by or against *the company concerned shall be*

[8] The Applicant's request for a costs award against Mrs. Williams does not amount to proceedings "by or against the company". Accordingly, on a proper interpretation of section 359, the Court is at liberty to grant a costs order against Mrs. Williams notwithstanding the supervening liquidation of the Respondent company, should such a finding be made. One arrives at this conclusion whether one adopts a strictly linguistic interpretation of the section, or a purposive one. On a strictly linguistic analysis, a costs award against Mrs. Williams is not 'against the company'. It has been held that *"the phrase 'civil proceedings' where it appears in s 359(1)…must be limited in its application to proceedings in which… 'An order in the nature of a declaration of rights or of giving or doing something' is sought against the company in question"* (emphasis supplied). (See: **Blackman *et al* Commentary on the Companies Act** Vol. 3 14-233. See also: ***King Pie Holdings (Pty) Ltd v King Pie Pinetown) (Pty) Ltd*** 1998 (4) SA 1241 (D) 1248 where the Judge quoting from the judgment of De Villiers CJ in ***Collet v Priest*** 1931 AD 290 299, stated the following:

"Sequestration proceedings are instituted by a creditor against a debtor not for the purpose of claiming something from the latter, but for the purpose of setting machinery of the law in motion to have the debtor declared insolvent. No order in the nature of a declaration of rights or of giving or doing something is given against the debtor". Magid J found in ***Collier v Redler*** 1923 AD 640 ('civil suit') and ***Mostert v JW Jagger Ltd*** 1938 CPD 518 ('any proceedings instituted…for the recovery of debt') support, albeit

indirect, for the view that the term 'civil proceeding' in Section 359 (1) is limited to proceedings to obtain such orders. The proceedings in the instant matter fall outside the ambit of section 359 of the Companies Act.

[9] On a broader, purposive approach it is immediately apparent that no purpose at all would be served by delaying the determination of the Applicant's request for costs against Mrs. Williams herself until after the appointment of a liquidator. In simple terms, that request is a matter for Mrs. Williams, not the liquidator. As **Blackman** *et al op. cit* points out (**See Blackman et al Commentary on the Companies Act** Vol. 3 14-233 and authorities therein mentioned):

a) "The provisions of s359 have been enacted for the benefit of the liquidator"; and

b) "The purpose [of s359] is to ensure that the liquidator is not embarrassed with legal proceedings before he has had an opportunity to consider them, i.e. 'to afford the liquidator an opportunity, immediately after his appointment, to consider and assess, ***in the interests of the general body of creditors***, *the nature and validity of the claim or contemplated claim and how to deal with it – whether, for instance, to dispute or settle or acknowledge it'".* (emphasis supplied).

[10] The liquidator requires no such opportunity *in casu* since a costs award against Mrs. Williams herself is not a matter which affects the interests of the general body of the Respondent's creditors (as opposed to a costs award against the Respondent Company, which obviously does). Whatever the liquidator decides to do in relation to the principal application (i.e. whether he decides to continue to oppose or to abandon opposition), it is quite certain that he or she will not become involved in contesting the Applicant's request for costs against Mrs.

Williams herself. Indeed the conclusion that the supervening liquidation of a company does not prevent a Court from making a costs order against a director of the company (i.e. personally) in (other) proceedings against the company is clearly illustrated by the facts of ***BS Finance Corp v Trusting Engineering*** 1987 (4) SA 518 (W). Strangely the facts in ***BS Finance Corp v Trusting Engineering*** case *supra* are in material respects substantially similar to the facts of the instant matter.

[11] Because of the supervening provisional liquidation of the Respondent, in **BS Finance** case when the matter came before Court, counsel for the Applicant did not proceed in asking for relief (obviously mindful of the effect of section 359). Instead he requested a postponement of the matter to the return date of the provisional liquidation order in the Grammanos application. Notwithstanding the supervening liquidation of the Respondent in **BS Finance** case *supra* the Applicant sought a costs order against the director, Konstas, personally and on the attorney and client scale on the grounds of his vexatious and dishonest conduct in the litigation. The court granted that relief against Konstas (despite the fact that the Respondent company was in provisional liquidation).

