[REPORTABLE]

IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE HIGH COURT, CAPE TOWN)

CASE NO: 7403/2009

DATE: 8 SEPTEMBER 2009

In the matter between:

S MOODLIAR N.O. & TWO OTHERS APPLICANT

and

FADI HENDRICKS N.O. & TEN OTHERS RESPONDENT

J U D G M E N T

DAVIS, J:

Introduction

[1] The applicants, who are the provisional liquidators of Cape Kingdom (Pty) Ltd (in provisional liquidation) ("the company"), seek relief in terms of section 386(5) of the Companies Act 61 of 1973 ("the Companies Act") which, in effect, would authorise them to exercise certain powers set out in the notice of motion in relation to the administration of the company. The application is opposed by the trustees of the Vetulina Trust (the first to third intervening parties) and by one Michael Duncan

Stander (the further intervening party referred to in these proceedings as “Stander”.

[2] The Vetulina Trust is the majority shareholder of the company and Stander was at the time of provisional liquidation both the trustee of the Vetulina Trust and a director and chief executive officer of the company.

[3] The company was provisionally liquidated on 4 December 2008 on application of the trustees of the Cape Biotech Trust (“CBT”). These trustees appeared as the first to seventh respondents by virtue of a cost order sought against them in paragraph 5 of the notice of motion. No relief was sought against the Vetulina Trust or Mr Stander in the notice of motion.

[4] The company was provisionally liquidated on the basis that it was being mismanaged and its liquidation was therefore held to be just and equitable. In its reasons for the granting of a provisional order of liquidation, the Court found that Stander had used “company funds for personal use without proper authorisation”, promised to repay funds “which he substantially failed to do” and had created “a *de facto* situation where he is in sole control of the company which, on the account of its own auditors,

has not followed proper procedures in terms of the Companies Act with regard to accounting.

[5] Applicants were appointed as the provisional liquidators of Cape Kingdom on 10 December 2008 and the Master was advised by the Court to appoint a provisional liquidator to take charge of the company's business as soon as may be practical. The provision order has been extended to 24 November 2009, given that the company wishes to oppose the granting of a final order.

[6] Cape Biotech Trust avers that it is owed R10 million by the company. Applicants alleged in the founding affidavit that from their preliminary investigations "it appears that Cape Kingdom is unable to pay its debts in that it has liabilities of not less than R10 million which cannot be discharged by realisation of the assets with which it is vested".

[7] In the founding affidavit deposed to by Ms Moodliar on behalf of applicants, she alleges that applicants "have not been able to collect the book debts owing to Cape Kingdom nor to take charge of the stock and fixed assets". She also alleges that applicants are "entirely dependent on Stander's cooperation in order to ascertain

the whereabouts of Cape Kingdom's assets" and they alleged that "only Stander can assist the applicants in regard to the extent of Cape Kingdom's liabilities".

[8] Stander deposed to two affidavits in these proceedings. The first affidavit was compiled in support of his and the Vetulina Trust's application to intervene in this application. The second affidavit took the form of an answering affidavit. In neither of these affidavits did Stander appear to deny (1) applicants had not been able to collect the book debts owing to Cape Kingdom or to take charge of the stock and the fixed assets; (2) that they are entirely dependent on Stander's cooperation in order to ascertain the whereabouts of the company's assets; (3) only Stander can assist them in regard to the extent of the company's liabilities.

[9] In her founding affidavit, Moodliar sets out the powers which applicants seek and the justification therefor. It appears that these powers are the following:

1. The power to bring or defend any action or other legal proceedings and to instruct and pay attorneys and counsel.
2. The power to elect or abide by lease agreements.

3. The power to elect whether or not to continue with certain agreements.

The Vetulina Trust and Stander oppose this application essentially on the following grounds:

1. There was inadequate service why the applicants for provisional liquidation pursuant to section 346(4)(a) of the Act.
2. CBT was not a creditor at the time that they had applied for the provisional order.
3. The final order is unlikely to be granted because the company is not insolvent and, given the improbability of a final order being granted, the powers sought in the notice of motion are unnecessary and should not on any basis therefore be granted given the facts which have been placed before this Court.

