THE SUPREME COURT OF APPEAL
REPUBLIC OF SOUTH AFRICA

JUDGMENT

Case No: 325/08

PIETER ARNOLDUS CRONJE NO	**First Appellant**
ENVER MOHAMED MOTALA NO	**Second Appellant**
NEDBANK LIMITED	**Third Appellant**

and

HILLCREST VILLAGE (PTY) LTD	**First Respondent**
CRYSTAL COOPER DE LA PIERRE NO	**Second Respondent**

Neutral citation: *Cronje v Hillcrest Village* (325/08) [2009] ZASCA 81 (17 July 2009)

Coram: STREICHER ADP, LEWIS, VAN HEERDEN JJA, GRIESEL & BOSIELO AJJA

Heard: 14 MAY 2009

Delivered: 17 JULY 2009

Summary: Section 420 of Companies Act 61 of 1973 – application to avoid dissolution of liquidated company - unlikelihood of avoidance yielding a financial benefit to applicant, inaction and delay on the part of applicant factors to be taken into account in exercise of court's discretion.

ORDER

On appeal from: High Court, Pretoria (Mavundla J sitting as court of first instance)

1 The appeal is upheld with costs. In the case of the second and third appellants such costs are to include the costs of two counsel.

2 The order by the court below is set aside and replaced with the following order:

'The application is dismissed with costs.'

JUDGMENT

STREICHER ADP (LEWIS, VAN HEERDEN JJA, GRIESEL & BOSIELO AJJA concurring)

[1] This is an appeal against a judgment in the High Court, Pretoria in terms of which Mavundla J, in an application by the first respondent, Hillcrest Village (Pty) Ltd ('Hillcrest'), and the second respondent, the trustees of the CMT Trust ('CMT'), declared the dissolution of a company, Waterkloofspruit Projects (Pty) Ltd (in liquidation) ('WKP'), to have been void and ordered certain ancillary relief. The appeal is with the leave of the court below.

[2] The respondents' founding affidavit is only 11 pages long but after receipt of the appellants' answering affidavits they filed a replying affidavit consisting of 131 pages containing new matter. The appellants

thereupon filed a supplementary answering affidavit dealing with the new matter. The court below dismissed an argument by the appellants that it should not have regard to new matter in the replying affidavit and proceeded to deal with the matter on the basis also of such new matter. However, it was either unaware of the existence of the supplementary answering affidavit or chose to ignore it. Mavundla J stated in his judgment: 'Besides, the respondents, it would seem, never sought to file further affidavits to deal with what they contend is now a new ground, ie the fraud' and later 'I have taken note of the fact that the fifth, sixth and seventh respondents did not seek leave of the Court to deal with what is alleged to be new matters being raised in the replying affidavit.' However, according to the respondents the appellants had been given leave to deal with the new matter. Before us the matter was, therefore, argued as if the replying affidavit formed part of the founding affidavit and as if the answering affidavit and supplementary answering affidavit constituted the answer to these founding affidavits. That is the sensible way to deal with the matter. One can certainly not have regard to the new matter in the replying affidavit and ignore the supplementary answering affidavit.

[3] The Plascon Evans rule applies and the facts will be stated in accordance with that rule. On 19 October 1994 WKP purchased Erf 1856 Waterkloof Ridge from the City Council of Pretoria ('the City Council'). The property was to be developed as part of an upmarket security village, Waterkloof Boulevard, consisting of 113 residential stands and 107 cluster stands. In terms of the agreement of sale WKP was obliged to create a nature park at a cost of not more than R2 158 000 on the remainder of Erf 1856. At that stage the remainder of Erf 1856 comprised '29,5902 hectare of disturbed land' within a natural valley formed by the

Waterkloofspruit which bisects the site. BOE Private Bank and Trust Company Ltd ('BOE') guaranteed WKP's obligation to create a nature park. BOE also made available to WKP an amount of R14 200 000 secured by a mortgage bond over the property for purposes of funding a turnkey development on the property.

[4] On 3 February 2000 a lease agreement was entered into between the City Council and WKP which committed WKP, in addition to the development of the park, to the long term maintenance of the park at an initial rental amount of R5 000 per year. In terms of the lease agreement the lessee was obliged to commence with the development of the park within 60 days of signing of the lease agreement and to complete the park within a 12-month period. WKP failed to do so. As a result the City Council, on 13 October 2000, in terms of the guarantee referred to above, claimed payment by BOE of an amount of R2 158 000.