[12] I am of the view that Mr. Van der Merwe's argument that section 359 of the Companies Act prevents the Court at this stage from making a determination as to whether or not Mrs. Williams should be ordered to pay costs personally, cannot be sustained. The submissions made in substantiation of the *point in limine* did not succeed in persuading me. The *point in limine* therefore stands to be dismissed and is hereby dismissed. I proceed *infra* to consider the application on its merits.

ATTORNEY AND CLIENT COSTS

[13] An absence of *bona fides* may constitute a ground for awarding an attorney and client costs, examples being fraudulent or dishonest conduct. Indeed dishonesty or fraud is not a requirement. However, conduct that is vexatious and an abuse of legal process may justify a punitive costs award even though there is no intention to be vexatious. Unworthy, reprehensible or blameworthy conduct as well as conduct contemptuous of the Court may also justify the sanction. At times less than grave misconduct or reprehensible misconduct may, however, suffice. The following are examples:

i) A gross failure to put before the Court a material fact which it was essential the Court should know may lead to an attorney and client costs award.

ii) So too may unreasonable conduct on the part of the litigant.

See **Joubert** (ed) **LAWSA** First Re-issue Vol. 3 part 2 para 324 and the authorities there collected. The above are principles relating to special costs awards. These will guide me as I proceed to determine this application.

COSTS ORDERS AGAINST COMPANY DIRECTORS

[14] In a proper case the Court will order a company director to pay costs *de bonis propriis.* See: **Herbstein & Van Winsen – The Civil Practice of the Supreme Court of South Africa** 4ed p732; **Joubert** (ed) op. cit. para 380; **Cilliers The Law of Costs** B10-28. The general principles has been described thus: *"It is unusual to order a litigant in a fiduciary position to pay costs de bonis propriis, and good reason for such a course should be shown, such as want of bona fides, negligent or*

unreasonable action, or improper conduct... The basic notion is a material departure from the responsibility of office....” See **Herbstein & Van Winsen** op. cit. p728-729; also **Cilliers** op. cit. B10-22.

[15] In the specific case of company directors, it has been held that the basis for making such a costs award is that “justice requires that it be done”. See ***BS Finance Corp v Trusting Engineering*** 1987 (4) SA 518 (W) at 523F-J, 524G/H; ***Francarmen v Gulmini and Another*** 1982 (2) SA 485 (W) at 490A; ***Registrateur van Banke v Clanwilliam-Eksekuteurskamer Bpk*** 1972 (4) SA 387 (C) at 401A-C (where the Court apportioned liability for the costs of a curatorship application in respect of the Respondent company amongst its directors on an equitable basis).

[16] In the **BS Finance** case *supra* the following factors motivated Kirk-Cohen J to order the director concerned to pay the costs of the proceedings *de bonis propriis* (at 524C-H):

i) The director had litigated on behalf of the company in a manner which could not be to the advantage of the company.

ii) The director’s conduct had been vexatious and thoroughly dishonest.

iii) If the costs arising from the director’s reprehensible conduct were to be paid by the Respondent corporation (as opposed to the director himself), this “would be at the expense of the general body of creditors”.

Obviously the Applicant need not show dishonesty on the part of Mrs. Williams. Differently stated, whilst dishonesty is not a requisite but it would militate in favour of the costs order sought

in a deserving case. At the very least the Applicant need only show unreasonable, improper or negligent conduct on the part of a litigant from whom/which such costs are sought to be recovered. In Mr. Blumberg's submission Mrs. Williams has been guilty of gross unreasonableness as well as dishonesty or at least recklessness with the truth.

