported sale agreement and the purported cession agreement, insofar as they may be at all genuine or enforceable, constitute an agreement or a series of agreements to dispose of all

or the greater portion of Tuscaloosa's assets, as referred to in section 115, as read with section 112, of the Companies Act (2008).

48. No meeting of the shareholders was called. There was, accordingly, no special resolution adopted by persons entitled to exercise the voting rights on such a matter, at a meeting called for that purpose and at which sufficient persons were present to exercise, in aggregate 25% of all of the voting rights that are entitled to be exercised on the matter.

49. Simply put, there was no resolution, as required, for the disposal of the claim.

50. I revert to the resolution by the Harsaheinmar Trust, in terms of which it made over its 60% of the Tuscaloosa shares owned by it to PTF2 and PTF3, each obtaining 50% thereof. The language employed in the resolution was that PTF2 and PTF3 would acquire all right, title and interest, including ownership and the right of action thereunder, in the shares, so made over. The Harsaheinmar Trust could, however, repurchase those shares at the nominal price of their par value (that is, at R1 per share). Although PTF2 and PTF3 could have contended for full ownership of these shares, they held them as security, but with the attendant right to exercise the voting rights therein. While it is plain that the Harsaheinmar Trust was willing to part with its full interest in its Tuscaloosa shares, PTF2 and PTF3 did not take them as owner.

51. The voting rights on 60% of the Tuscaloosa shares were exercisable by PTF3 (upon the cession of all rights theretin to PTF3 by PTF2 in terms of the settlement agreement), in the circumstances described.

52. The remaining 40% of the Tuscaloosa shares were exercisable by the Carwi Trust and Casanostra Trust, each holding 20% of the remaining 40%.

53. Neither of these two trusts attended or voted at any meeting of the nature described above. PTF3 did not attend any such meeting, nor did it vote.

54. Indeed, no such meeting was called. In confirmation hereof, I attach the affidavit of Mr Botha hereto, marked 'FA20', and that of Mr De Klerk hereto, marked 'FA21'. There could not, in the circumstances, be a lawful disposition of the claim by Tuscaloosa to Gate Investments.

55. The disposal of the claim is, in the circumstances, unlawful, unenforceable and stands to be declared null and void. PTF3 would have it declared as such. The Carwi Trust and the Casanostra Trust support such relief.'

[43] Section 112 of the Companies Act no 71 of 2008 reads:

"(2) A company may not dispose of all or the greater part of its assets or undertaking unless –

(a) the disposal has been approved by a special resolution of the shareholders, in accordance with section 115; and

(b) the company has satisfied all other requirements set out in section 115, to the extent those requirements are applicable to such a disposal by that company.

(3) A notice of a shareholders meeting to consider a resolution to approve a disposal contemplated in subsection (2)(a) must-

(a) be delivered within the prescribed time, and in the prescribed manner, to each shareholder of the company, subject to section 62 read with any changes required by the context;

[Para (a) substituted by s. 69(a) of Act No 3 of 2011.]

(b) include or be accompanied by a written summary of-

(i) the precise terms of the transaction or series of transactions, to be considered at the meeting; and

(ii) the provisions of sections 115 and 164,

in a manner that satisfies the prescribed standards.

(4) Any part of the undertaking or assets of a company to be disposed of, as contemplated in this section, must be fairly valued, as calculated in the prescribed manner, as at the date of the proposal, which date must be determined in the prescribed manner.

[Sub-s. (4) substituted by s. 69(b) of Act No 3 of 2011.]

(5) A resolution contemplated in subsection (2)(a) is effective only to the extent that it authorises a specific transaction.

[Sub-s. (5) substituted by s. 69(b) of Act No 3 of 2011.]" [4]

[44] Section 115 of the Companies Act deals with required approval for transactions contemplated in part. In terms of subsection (2)(a) and (b) thereof a proposed transaction contemplated in subsection (1) must be approved by a special resolution adopted by persons entitled to exercise voting rights on such a matter, at a meeting called for the purpose and at which sufficient persons are present to exercise, in aggregate, at least 25% of all of the voting rights that are entitled to be exercised on that matter or any higher percentage as may be required by the Companies Memorandum of Incorporation, as contemplated in section 64(2) and by a special resolution, also adopted in the manner required by paragraph (a), by the shareholders of the company's holding company if any.