[5] It became apparent that the work that had already been done in respect of the project had deviated from the approved site and landscape development plans resulting in substantial damage being effected to an already seriously disturbed site. BOE thereupon undertook to complete the project on behalf of WKP.

[6] WKP was entirely dependent on the funding provided by BOE to complete the development and it had become clear prior to 2000 that it was unable to meet its obligations vis-à-vis BOE, the City Council in respect of rates and taxes, and other creditors. In consequence of WKP's financial constraints BOE, during 2000, advanced a further loan of R10,8m to WKP secured by a mortgage bond, for purposes of restructuring the development. In that year and at the request of Mr

Edward de la Pierre ('De la Pierre') who acted on behalf of WKP, BOE mandated Pam Golding Properties to launch a marketing campaign in respect of the stands in the development. BOE incurred all the costs of this campaign. But although the campaign was driven with the assistance of De la Pierre it failed, mainly because potential purchasers were interested only in stands in respect of which transfer could not yet be given because of problems with the sub-division and installation of services. As a result BOE considered itself as not having any alternative but to foreclose its mortgage bond. At about this time another creditor applied for the liquidation of WKP. In an attempt to avoid the liquidation De la Pierre was willing to conclude a sale agreement with one Da Silva, on whom BOE pinned its hopes to undertake the completion of a substantial portion of the development. Da Silva purchased the cluster stands and undertook to pay to BOE the purchase price in respect of each cluster stand purchased upon completion of building operations on the relevant stand and the sale thereof to a third party. In terms of the Da Silva agreement BOE undertook to provide services to the cluster stands at its cost.

[7] The Da Silva agreement was signed by De la Pierre on 18 July 2000. Three days later, on 21 July 2000, WKP also gave a general power of attorney to BOE in respect of the disposition of the remaining unsold subdivisions of Erf 1856 and undertook not to interfere or in any way participate in the marketing and selling of the properties. In terms of the general power of attorney BOE undertook to effect payment of an amount not exceeding R5,1m in reduction of any lawful and current debt due by WKP to its sundry debtors. Pursuant to the general power of attorney serious attempts were made to market the properties and BOE settled the

claims of various creditors of WKP involving an amount of approximately R5m.

[8] BOE believed that with Da Silva's involvement at least a substantial portion of the project could be successfully completed. However, subsequent to the conclusion of the agreement of sale, WKP contended that De la Pierre had no authority to conclude the agreement and refused to ratify it. By that time Da Silva had commenced with construction. De la Pierre then claimed that the stands had a value which BOE considered to be unrealistic and adopted an attitude which BOE considered to be unreasonable, unreliable and uncooperative. In the circumstances BOE considered itself not to have any option other than to apply for the liquidation of WKP.

[9] On 14 February 2001 WKP was placed in liquidation and Mr Cronje, the first appellant, and Mr Motala, the second appellant (hereinafter jointly referred to as the liquidators), were appointed as provisional liquidators. The liquidators applied to the Master for authority in terms of s 386(2A) and (2B) of the Companies Act 61 of 1973 to sell the immovable property of WKP by way of public auction 'met bekragtiging onmiddelik na afloop van die veiling'. In its request for authority it stated that the amount owing by WKP to BOE as mortgagee was R29 442 461.59, that it would not be possible to recover the amount from the proceeds of the auction, that in addition to a capital loss BOE would also have to write off approximately R400 000 interest per month and that BOE would have to pay rates and levies of approximately R180 000 per month to the Local Transitional Council. The liquidators stated:

'Die voorwaardes van die voorgenome verkoop van die onroerende eiendomme is kortliks soos volg:

('n afskrif van die voorgenome Verkoopsvoorwaardes hierby aangeheg vir u meer volledige verwysing)

1 Die eiendomme word elkeen apart opgeveil, en word voetstoots verkoop, elk onder `n aparte koopkontrak.

2 10% van die verkoopprys in kontant op ondertekening van die verkoopsvoorwaardes.

3 Die balans koopprys tesame met 16% rente per jaar, bereken vanaf datum van veiling tot datum van oordrag in die naam van die koper, beide dae ingesluit, binne 30 dae vanaf veilingsdatum per bank of bouvereniging waarborg.

4 Die verkoping vind plaas met onmidelike bekragtiging na afloop van die veiling, en is geen bekragtigingsperiode van krag nie.

. . .