MRS. WILLIAMS' CONDUCT

[17] Mrs. Williams sought and obtained a postponement on 6 August 2007 on the basis that she was not in the country at that time (and could not be in the country at that time). She was, however, well aware that the matter would be proceeding on 6 August 2007. Why then was she not here? I ask rhetorically. Her counsel sought to explain her absence on the grounds of her involvement in litigation in the USA. Mrs. Williams, however, says nothing of this in her affidavit. Her failure to be present at Court on 6 August 2007 is simply unexplained. Mrs. Williams says in her Answering Affidavit that she thought that her *"testimony was not required"*. Is this why she saw it fit not to be present on 6 August 2007 (i.e. that she had deliberately absented herself)? If that is her explanation, on what basis did she instruct her legal representatives to seek a postponement on the grounds that she was not in South Africa (i.e. if she was under the impression the litigation could proceed in her absence)? I am of the view that Mrs. Williams indeed acted unreasonably in unilaterally excusing herself from Court on 6 august 2007. Moreover, her failure to even attempt any explanation for her absence on 6 August 2007 is certainly contemptuous of this Court.

[18] The further postponement on 12 September 2007 needs further

attention. Mrs. Williams did not disclose to the Court on 6 August 2007 that she had taken steps to liquidate the Respondent. Has she disclosed this:

i) The matter would never have been postponed to 12 September 2007, since the Court and the parties would have been well aware (as Mrs. Williams was) that the matter could not proceed on that date; and

ii) The wasted costs arising from setting the proceedings down on 12 September 2007 would have been avoided.

Instead, Mrs. Williams waited until 10 September 2007 to disclose the fact of the liquidation. By that stage, counsel was on brief and wasted costs had been incurred. Even if Mrs. Williams had only disclosed the fact of the liquidation after it happened (on 15 August 2007), the wasting of costs could have been avoided: counsel could have been taken off brief then and there. Mrs. Williams' failure to disclose the fact of the Respondent's liquidation (at her own hands) to the Court and to the Applicant was correctly described by Mr. Blumberg as "grossly unreasonable and vexatious."

[19] That is not the end of Mrs. Williams' unreasonable and contemptuous conduct. On 12 September 2007, her counsel sought a (yet further) postponement of the matter on account of Mrs. Williams being out of town. When questioned by the Court about why Mrs. Williams was not in Cape Town when the matter was set down to proceed on 12 September 2007, her counsel indicated that Mrs. Williams was entitled to an opportunity to explain her absence on Affidavit. No explanation has been proffered at all to-date.

[20] On 6 August 2007 Mrs. Williams' counsel, on her instructions, argued that a

postponement should be granted since a costs award against the Respondent Company would address the Applicant's prejudice. Mrs. Williams was, however, well aware that the costs award would never be met (owing to the Respondent's insolvent position and its imminent liquidation). The net result is that the Applicant is indeed severely prejudiced by the postponement in that it is unable to recover the wasted costs of briefing counsel for the proceedings commencing on 6 August 2007, as well as the travelling, accommodation and other costs of its attorney. I would agree with Mr. Blumberg that Mrs. Williams' conduct in this regard is at least reckless as to the truth. It in fact borders on dishonesty.

[21] Her Answering Affidavit is riddled with inconsistencies and contradictions. For purposes of illustration I merely mention *infra* two (2) examples justifying my conclusion. In paragraph 25 of her Answering Affidavit Mrs. Williams says: "At no time did I ever contemplate liquidating the Respondent until my conversation with Mr. Bennie Van Der Hoven." This "conversation" can only be that of 6 August 2007 (when Mrs. Williams first had contact with Mr. Van Der Hoven, or that of "mid August 2007." Either way, the statement is obviously devoid of the truth regard being had to what follows: Mrs. Williams admittedly signed a resolution that the company be wound up on 31 July 2007 and faxed it to Mr. Oelofse (whom she instructed to procure the winding up) on 2 August 2007 i.e. before her very first conversation with Mr. Van Der Hoven.

[22] In paragraph 27 Mrs. Williams says "I did not contemplate liquidating the Respondent after the matter had been taken on by Mr. Van Der Hoven" (this occurred on 6 August 2007). How this statement is to be reconciled with the one quoted in the previous paragraph is not explained at all. Moreover, Mr.

Oelofse, however, says that he proceeded with the liquidation of the company after receiving an instruction to do so from Mrs. Williams "during mid August 2007". The fact of the matter is that Mrs. Williams has caused costs to be wasted on two occasions: 6 August 2007 and 12 September 2007. Had she acted reasonably and honestly, those wasted costs could have been avoided. The Applicant is out-of-pocket in respect of substantial legal expenses which are wasted due to Mrs. Williams' unpardonably poor behaviour. Fairness demands that the Applicant be indemnified in respect of such expenses.