[10] I turn to deal with each of these objections which were central to the resolution of the dispute between the parties.

Non-compliance with service

[11] Section 346(4)(a) of the Companies Act provides that:

(a) When an application is presented to the Court in terms of this section, the applicant must furnish a copy of the application:

(i) to every registered trade union that as far as the applicant can reasonably ascertain represents any of the employees of the company; and

(ii) to the employees themselves:

(aa) by affixing a copy of the application to any notice board to which the applicant and the employees have access inside the premises of the company; or

(bb) if there is no access to the premises by the applicant and the employees by affixing a copying of the application to the front gate of the premises, where applicable, failing which to the front door of the premises from which the company conducted any business at the time of the application.

(iii) To the South African Revenue Service' and

(iv) to the company unless the application is made by the company or the court at its discretion dispenses with the furnishing of a copy where it is satisfied that it would be in the interests of the company or of the creditors to dispense with it.

(b) The applicant must before or during a hearing file an affidavit by the person who furnished a copy of the application which sets out the manner in which paragraph (a) has complied.

[12] Ms Davis, who appeared on behalf of the intervening creditor, submitted that the requirements of section 346(4)(A)(a)(i), (ii), (iii) are peremptory, as is indicated by the use of the word “must” in section 346(4)(A)(a), together with a lack of any discretion conferred on the Court to depart from the requirements of these subsections.

[13] She contrasted this provision with the discretion granted to the Court in terms of subsection (iv) to dispense with the requirement of service on the company. She therefore submitted that this was a case where the maxim *expression unius est exclusio alterius* applies. In Ms Davis’ view, the affidavit of service filed in the

liquidation application by Nadia Cassiem, Insaaf Davids and Richard Michael Gray Fitzgerald showed that a copy of the liquidation application was not affixed to a notice board on the business premises of the company, nor on the front gate or door of its business premises. Instead, copies of the application were handed personally to Stander and to three other persons who were allegedly employees of the company, namely Surayah Hartley, James Tooley and Rina de Wet.

[14] Ms Davis observed that the three "employees" who were handed a copy of the application were no longer employees of the company as they had been dismissed. Further, service on the three alleged employees did not take place at the business premises of the company. She submitted that there were five employees of the company other than Stander who were not given copies of the application for provisional liquidation and received no notice whatsoever of the application. This submission was made pursuant to a further answering affidavit deposed to by Stander.

[15] No mention, in her view, was made in any of the service affidavits by Cassiem, Davids or Fitzgerald of service of the application on SARS or of any enquiries having been

made to ascertain whether any employees of the company were represented by a trade union. Thus, Ms Davis submitted service which had been effected did not comply with the requirements of section 346(4)(a), which requirements were mandatory.

[16] She further submitted that this Court did not have the power to condone such non-compliance, nor did any court hearing the application. Accordingly, in the circumstances, the provisional order of liquidation ought not to have been sought nor granted and therefore could not be made final on the return day.

[17] The basis for the submission that, where a provisional order of liquidation is defective, a final order cannot be granted on the papers and thus the provisional order must be discharged was predicated on a series of cases to which Ms Davis drew the attention of this Court. See in particular, Graham R E Fuller & Company (Pty) Ltd t/a Fuller Construction 1987(3) SA 71 (D); Rubenstein N.O. & Another v Langhold (Pty) Ltd 1983(2) SA 228 (C); Fay's Electric Company (Pty) Ltd v Zinman's Electrical Sales (Pty) Ltd 1973(3) SA 914 (W); Storti v Nugent & Others 2001(3) SA 783 (W) at 803G-H.

[18] Therefore she submitted that it would be inappropriate to grant extended powers to the applicants in contemplation of the final order being granted when all the indications were that a final order would not be granted.