8 Voor dat die individuele standplase opgeveil word, word dit in die vooruitsig gestel dat die ontwikkeling as `n geheel opgeveil sal word, om sodoende te verseker dat die maksimum voordeel vir die verbandhouer verkry sal word.'

The conditions of sale provided that the auctioneer could reject any bid without giving a reason.

[10] The auction took place on 20 March 2001. Although it was well attended no bidding interest was shown and there was no realistic expectation of a selling price in respect of the stands which would be remotely close to the outstanding balance owed to BOE at the time. As a result BOE considered itself not to have any choice 'but to buy in the project as it was the only creditor'. It did so by offering a nominal amount of R100 000 and that bid was accepted by the auctioneer obviously on instruction of the provisional liquidators.

[11] Before the auction, on 6 March 2001, an agreement of settlement was concluded between Gilboa Properties Ltd ('Gilboa'), Hillcrest and

other debtors of WKP on the one hand and WKP and BOE on the other hand. In terms of this agreement –

(i) it was recorded that R5,2m was owed by these debtors to WKP and that some of these debtors had bound themselves as sureties and co-principal debtors to BOE in respect of the obligations of WKP to BOE in terms of a loan by BOE to WKP;

(ii) the debtors undertook, jointly and severally, to pay to WKP an amount of R10m together with interest at the rate of 16,5 per cent per annum;

(iii) the debtors had to deliver share certificates in respect of 20 million Gilboa shares together with share transfer forms as security in respect of the obligations undertaken by them.

(iv) the debtors waived any claims that they might have against WKP and BOE.

[12] On 24 August 2001 the parties to the first settlement agreement and the trustees of CMT, being De la Pierre, De la Pierre's wife and one Jan Boshoff entered into a second settlement agreement in terms of which it was agreed that CMT would deliver share transfer forms in respect of the Gilboa share certificates that had already been delivered, that the liquidators could sell the shares on the Johannesburg Stock Exchange and that the proceeds would be applied in reduction of the debt of R10m. Because of 'the fact that there was a minimal market for the shares' Hillcrest borrowed R3m against security of a mortgage bond over its property and paid the amount to WKP in reduction of the debt of R10m. In terms of yet a further agreement of settlement ('the third settlement agreement') concluded on 23 August 2002 the parties to the second settlement agreement agreed that Hillcrest would transfer the immovable property known as Gilboa House to BOE at a price equal to the amount

owing to BOE in terms of the mortgage bond over the property (being R6,9m), that the Gilboa shares which had not been sold (20 775 000 less 600 000) would be redelivered to CMT and that, against transfer of the property, CMT and the other parties would be absolved from their obligation to pay the amount of R10m to WKP and from their obligations to BOE in terms of any suretyships. Effect was given to this agreement.

[13] A first and final liquidation and distribution account was confirmed by the Master on 13 December 2002 and WKP was dissolved on 25 June 2004. According to the liquidation and distribution account BOE, having paid the other creditors, was the only creditor that proved a claim against WKP. It proved a claim of R29 297 229,13 secured by a mortgage bond. Its security realised only R100 000 (plus VAT) and an additional R720 000 (plus VAT) in respect of two stands separately auctioned which, after deduction of deductible costs, entitled it as a secured creditor to a dividend of R784 527,23 leaving it with a concurrent claim in an amount of R28 512 701,90 in respect of which it received a dividend of R3 619 804,73. The only other assets reflected are a cash balance of R688 008,92, an amount of R82 210,34 refundable by SARS and an amount of R4 209 812,22 payable by BOE. The latter amount is made up as follows:

Proceeds of Gilboa shares	R 109 812,22
Proceeds of loan to Hillcrest	R3 000 000,00
Net value of the Gilboa House property	R1 100 000,00

[14] BOE suffered a loss of approximately R7m in respect of the project. It recovered approximately R28,5m from the disposal of the stands it purchased at the auction. In addition it credited its WKP account with an amount of R4,1m in respect of the Gilboa House property which

was transferred to it as part payment of the debt of R10m and received a dividend of approximately R4,4m from the liquidators. R4.1m is the difference between R11m which De la Pierre claimed the value of the property to have been and the R6.9m owed in terms of the mortgage bond held by BOE over the property. The balance owing by WKP to BOE at the time of the liquidation was approximately R29,3m to which should be added R14,5m in respect of post liquidation interest and expenses.