[23] Leaving the company to pay such wasted costs does not, in my view, bring about a fair result since:

i) The Applicant will not end up being indemnified at all, given the hopelessly insolvent state of the company; and

ii) To the extent that concurrent creditors do receive any dividend at all, a costs award against the company will simply end up reducing that dividend, with the result that the Respondent's creditors effectively shoulder the financial burden of Mrs. Williams' conduct.

It cannot, in my view, be contended that Mrs. Williams has sought to advance, or has advanced, the interests of the Respondent Company in her handling of this matter particularly regard being had to her behaviour outlined *supra*. Given Mrs. Williams' unreasonable and vexatious conduct, coupled with her apparent lack of bona fides (or as justifiably labelled by Mr. Blumberg "her recklessness with the truth"), it is appropriate that she be ordered to pay the wasted costs of the two postponements in her personal capacity (*de bonis propriis*) and on the attorney and client scale.

THE COSTS AWARD MADE ON 7 AUGUST 2007

[24] Generally, costs awards are regarded as final orders and Courts are thus disinclined to amend them. At common law, however, a Court may recall or amend a final order:

i) That was made pursuant to fraud on the part of one of the parties. (See **Joubert** (ed) op cit. para 299; ***Joseph v Joseph*** 1951 (3) SA 776 (N) at 780; ***Ex Parte Nel*** 1957 (1) SA 216 (D) at 218-219, esp at 219C; ***Society for the Prevention of Cruelty to Animals WO 916 (Bloemfontein) v De Swart*** 1969 (1) SA 655 (O) at 659A.)

ii) When new (and material) documents are later discovered, provided that the applicant (for the amendment) is not to blame for not placing the documents before the court in the first place (See ***Booth v Collis*** 1916 CPD 453 at 456; ***Childerley Estate Stores v Standard Bank of SA Ltd*** 1924 OPD 163 at 168; ***Schierhout v Union Government*** 1927 AD at 105.)

[25] The resolution pursuant to which the Respondent Company was placed in liquidation, as well as the statement of affairs showing the Respondent to be hopelessly insolvent, were material to the order made on 6 August 2007, given the importance of the costs order in the context of the decision to grant the postponement. Had the Court been aware of these documents, it most certainly would not have:

i) Ordered that the wasted costs be borne by the Respondent Company (which is and was insolvent); and

ii) Allowed the matter to be postponed to 12 September 2007 (when the matter could never proceed).

It is my view that the subsequent discovery of these documents is and remains a basis for revisiting and amending the previous costs order I made. Non-disclosure of the fundamental truth and the said documents can in no way be attributable to the fault on the part of the Applicant. This true situation regarding the financial condition of the Respondent Company was well within the knowledge of Mrs. Williams. She chose for reasons best known to herself, not to disclose same to this Court.

ORDER:

[26] In the circumstances I make the following order:

(a) The application under the above case number is postponed pending the appointment of a liquidator to the Respondent.

(b) The wasted costs occasioned by this postponement are to be borne by Mrs. Elsie Maria Magdalena Williams in her personal capacity (*de bonis propriis*) and on the attorney and client scale.

(c) Paragraph 2 of the order of Court made on 7 August 2007 is hereby amended to read as follows:

"2. The wasted costs occasioned by the postponement are to be paid by Mrs. Elsie Maria Magdalena Williams *de bonis propriis* and on the attorney and client scale. Such costs are to include the travelling and accommodation expenses of the Applicant's attorney and witness (Mr. Thomas)."

(d) The costs of the application launched by the Applicant on 11 September 2007 (under the 'Notice of Application' of that date) are to be paid by Mrs. Elsie Maria Magdalena Williams in her personal capacity (*de bonis propriis)* and on the attorney and client scale. Such

costs shall include the travelling and accommodation expenses of the Applicant’s attorney, Mr. Andrew Conroy, in attending court on 12 September 2007 and 19 September 2007.

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DLODLO, J