IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NUMBER: 86185/19

1. REPORTABLE:	**NO**
2. OF INTEREST TO OTHER JUDGES:	**NO**
3. REVISED	**YES**
28 APRIL 2021 DATE	SIGNATURE

In the matter between:

BRADLEY BRETT LIEBMAN	**FIRST APPLICANT**
ANDREA ANTHEA LIEBMAN	**SECOND APPLICANT**
BRADLEY BRETT LIEBMAN N.O.	**THIRD APPLICANT**
ANDREA ANTHEA LIEBMAN N.O.	**FOURTH APPLICANT**
ALFREDO FIGUEIREDO PEREIRA CAMPOS N.O.	**FIFTH APPLICANT**

and

LEBOGANG MICHAEL MOLOTO N.O	**FIRST RESPONDENT**
MABATHO SHIRLEY MOTIMELE N.O	**SECOND RESPONDENT**
MALEBO RIAN ELISA MOLOTO N.O	**THIRD RESPONDENT**
THE MASTER OF THE HIGH COURT	**FOURTH RESPONDENT**

REASONS FOR THE ORDER MADE ON 17 MARCH 2021

COERTZEN AJ:

[1] These are the reasons for the order dismissing the application on 17 March 2021.

[2] In terms of the notice of motion the applicants sought to interdict the first, second and third respondents ("the liquidators') from selling, disposing or otherwise alienating any of the assets of Villa Rivage (Pty) Ltd (in liquidation) - ('Villa Rivage'), pending the finalization of an action to be instituted within 30 days of the order to set aside the voluntary liquidation of Villa Rivage, and/or from finalizing the winding up of Villa Rivage, pending the finalization of the contemplated action.

[3] The liquidators opposed the application.

[4] Leading up to the application, and since March 2019, there has already been extensive and acrimonious litigation between the first applicant and his father relating to the different companies and entities in which they have or had interests. These entities are referred to by the first applicant as "the Liebman Group". The liquidators point out that on 6 December 2019 (after the date of the institution of these proceedings) this court by order of Van der Westhuizen J under case number 50451/ 2019, placed seven[1] of the entities referred to by the first applicant as part of the Liebman Group, in final liquidation. The first applicant's father was the applicant in those proceedings and the first applicant, as the first respondent in those proceedings, opposed the relief sought for final liquidation. Allegations of fraud, mismanagement and *mala fides* were made and are made by the first applicant against his father and *vice versa*. The first applicant's father deposed to a confirmatory affidavit in support of the liquidators' opposition to the present application. This is yet another in a series of legal proceedings resulting from a family dispute between the first applicant

[1] These are the following:
Atherb Investments (Pty) Ltd; OVH Unit No 12 CC; Sweet Loft Properties.(Pty) Ltd; Golden Wedge Trading (Pty) Ltd; Great Space Trading (Pty) Ltd; Panaway Properties (Pty) Ltd and Pollick Properties (Pty) Ltd.

and his father. In his judgment Van der Westhuizen J described the relationship between the first applicant and his father as:

"The one regards the other as either a patriarchal father or an insolent, insubordinate and disloyal son."

I must confess that is also my impression from the papers.

[5] On date of its liquidation the only directors of Villa Rivage were the first applicant's father and the first applicant's sister. The first applicant and his wife (the second applicant), occupy the immovable property of Villa Rivage. The third to fifth applicants are alleged in the founding affidavit to be the trustees of the BBL Trust. In respect of the BBL Trust the first applicant alleges in the founding affidavit that "*the shareholding in Villa Rivage and River Lake was held in the said companies as nominees of the BBL Trust and the K&RL Trust, for tax purposes."* The statement is not further substantiated, but the allegation is in any event disputed by the liquidators and the first applicant's father.

[6] Villa Rivage was placed in voluntary liquidation by way of a special resolution on 8 August 2019. The notice of motion in this matter is dated 13 November 2019 and was issued in this court as far back as 15 November 2019. The applicants' replying affidavit is dated 25 February 2020.