[15] De la Pierre did not attend the auction and did not object to the sale. But he became aware of articles in the Pretoria News to the effect that banks which were repossessing properties bought these properties at reduced prices, resold them later at a profit and did not pass the profits on to the original owners. According to the newspaper the 'country's banking adjudicator' said that this kind of profiteering 'flies in the face of common law and the Code of Banking Practice'. He then started investigating the matter and those investigations gave rise to the present application by Hillcrest, of which De la Pierre is the sole director, as first applicant and CMT as second applicant. In terms of the application the applicants prayed for an order:

1 That the dissolution of WKP be declared void in terms of s 420 of the Companies Act 61 of 1973.

2 That the liquidation and distribution account be re-opened.

3 That the Master of the High Court be ordered to appoint new liquidators to wind up WKP.

[16] In their founding affidavit Hillcrest and CMT alleged that the sale to BOE was void because, contrary to the provisions of s 82(1) of the Insolvency Act 24 of 1936, the auction had not been advertised in the Government Gazette as a result of which the protection afforded by

s 82(8) to a purchaser in good faith was not available to BOE because BOE had acted mala fide. They alleged furthermore that in the event of the auction sale being declared void Hillcrest would have a claim against WKP, Cronje and BOE because of the transfer of Gilboa House to BOE. CMT is alleged also to have an interest in the matter as cessionary of all Gilboa's rights 'in and to all claims which Gilboa . . . may have against BOE Bank Ltd . . . or any other third party, in respect of Gilboa's rights as shareholder in Waterkloofspruit Projects (Pty) Ltd' in terms of a cession dated 7 May 2001. The cession provides that the claims referred to are in terms of the cession 'not limited to any specific cause of action and includes any claim or claims which emanate or might emanate from or in respect of the liquidation of Waterkloofspruit Projects (Pty) Ltd and/ or any claims in respect of the Waterkloof Boulevard Project.'

[17] Section 420 of the Companies Act reads:

'When a company has been dissolved, the Court may at any time on an application by the liquidator of the company, or by any other person who appears to the Court to have an interest, make an order, upon such terms as the Court thinks fit, declaring the dissolution to have been void, and thereupon any proceedings may be taken against the company as might have been taken if the company had not been dissolved.'

The court below held that Hillcrest and CMT as sureties in respect of the indebtedness of WKP to BOE had an interest in the setting aside of the dissolution of WKP. It held that CMT also had such an interest as a cessionary of the rights of Gilboa, the sole shareholder of WKP.

[18] As sureties Hillcrest and CMT, in the ordinary course, would have had an interest in the winding-up of WKP in that, upon payment of WKP's debt, they would have had a right of recourse against WKP. However, they entered into agreements of settlement with BOE and WKP in terms of which (i) they settled all claims which WKP and BOE had or

might have had against them and (ii) they waived any claims that they might have had against WKP. As a result they no longer, as sureties, had any interest in the winding up of WKP. As cessionary of the rights of Gilboa, the sole shareholder of WKP, the only interest that CMT can have in avoiding the dissolution of WKP can be its entitlement to a surplus upon completion of the winding up.

[19] As indicated above the respondents contended in their founding affidavit that the sale of the properties at the auction was invalid because it had not been advertised in the Government Gazette as required by s 82(1) of the Insolvency Act 24 of 1936. The section reads as follows:

'82 Sale of property after second meeting and manner of sale

(1) Subject to the provisions of sections *eighty-three* and *ninety* the trustee of an insolvent estate shall, as soon as he is authorized to do so at the second meeting of the creditors of that estate, sell all the property in that estate in such manner and upon such conditions as the creditors may direct: . . . Provided that if the creditors have not prior to the final closing of the second meeting of creditors of that estate given any directions the trustee shall sell the property by public auction or public tender. A sale by public auction or public tender shall be after notice in the *Gazette* and after such other notices as the Master may direct and in the absence of directions from creditors as to the conditions of sale, upon such conditions as the Master may direct.'

[20] In their replying affidavit the respondents alleged that BOE had committed a series of frauds and that the conduct of Cronje and Motala is inexplicable in the absence of them having colluded with BOE. The properties had previously been sold to Da Silva for R30m and Cronje and Motala colluded with BOE to ensure that they were sold to BOE for R100 000. They allege furthermore that in terms of s 31 of the Insolvency Act, in the event of the dissolution of WKP being set aside, Cronje,

Motala and Nedbank, the third respondent, as successor to BOE[1] would be liable to WKP for substantial amounts having regard to their collusive dealings immediately prior to the liquidation.