[45] In my view, the averments set out in paragraphs 47 to 51 of the applicant's founding affidavit as quoted in paragraph 42 above, establish a case for the invalidity and unenforceability of the sale agreement and cession concluded between the first respondent and the seventh respondent.

PERFECTION OF THE NOTARIAL BOND

[46] In prayer 7 the applicant wants to perfect its notarial bond through the sheriff and by authorising the sheriff to make symbolic attachment thereof. This is a protection to the applicant to ensure real and preferential treatment in respect of its claim against the first respondent. The applicant should be found to be entitled to the relief sought. I now turn to deal with another ground of invalidity the applicant alleges.

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[4] Section 112(2) of the Companies Act no 71 of 2008

SUSPENSIVE CONDITION

[47] Suspensive condition was quoted in paragraph 12 of this judgment. The agreement was on condition that the purchase price is paid in accordance with clause 2 and only when such condition is fulfilled will the agreement become effective as from the date of the signature of the agreement. At the risk of repetition, an amount of R60 million was to be paid to the first respondent within one business day of receipt of the moneys from the claim. The rest was to be paid into a trust account to be appointed by the eighth respondent. However, upon conclusion of the agreement the seventh respondent did not waste time to substitute the first respondent in the case against the MEC for Finance.

[48] In the written heads of argument counsel for the applicant states:

> '10. In the absence of the fulfilment of such suspensive condition, Gate Investments has no right whatsoever to deal with the claim instituted by Tuscaloosa against the MEC'.

[49] However, the criticism should be seen in the context of clause 4 of the purported sale agreement. Clause 4 thereof deals with "litigation". It is recorded as follows:

> 'Gate Investments should, upon acceptance of the offer to purchase by Tuscaloosa, be entitled to take over the litigation in respect of the said claim ...'

[50] Two situations appear to have been created. One, is the facilitation to pursue the case against MEC to ensure finalisation and payment thereof as envisaged in clause 4. Two, is the fulfilment of the suspensive condition once payment in

respect of the claim is received. The two are not mutually destructive and unenforceable.

[51] The only asset the first respondent has is the claim in question. This is also alluded to in the founding affidavit. The first respondent is clearly in no financial position to litigate in order to realise its claim against the MEC. Clause 4 appears to be the engine to ensure the conclusion of the litigation against the MEC. Almost like; 'you litigate on my behalf', and upon payment of the claimed amount, you get paid R60 million within one business day after receipt of the claimed amount from the MEC'. In other words, until such time that the claimed amount is paid, there is no obligation to pay. Therefore, the fact that the first respondent was substituted before the fulfilment of the suspensive condition, would not have rendered the agreement unenforceable had it not have been for the other grounds of attack alluded to in the preceding paragraphs.

COSTS

[52] An order for costs is an exercise of discretion. Such discretion has to be exercised ordinarily upon a consideration of the facts of each case. In essence, the decision is a matter of fairness to both parties.[5] In leaving the court a discretion, the law contemplated that it should take into consideration the circumstances of each case carefully weighing the issues in the case, the conduct of the parties and any other circumstances which may have a bearing on the issue of costs and then make such order as to costs as would be fair and just between the parties.[6]

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[5] Intercontinental Exports (Pty) Ltd v Fowler 1999 2 SA 1045 (SCA) at 1055F-G; Naylor v Jansen 2007 1 SA 16 (SCA) at 23F-28F

[6] Fripp v Gibbon & Co 1913 AD 354 at 363

[53] Since costs are in the discretion of the court, it is undesirable to lay down hard and fast rules for the guidance of the courts to which they will be expected to conform to in the absence of special circumstances.[7] Rules for the court's guidance in exercising its discretion in the award of costs are various, *inter alia,* the court may order the losing party to pay the costs of the successful party on an attorney and client scale. Secondly, as a general rule, the successful party is entitled to his costs.