[7] It was common cause at the hearing that the applicants have not instituted an action as contemplated in terms of the notice of motion, or at all. It was further common cause that none of the applicants are directors, shareholders or creditors of Villa Rivage.

[8] Counsel for the parties filed a joint practice note dated 10 March 2020 indicating the parties' readiness to proceed with the matter.

THE APPLICATION FOR REMOVAL:

[9] On the date of hearing the applicants sought to merely remove the application from the opposed motion court roll and tendered the costs. No affidavit explaining the reasons for such request was placed before the court. Counsel for the applicants indicated orally from the bar that the reason for the request was that the applicants wished to place a supplementary affidavit before the court, purportedly to more clearly explain the applicants' *locus standi*, and to rely on the provisions of s 388 of the Companies Act 61 of 1973 ('the Act')[2]. When I questioned her about the fact that nothing to this effect is recorded in the joint practice note, counsel for the applicants indicated from the bar that the decision to request a removal of the application from the roll, was only taken by the applicants on the morning of 16 March 2021 (i.e. the day before the hearing). Counsel for the applicants readily conceded that a reliance on s 388 of the Act would at the very least have required an amendment of the relief sought in the notice of motion, as well as the leave of the court to file further affidavits to sustain the relief provided for under the section,[3] none of which were applied for, either in terms of an application to amend, or in terms of a further affidavit presented at the hearing.

[10] The applicants could have approached the court in terms of the section, provided they could make out a proper case for relief under the section. The words in s 388(1) *"any question arising in the winding-up"* and *"powers which the Court might exercise if the company were being wound up by the Court"*, in my view however presupposes a valid winding-up, which is contrary to what is alleged in the applicants' papers as they stand at present.

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[2] The section provides:
'(1) Where a company is being wound up voluntarily, the liquidator or any member or creditor or contributory of the company may apply to the Court to determine any question arising in the winding-up or to exercise any of the powers which the Court might exercise if the company were being wound up by the Court.
(2) The Court may, if satisfied that the determination of any such question or the exercise of any such power will be just and beneficial, accede wholly or partly to the application on such terms and conditions as it may determine, or make such other order on the application as it thinks fit.'

[3] For instance, to hold an enquiry into the affairs of the company in terms of s 417 & 418 – See: *Swart v Heine and Others* (192/2015) [2016] ZASCA 16 (14 March 2016); [2016] JOL 35469 (SCA) at paras 2 & 8.

[11] The liquidators opposed the application to remove the application from the roll.

[12] It is to be mentioned that the liquidators' attorney, who is also the attorney of the first applicant's father (who resolved to place Villa Rivage in liquidation), addressed a letter to the Acting Deputy Judge President on 22 September 2020.[4] The liquidators requested a date for special hearing of the opposed motion because the papers in the application exceed 500 pages. It is also stated in the letter that the first applicant's father is, as on date of the letter, already 84 years of age and he is in ill health. This fact is confirmed by the first applicant in the founding affidavit. It is further stated in the letter that the litigation between the parties has a negative impact on the health of the first applicant's father and that he needed to tie up his legal affairs urgently.

[13] Although the applicants did not apply for a postponement *per se*, the effect of the request for removal was in my view nothing other than a request for a postponement. I was not persuaded that the applicants have shown good cause. It appeared to me that to merely remove the matter in these circumstances, would not be in the interests of justice and would cause an undue delay – See: *National Police Services Union and Others v Minister of Safety and Security and Others* (CCT21/00) [2000] ZACC 15; 2000 (4) SA 1110; 2001 (8) BCLR 775 (CC) (27 September 2000) at paras 4 & 5. After considering the arguments I refused the application to remove the matter.

[14] Counsel for the applicants then informed me that the applicants wished to proceed to argue the main application on the papers as they are.