[21] The court below referred to the fact that the properties had been sold for R100 000 while they were clearly much more valuable and stated that the allegations of fraud and collusion required to be investigated. The court expressed the view that had these facts, as also the non-compliance with the provisions of s 82(1) of the Insolvency Act, been brought to the attention of the Master, he would probably not have confirmed the liquidation and distribution account. For these reasons the court below declared the dissolution of WKP void, ordered the re-opening of the liquidation and distribution account, ordered the Master to appoint new liquidators and ordered the appellants to pay the costs occasioned by their opposition to the application.

[22] Section 82(1) of the Insolvency Act deals with the sale of property after the second meeting of creditors and is not applicable to the auction of WKP's property. The auction sale was a sale authorised by the Master in terms of s 386(2B) of the Companies Act before a general meeting of WKP's creditors had been convened. The court below therefore erred in considering the section to be of application in respect of the auction sale.

[23] In terms of s 31(1) of the Insolvency Act which, in terms of s 340 of the Companies Act, applies mutatis mutandis to companies being wound up and unable to pay their debts, a court may after the liquidation of a company set aside any transaction entered into by the company before the liquidation, whereby the company in collusion with another

[1] The rights and obligations of BOE were transferred to Nedbank Ltd in accordance with the provisions of s 54 of the Banks Act 94 of 1990 with effect from 1 January 2003.

person disposed of property belonging to the company in a manner which had the effect of prejudicing the company's creditors or of preferring one of his creditors above another. Section 31(2) provides for the recovery of the loss suffered by the company as a result of the collusive disposition from the other person, for the imposition of a penalty payable by such person and for forfeiture of the other person's claim against the estate of the company if such person is a creditor of the company. The section deals with transactions by the liquidated company before its liquidation, ie at the time when De la Pierre was in control and before Cronje and Motala had been appointed as liquidators. There is therefore no merit in the allegation that, in terms of the section, Cronje, Motala and Nedbank would be liable to WKP for substantial amounts should the dissolution of WKP be avoided.

[24] That several irregularities were committed in the liquidation of WKP is clear. The Master authorised the sale of the individual stands subject to the whole development being auctioned first to ensure that the maximum benefit for the bondholder be obtained. I interpret that authority to mean that the project as a whole could be auctioned and thereafter the individual stands, whereupon the most advantageous offer or offers could be accepted. None of the parties contended that the Master's authority should be interpreted differently. However, individual stands were never offered for sale at the auction. According to Cronje it became clear at the auction that 'due inter alia to the failure by [WKP] (controlled by De la Pierre) to comply with the provisions regarding subdivision, the provisions regarding the development of the park . . . and the generally incomplete and stagnant condition of the development as a whole no parties were prepared to purchase individual erven.' But according to Adams, at the time Regional General Manager: Property

Finance of BOE, BOE's purpose in holding the auction was to attract a willing and able contractor/developer to take over the project. He said that, based on BOE's experience at the time, BOE realised that it would not be legally possible nor financially viable to dispose of the stands individually, and that there was no realistic prospect of a high enough bid to settle the total outstanding debt of WKP. There may well, therefore, never have been an intention to offer the individual stands for sale at the auction. However that may be, the auction was not conducted in the manner authorised by the Master.

[25] In terms of s 342 and s 391 of the Companies Act the assets of a company being wound up must be applied in payment of the costs incurred in the winding-up and of the claims of creditors and, unless the company's memorandum otherwise provides, any surplus assets available must be distributed by the liquidators among the members according to their rights and interests in the company. It follows that not only the creditors but also the members of a company have an interest in the proper winding-up of a company. See in this regard *Van Zyl NO v Commissioner for Inland Revenue* 1997 (1) SA 883 (C) at 891C-E where Hodes AJ said: 'It should be remembered that a company in liquidation is administered not only for the benefit of creditors, but that the liquidator is obliged to take the interests of members into account. In terms of s 342 (1) of the Companies Act, if there is a surplus after payment to creditors, this goes to members. The interest of members in the proper winding-up of the company is recognised in ss 360(1), 386(3)(a) and 387(1) of the Companies Act.' See also *Concorde Leasing Corporation (Rhodesia) Ltd v Pringle-Wood NO & another* 1975 (4) SA 231 (R) at 234 *in fine* to 235A where Beadle ACJ said that it is clear from the authorities and a matter of common-sense that the liquidator in the

winding-up of a company owes a duty both to that company and to the creditors. 'He owes a duty to the company to see that its assets are realised and its liabilities minimised to the best possible advantage of the company and he owes a duty to the creditors to see that they suffer the least loss and receive the most advantageous dividend.'