[55] In the present case, the applicant should be seen as a successful party though the seventh respondent and neither of the other respondents participated during the hearing of this application. The question as I see it is not whether the seventh respondent in particular should pay the costs, but rather whether he should be ordered to pay costs on an attorney and client scale.

[56] The court makes an order of attorney and client costs in order to mark its disapproval of the conduct of the losing party. Normally an order for costs on attorney and client scale will be made only where there is a special prayer therefor or when notice has been given that such an order will be asked for,[8] but the absence of such notice is not necessarily fatal.[9] An award of attorney and client costs will not be lightly granted, if the courts look upon such orders with disfavour and are loath to penalise a person who has exercised its right to obtain judicial decision on any complaint he or she may have.[10]

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[7] See Fripp at 364
[8] Sopher v Sopher ..... 1 SA 598 (W) at 601
[9] Shatz Investments (Pty) Ltd v Valovyrnas 1976 2 SA 545 (A) at 560
[10] Bovungana v Road Accident Fund 2009 4 SA 123 (E) at 133G-H

[57] In general, it can be stated that the court does not order a litigant to pay costs of another litigant on the basis of attorney and client scale unless some special grounds are present such as, for example, that he has been guilty of dishonesty, or fraud or that his motives have been vexatious, reckless and malicious, or frivolous,[11] or that he has acted unreasonably in his conduct of litigation or that his conduct in some way is reprehensible.[12]

[58] Now, in the present case, the seventh respondent has been given a notice of relief for punitive costs order on an attorney and client scale. That is prayer 8 of the notice of motion. Secondly, the conduct of the seventh respondent has been questioned. In his written heads of argument counsel for the applicant alluded to the followings: that the main application having been served on the seventh respondent on 14 November 2012, it only filed notice to oppose on 11 December 2012. By this conduct it is argued that this was meant to retard the hearing of the main application. On 5 March 2013, the seventh respondent brought an application for postponement. This was to delay the hearing of the main application which was set down for hearing on 7 March 2013.

[59] On 6 December 2013 the seventh respondent and eighth respondent brought a voluminous interlocutory application aimed at causing a postponement of the main application which was set down for hearing on 11 December 2013. After the case was postponed the interlocutory application was never prosecuted to its finality. On 14 August 2014 the seventh respondent prepared another voluminous application which was served on the applicant's attorney, but never filed with the Registrar of this court. On 19 August 2014 only then did the seventh respondent

[11] Wraypex (Pty) Ltd v Barnes 2011 3 SA 205 (GNP) at 205I-207G
[12] Nyothi v MEC fpr Dept of Health Gauteng ..... SA 94 (CC) at 581F-582G

cause the application to be handed over to the court. That caused the matter to be postponed to 17 and 18 November 2014.

[60] When this matter was laid before me on 17 November 2014, there was still no compliance with the order of 19 August 2014 referred to in paragraph 18 of this judgment and the seventh respondent's legal representatives withdrew. The seventh respondent was not in court. All of these point to the unreasonable conduct of the seventh respondent in litigating with the applicant.

[61] All of these coupled with the circumstances under which the alleged agreement of sale and cession of the first respondent's claim was concluded should be found to justify a punitive costs order as prayed for.

ORDER

[62] Consequently, an order is hereby made in terms of prayers 3, 4, 5, 7 and 8 of the notice of motion quoted in paragraph 1 of this judgment.

[63] The seventh respondent's application dated 14 August 2014 is hereby dismissed with costs, such costs to be on an attorney and client scale.

M F LEGODI
JUDGE OF THE GAUTENG DIVISION, PRETORIA

HEARD ON: 17 November 2014

ATTORNEYS FOR THE APPLICANT: PETERSEN, HERTZOG & ASSOCIATES

C/O KLAGSBRUN EDELSTEIN BOSMAN
DE VRIES INC.
220 Lange Street, Nieuw Muckleneuk
Brooklyn, PRETORIA
REF: Mr Petersen
TEL: 011 784 1084

ATTORNEYS FOR THE 7TH RESPONDENTS: WALTER NIEDINGER & ASSOCIATES
477 Faida Street,
Cnr Windsor and Faida Street
Garsfontein, PRETORIA
REF: G044
Tel: 086 100 8254