THE MAIN APPLICATION:

[15] The applicants must stand or fall by their pleaded cause of action.[5] It is trite

[4] A copy of the letter is uploaded on CaseLines.

[5] Khumalo and Another v Member of the Executive Council for Education: KwaZulu Natal (CCT 10/13) [2013] ZACC 49; 2014 (3) BCLR 333 (CC); (2014) 35 ILJ 613 (CC); 2014 (5) SA 579 (CC) (18 December 2013) at para 90.

that the applicants must make out their case in their founding affidavit.[6]

[16] It remains unclear to me what the basis of the relief is that the applicants will seek in the contemplated action. In paragraph 12 of the applicants' heads of argument it is contended that the applicants will seek an order in the action to be instituted *"to declare the voluntary liquidation of Villa Rivage unlawful due to the acts of fraud committed"*.[7] In the founding affidavit the applicants rely on the alleged *"unlawful voluntary liquidation of Villa Rivage"* by the first applicant's father and the first applicant's sister. The first applicant states in the founding affidavit:

"…my legal representatives (i.e. my attorney and Junior Counsel), have prepared a Combined Summons in which proposed action I will seek an order inter alia to set aside the aforesaid fraudulent voluntary liquidation of Villa Rivage. I am informed that at present, my attorney only awaits the signature of the Particulars of Claim thereto by Senior Counsel and Junior Counsel (both of whom I am informed have served as acting judges in the last two weeks)."

[17] The applicants have not instituted the action as contemplated in the notice of motion. No such 'draft' particulars were placed before the court at the hearing. The liquidators contend that the present application is nothing more than a delaying tactic to frustrate the liquidation process. When I questioned counsel for the applicants about this, she was simply unable to explain why the intended action has not yet been instituted. Be that as it may, in the intended action the applicants would have to show special or exceptional circumstances which justifies the setting aside of the voluntary liquidation.[8] The applicants would also have to prove their *locus standi* to the satisfaction of the court.[9]

[18] The liquidators contend that the applicants do not have *locus standi*. I have

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[6] Bowman N.O. v De Souza Roldao 1988 (4) SA 326 (T) at 327.
[7] The applicants' heads of argument were drafted by different counsel than who appeared at the hearing.
[8] Ward v Smit: In re Gurr v Zambia Airways Corporation Ltd 1998 (3) SA 175 (SCA).
[9] Ex parte Strip Mining: In re Natal Coal Exploration Co Ltd 1999 (1) SA 1086 (SCA) at 1091 - 1092.

already alluded to the fact that the applicants seemingly came to the realisation on the eve of the hearing of the application that the allegations on which they rely in the founding affidavit, may not be sufficient to sustain *locus standi*. In support of their *locus standi* the applicants rely on the first and second applicants' occupation of the property of Villa Rivage. It is common cause that the applicants remained in occupation of the property after the failure of a bed and breakfast venture that was being operated from the property. It is common cause that there is no lease agreement between the applicants and Villa Rivage. It is also not in dispute that the creditors of Villa Rivage remain unpaid. Rand Merchant Bank ('RMB') has a claim against Villa Rivage slightly in excess of R1 million. RMB's claim has its origin in a written suretyship executed by the applicant's father in 2003, binding Villa Rivage as surety in favour of RMB for a loan to the applicant's father. As collateral RMB registered a mortgage bond over the immovable property occupied by the first and second applicants. This all happened in 2003 already. Eskom, the Emfuleni Local Municipality and another company referred to as Dibrajac (Pty) Ltd (which appears to have been deregistered), are listed on the Statement of Affairs as unsecured creditors of Villa Rivage. The liquidators state that Villa Rivage has no means to pay its creditors. This is not disputed in reply.

[19] It is common cause that the liquidators, in terms of a warrant in terms of s 69 of the Insolvency Act, 24 of 1936, seized and removed certain movable assets from the property. The first applicant opposed the application on the return date in the Magistrate's Court, Vanderbijlpark. The rule *nisi* in terms of which the warrant was issued, was confirmed on 17 March 2020. The liquidators state that the applicants have to date not provided the liquidators with proof of ownership of the movable assets, apart from a BMW X3 motor vehicle which was returned to the first applicant. There can therefore be no question of irreparable harm.