[26] In the liquidation application it was stated that the properties had a value of R26,702m. People were interested in the stands as is evidenced by the Da Silva agreement, enquiries made by one Rojahn before the sale, and the sale of stands by BOE to Dotcom Trading 635 (Pty) Ltd shortly after the auction. No bidding interest may have been shown at the auction when the project as a whole was offered for sale but that did not prove that there were no buyers who were interested in buying the properties. The mere fact that the auction was well attended indicated that there were people who were interested in the properties. The properties constituted BOE's security in respect of its claim of more than R29m against WKP. It would therefore not have agreed to a sale of the properties to a third party at a price substantially lower than the value (R26,702m) it had placed on the properties. Fourie, the deponent to Nedbank's answering affidavit, himself stated that he did not dispute 'that it would have been obvious to potential bidders that [BOE] would not confirm any bid unless a substantial amount could be derived from the proceeds of the auction for purposes of settling at least part of [BOE's] exposure.' The fact that no bidding interest was shown, therefore, did not indicate that the project had virtually no value; all it indicated was that nobody was prepared to pay an amount which was considered acceptable to BOE. In these circumstances the offer of R100 000 by BOE should not have been accepted. BOE was not entitled to preferential treatment as a buyer and an offer which would not have been acceptable if made by another buyer

should not have been acceptable if made by BOE. The offer was nevertheless accepted by the liquidators. In doing so they did not act in the best interests of WKP. It should have been obvious to them that the property as a unit was much more valuable than R100 000 and that a much higher price could be obtained for it. However, it would seem that they did not realise that they owed a duty to the company. Confirmation that that was the case is to be found in the supplementary answering affidavit deposed to by Cronje where he said: 'BOE would remain the preferent creditor and the largest creditor by far would determine what the liquidators would or would not do.'

[27] Counsel for BOE submitted that it was ludicrous to suggest that BOE paid R100 000 for the properties. According to him the purchase consideration was R100 000 plus the waiver of BOE's claim of R29m against WKP. However, there is no evidence that BOE waived its claim. On the contrary, it is clear that it did not do so. But although BOE paid only R100 000 (plus VAT) for the properties, it in effect placed a value of R100 000 on its security with the result that, in terms of the liquidation and distribution account, it, in the event, received a dividend of R784 527,23 in respect of its secured claim and R3 619 804,73 in respect of the balance of its claim as a concurrent claim. Had it not purchased the property it would have received (up to a maximum of R29m plus interest, being its secured claim) the selling price of the properties plus the dividend of R3 619 804,73 less the additional costs relating to the selling of the properties. The additional costs would have included the costs relating to the installation of services. The amount that it would have received in these circumstances less the dividends BOE received plus the R100 000 (plus VAT) purchase price paid thus, in effect, constitutes the amount it cost BOE to acquire the properties.

[28] In terms of the first settlement agreement an amount of R10m was payable by Hillcrest and other debtors to WKP. R3m was paid by Hillcrest to WKP in reduction of the debt. In respect of the balance of R7m payable by the debtors to WKP it was agreed that Hillcrest would transfer the property known as Gilboa House to BOE at a price equal to the amount owing to BOE in terms of BOE's mortgage bond over the property and that the remaining debt of R7m would thereby be extinguished. The liquidators were parties to the agreement and by agreeing as aforesaid they simply relinquished an asset, namely WKP's entitlement to R7m, in favour of BOE. Once again the liquidators did not act in the best interests of the company. However, in calculating its loss as a result of the project, Nedbank did credit its WKP account with R4.1m being the difference between the R11m De la Pierre claimed the value of the property to have been and the R6.9m owed in terms of the mortgage bond held by BOE over the property.

[29] In the light of these irregularities I am satisfied that in the event of the dissolution of WKP being avoided WKP may well have a claim against the liquidators in respect of the dereliction of their duty to act in the best interests of the company. The question then arises whether in these circumstances the dissolution of WKP should have been declared void by the court below.

[30] Section 420 confers a discretion on a court, on application by a person who appears to the court to have an interest, to make an order, upon such terms as the Court thinks fit, declaring the dissolution of a company to have been void. As stated above, the court below did not have regard to the supplementary answering affidavits filed by the

appellants. It therefore, failed properly to apply its mind to the matter. It follows that we may substitute our view as to how the court below should have exercised its discretion, whether or not the discretion to be exercised in terms of s 420 is a discretion in the wide or the narrow sense.[2] In the circumstances and as no argument was addressed to us as to the nature of the discretion, I do not intend expressing any view as to whether it is a discretion in the wide or narrow sense.