[19] It is necessary to examine these relevant authorities. The three cases which appear to be of significance to these proceedings (Graham's case deals with an application of a judicial manager and, in my view, adds little to the argument in this case) are all, with respect, distinguishable. In Rubenstein, the case dealt with the right of a member to apply for the winding up of a company which was expressly denied unless he had been registered as a member in a register of members for a period of at least six months immediately prior to the date of the application, or his shares had devolved on him through the death of a former member.

[20] In dealing with this particular problem, Vivier, J (as he then was) held at 332A-B:

> "I am in respectful agreement with the weight of authority which I have referred to above that the six month registration requirement should be strictly enforced. In my view, the clear language of the subsection leaves no room for the submission by Mr

Hodes that the subsection does not apply to an application by a trustee in an insolvent estate.

I am accordingly of the view that applicants have not complied with the requirements of s 346(2) of the Act and that the provisional order should, for this reason, be discharged".

[21] In Fay's Electric, *supra*, applicant's attorneys sent a letter of demand to the respondent company's registered address. Unbeknown to the attorneys, the letter of demand had been returned by the postal authority marked "gone away". The attorney's messenger had signed for the returned letter but had failed to file it or draw the attention of any of the firm's members thereto. Applicant, unbeknown to respondent, had obtained a provisional liquidation order against the respondent, the process served by the deputy sheriff having been by "pinning copies thereof to the main door" of the registered address.

[22] Respondent, immediately on becoming aware of the order, applied to have it set aside and this was not opposed, save for the question of costs. Coetzee, J at 915 said the following:

> "The respondent was unaware of the fact that these proceedings had been taken against it and that a provisional order had indeed been made until such time later when it immediately applied to court to have the provisional order set aside".

Accordingly, the Court held that, as the negligence of the messenger for which the applicant's attorneys were responsible, had put respondent to much expense and subjected it to great embarrassment, the effect was that the proceedings were vexatious although they were not intended to do so. Accordingly, applicant was ordered to pay respondent's costs on a punitive scale.

[23] In Storti, *supra*, the dispute turned on section 354(1) of the Companies Act which provides that: "

> "A court may at any time after the commencement of a winding up, on the application by any liquidator, creditor or member and on proof to the satisfaction of the Court that all proceedings in relation to the winding up order the winding up ought to be stayed or set aside, make an order staying or setting aside the proceedings.

Gautschi, AJ said at 795D-G:

> "A moment's reflection reveals that an application to set aside or stay winding up proceedings may

arise in two broad situations. On the one hand, the winding up order may be attacked on the basis that it should never have been granted by reason of some defect in the procedure or the merits of the application; on the other hand, the winding up order may be unassailable in itself but later events may render a stay or a setting aside of the winding up proceedings necessary or desirable.

In my view, the section is intended to cover the latter situation not the former. My reason for this is the following: firstly the winding up order is assailable and it may be rescinded under the common law and there is no need for a section in the Companies Act to provide for such a situation (I leave out the applicability of s149(2) of the Insolvency Act 24 of 1926 for the moment since its use in the argument would lead to a circuitous reasoning I shall deal with that later). There is, however, a real need for the section to deal with the second situation".

[24] In my view, these cases do not deal with the situation where a provisional order is granted, most certainly after notice, although allegedly not complete compliance in terms of section 346(4)A. I am uncertain on the basis of

these papers whether Allie, J, who granted the provisional order, condoned the lack of complete compliance or regarded the service which had been made to be in substantial compliance with the section.

[25] Much was made by Ms Davis of the peremptory nature of section 346(4)A, namely an applicant must furnish a copy of the application. In short, this case, unlike any of the others, deals with the issue of notice and the compliance with the section and stands in contrast to the facts of each of the cases cited to this Court. It is correct that section 346(4)A(iv) expressly provides the Court with a discretion in this regard to dispense with the requirement regarding service. As this discretion is not specified elsewhere, the question arises as to whether there is an inherent power to condone.