[20] It appeared to me that as far as *locus standi* and the applicants' alleged entitlement to an interim interdict are concerned, the applicants' case is based

on general allegations of fraud on the part of the first applicants' father and on the part of the first applicant's sister; in relation to the businesses of the first applicant and his father; in relation to the appointment of the first applicant's sister as a director of Villa Rivage; and in relation to the resolution to place Villa Rivage in voluntary liquidation. The high-water mark for the applicants in this regard appears to be the following statement in the founding affidavit:

"I submit that my father, sister and Stanger [the father's attorney and attorney of record for the liquidators]*, have conspired together to fraudulently place the company into voluntary liquidation as aforesaid, with the sole intention of ferreting off to my father, the surplus proceeds that will become available upon the dissolution of the winding up proceedings, alternatively, the assets of the company."*

[21] A party wishing to rely on fraud must not only plead it but must also prove it clearly and distinctly.[10] There is nothing on the papers to show that the applicants have sufficient legal interest to seek to set aside the voluntary liquidation of Villa Rivage. The applicants have further in my view not shown that *prima facie* Villa Rivage was *"placed into fraudulent and unlawful voluntary liquidation"*, as contended in the applicants' heads of argument, or that some other reason existed why the company should not have been placed in voluntary liquidation, or that subsequent events would entitle the applicants to seek to set aside the liquidation.

[22] Temporary restraint against the exercise by the liquidators of their statutory powers may be granted only in the clearest of cases.[11]

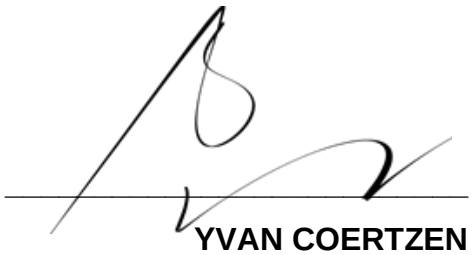
[23] The granting of an interim interdict pending an action is an extraordinary

[10] Blue Crane Eco Mall Ltd and Another v Oh My Restaurants and Coffee Shops (Pty) Ltd & Nikkel Trading 59 Ltd and Another (2017/21216/21) [2017] ZAGPJHC 280 (5 October 2017) at para 26.
[11] National Treasury and Others v Opposition to Urban Tolling Alliance and Others (CCT 38/12) [2012] ZACC 18; 2012 (6) SA 223 (CC); 2012 (11) BCLR 1148 (CC) (20 September 2012) at para 47.

remedy within the discretion of the Court.[12]

[24] In the result the applicants have not in my view shown on the papers that they have a *prima facie* right to the relief sought and have not satisfied the requirements for the granting of an interim interdict.[13]

[25] For these reasons I dismissed the application and ordered the applicants, jointly and severally, to pay the liquidators' costs.



YVAN COERTZEN
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

Date of hearing: 17 March 2021
Date of the order: 17 March 2021
Date of reasons: 28 April 2021

These reasons were handed down electronically by circulation to the parties' legal representatives by email and by uploading to the digital CaseLines system. The date and time for hand-down is deemed to be at 10h00 on 28 April 2021.

Appearances:

Counsel for the applicants:	Adv H Worthington
	Attorneys for the applicants:
	David Kotzen Attorneys
Counsel for the respondents:	Adv N Nortje
	Attorneys for the respondents:
	Aaron Stanger & Associates

[12] Eriksen Motors (Welkom) Ltd v Protea Motors, Warrenton and another [1973] 4 All SA 116 (A).
[13] Which are a *prima facie* right, a well-grounded apprehension of irreparable harm if the interim interdict is not granted; the balance of convenience must favour the applicant and there must no ordinary remedy.