[31] The appellants submitted that the avoidance of WKP's dissolution would not benefit CMT as, considering BOE's concurrent claim, there is no prospect of a surplus being available for distribution to the members of WKP. I agree that it would seem highly unlikely that CMT would be able to prove that had these irregularities not been committed there would have been a surplus available for distribution to the members of WKP. De la Pierre used to be in control of WKP and knew what the market conditions were like. On his version he was not even aware of the auction but was under the impression, as a result of Deeds Office print-outs that he had seen, that the properties had been sold for R100 000 each. He says that it was only in about May 2004 that he ascertained from his attorneys that there had been an auction. The appellants deny this version but if it were true his disinterest in the winding-up proceedings is a clear indication that he did not consider that there was any possibility of the winding-up yielding a surplus for distribution to members. Moreover, De la Pierre said that R100 000 per stand would have been well below market value but would possibly have been acceptable in the circumstances. At that price the auction would have yielded a mere R13,7m, some R15,5m less than the amount owing to BOE, and services still had to be installed. BOE took over the project in order to minimise

[2] See the discussion in *Bookworks (Pty) Ltd v Greater Johannesburg Tansitional Metropolitan Council and Another* 1999 (4) SA 799 (W) at 804H-808C.

its losses and was able to restrict such losses to approximately R7m. There is no reason to believe that the liquidators would have been able to do any better.

[32] De la Pierre contends that the Da Silva agreement proves that the reasonable market value of the unsold stands, some six months prior to the auction, was R30m, to which R8,4m should be added in respect of the improvements erected by Da Silva on 14 of them; that BOE, Cronje and Motala had fraudulently ensured that interested buyers would be under the mistaken belief that, sold as a lot, BOE would not accept any bid unless it was way above a reasonable market value; and that the intention was to 'torpedo' the auction so as to ensure that 'BOE would acquire the lot at a ridiculously low price so as to continue with the Da Silva agreement'.

[33] Da Silva had a builder's lien over the improvements erected by him and, therefore, for purposes of determining whether any surplus for distribution to members could be achieved, the amount of R8,4m should be left out of the reckoning. Furthermore, the Da Silva agreement does not afford evidence that the stands could have been sold for R30m. First, if the unsold stands in fact had a market value of R30m, De la Pierre would never have allowed the liquidators to proceed with the sale of the stands for R100 000 each as he allegedly thought they were doing. Second, Da Silva had to take transfer of the stands within a period of 12 months, did not have to pay interest on the purchase price of the first 20 stands he took transfer of for a period of nine months, and, on the subsequent stands he took transfer of, for a period of six months from date of transfer. Third, payment of the purchase price in respect of the stands had to be effected upon completion of building operations on the

stand and the sale thereof to a third party only. Fourth, BOE undertook responsibility for the provision of services to the stands at its cost. As regards the alleged fraud the appellants deny that they ensured that interested buyers would be under the mistaken belief that sold as a lot, BOE would not accept a bid unless it was way above a reasonable market value. It is improbable that they would have done so but in any event it is on the appellants' version that the matter has to be decided.

[34] Counsel for CMT submitted that an interest relied upon in an application for the avoidance of a dissolution in terms of s 420 need not be one which is firmly established or highly likely to prevail. In this regard he relied on *Re Wood and Martin (Bricklaying Contractors) Ltd* [1971] 1 All ER 732 (Ch) at 736 in which Megarry J said in respect of the similarly worded s 352 of the UK Companies Act 1948:

'It does not, I think, have to be shown that the interest is one which is firmly established or highly likely to prevail: provided it is not merely shadowy, I think it suffices for the purpose of s 352.'

In the present case the chances of an avoidance of the dissolution of WKP yielding any financial benefit to CMT seems to me to be remote. But, even if they are such that it can be said that CMT has a financial interest in the avoidance of the dissolution, the remoteness thereof is in my view a factor to be taken into account in the exercise of the discretion vested in a court to avoid or not avoid the dissolution.

[35] Other factors to be taken into account are the following. WKP was placed in liquidation on 14 February 2001 and the auction took place on 20 March 2001. In terms of s 363 of the Companies Act the directors of WKP were required to make out a statement as to the affairs of the company and lodge copies thereof with the Master within 14 days of the

winding-up order, and in terms of s 364(1)(b) the Master should have convened a meeting of members for the purpose of considering that statement and nominating a person or persons for appointment as liquidator or liquidators. The members could therefore have nominated a person as liquidator and the person so nominated would have been appointed by the Master unless he was disqualified from being nominated or appointed as liquidator, or failed to give the security mentioned in s 375(1), or was a person who in the opinion of the Master should not be appointed as a liquidator of the company (s 370(1)). Cronje and Motala were appointed as liquidators. They prepared a first and final liquidation and distribution account which was confirmed by the Master on 13 December 2002. Confirmation by the Master could have taken place only after the account had lain open for inspection as prescribed in s 408 and if no objection had been lodged or an objection had been lodged but had been withdrawn or had not been sustained by the Master or a court. Thereafter the company was dissolved on 27 May 2004.

[36] Gilboa and not CMT was a member of WKP. It ceded all claims that it could have against BOE or any other third party 'in respect of [its] rights as shareholders in Waterkloofspruit Projects (Pty) Ltd' and not its rights as a shareholder. It should have been aware of how the liquidators had dealt with WKP's property, it is not alleged that it was not so aware and it could have done something about the matter if it did not approve. De la Pierre alleges that he became aware that there had been an auction only in 2004. Coming from the person who was in control of WKP up to the time of its liquidation I find that hard to believe, especially in the light of the fact that, in terms of the deed of cession he took cession of Gilboa's claims as a shareholder against WKP on 7 May 2001, less than two months after the auction. However, if true, CMT, notwithstanding its

cession, must have been completely disinterested in the liquidation process. In either event and having regard to Gilboa's inaction and the remote possibility of an avoidance of the dissolution yielding a surplus, the dissolution should in my view not be avoided pursuant to an application by CMT launched some five years after the auction, more than three years after the confirmation of the liquidation and distribution account and almost two years after the dissolution of WKP. See in this regard *Goodman v Suburban Estates Ltd (in liquidation) & others* 1915 WLD 15 at 26 where Mason J said in respect of an application for the avoidance of the dissolution of a company:

'I [do not] think this extraordinary relief should be afforded to an applicant, who has acquiesced in the action which he complains of, or has been guilty of laches in invoking the assistance of the Court.'

[37] Section 408 of the Companies Act provides that the Master's confirmation of a liquidation and distribution account 'shall have the effect of a final judgment, save as against such person as may be permitted by the Court to re-open the account after such confirmation but before the liquidator commences with the distribution'. Because the confirmation has the effect of a final judgment an applicant for a reopening of the account must show grounds for *restitutio in integrum* such as *justus error* or *dolus* before a court will order the re-opening of the account (see *Kilroe-Daley v Barclays National Bank Ltd* 1984 (4) SA 609 (A) at 626G-H). No case of *justus error* or *dolus* in respect of the account has been made out by the respondents.

[38] For these reasons the court below should in the exercise of its discretion have dismissed the application.

[39] The respondents in their affidavits and in the heads of argument filed in this court made numerous allegations of fraud and collusion on the part of the appellants. The allegations were made without spelling out the factual basis thereof so as to enable a court properly to deal therewith and before us counsel for the respondents was unable to give a coherent and comprehensible exposition as to precisely what constituted the fraud. Counsel for the appellants submitted that the respondents should in the circumstances be ordered to pay the appellants' costs on the attorney and client scale. However, because it is the irregularities referred to above that gave rise to the application I do not think that the appellants should be awarded their costs on the attorney and client scale.

[40] The following order is made:

1 The appeal is upheld with costs. In the case of the second and third appellants such costs are to include the costs of two counsel.

2 The order by the court below is set aside and replaced with the following order:

'The application is dismissed with costs.

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P E STREICHER
ACTING DEPUTY PRESIDENT

APPEARANCES:

For appellant:	M P van der Merwe (1st) S du Toit SC (2nd) T A L L Potgieter (2nd) J G Wasserman SC; G D Wickins (3rd) Instructed by: Tintingers Inc, Pretoria (1st) Symington & De Kok, Bloemfontein Savage Jooste & Adams, Pretoria (2nd) Naudes, Bloemfontein Cliffe Dekker Hofmeyr (3rd) c/o Weavind & Weavind, Pretoria Webbers, Bloemfontein
For respondent:	D A Bregman SC Instructed by: Kobus Boshoff & Associates c/o Van Rensburg Inc, Pretoria E G Cooper Majiedt Inc, Bloemfontein