[28] In dealing with this question, Meskin Henochsberg on the Companies Act at 724(1) appears to be uncertain as to the position, as is evident from the following passage:

> "While sub-s (4)(A)(a)(iv) specifically provides for the circumstances in which the court may dispense with the delivery of the application of the company, no such provision applies in relation to the delivery of a copy of the application to the persons

mentioned in sub-s(4)(A)(a)(i), (ii), (iii) and non-compliance therewith may preclude the grant of a provisional order until there has been compliance. (my emphasis)

Insistence that a court cannot under any circumstances condone a deviation from strict compliance may, to some extent, run counter to the inherent jurisdiction of the court. See in this connection Jerold Taitz: Inherent Jurisdiction of the Supreme Court at 14-18 and the authorities cited therein.

[28] But the answer may well lie, not so much in the inherent jurisdiction of the court to condone non-compliance, as in the nature of the concept of compliance itself. In this connection L C Steyn: Die Uitleg van Wette (5de uitgawe) at 201, in dealing with the question of compliance, says the following:

"Somtyds egter word ook in hierdie verband slegs sogenaamde "wesenlike" nakoming vereis, maar dit word oorwegend gegee dat die korrekte standpunt gestel is in Maharaj and Others v Rampersand 1964(4) SA638(A) at 646 C-D, waar verklaar word …"

The enquiry I suggest is not so much whether there has been exact, adequate or substantial

> compliance, but rather where there has been compliance therewith. This enquiry postulates an application of the injunction to the facts and a resultant comparison between what the position is and what, according to the requirements of the injunction, it ought to be. It is quite conceivable that a court might hold that even though a position as it is not identical to what it ought to be the injunction has nevertheless been complied with. In deciding whether there has been compliance with the injunction, the object sought to be achieved by the injunction and the question of whether this object has been achieved, are of importance".

[29] To sum up, a court cannot condone non-compliance with the requirement that a copy of the application must be furnished on the parties which are specified in section 346(4)(a) I do not consider that the inherent jurisdiction would extend the power of the court. But a court may, in my view, determine whether the applicant has been in substantial compliance with each of these sections. In other words, it is for the court to determine whether the nature of the furnishing of the application, pursuant to the section, has been met.

[30] To express this point in another way, the means adopted by the applicant to comply with the section is something which the court is required to determine to decide whether there has been substantial compliance as I have set it out.

[31] In this case, the dispute regarding the service on the employees is whether all of the employees were in receipt of service. It is significant that Mr Stander told the Court on the 5th January 2009 that "there are no employees at the Westlake premises". It would therefore appear that when it comes to the question of the employees and whether service was effected pursuant to the Act, there is some measure a dispute on the papers. Mr Stander's averments are, with respect, hardly definitive of the position and it may well be that there was substantial compliance with the requirement pursuant to the affidavits of service to which I have made mention.

[32] In regard to the SARS, there can be no doubt that there was substantial compliance and I regret that my attention was not drawn to the fact that there is a SARS stamp on the application for the provisional order which is indicative of substantial compliance in that it is indicative

that the furnishing of a copy of the application was provided to SARS. That puts an end to that aspect of the matter, notwithstanding the very impressive learning to which this Court was subjected during the course of the application.

[33] The powers sought by the applicants are neither necessary nor appropriate.

Section 386(6) of the Act provides that the Master may restrict the powers of a provisional liquidator. Ms Davis pointed out in the present case the Master has chosen to restrict the powers of the applicants to those referred to in the certificate of appointment, namely those set out in sections 386(1)(a), (b), (c), (e) and section 386(4)(f) of the Act. In addition to these powers the provisional liquidators also enjoy statutory powers referred to in section 386(2), (2)(a) and (2)(b) of the Act.

[34] Ms Davis submitted that the discretion conferred on the Court in terms of section 386(5) of the Companies Act represented a drastic departure from the ordinary practice of the Master and serious inroads on the rights of creditors and the members to control the actions of the liquidator who was, in any event, on the basis of sections

to which she has referred, been granted adequate powers.

[35] Section 386(5) provides that:

> "The Court may, if it deems fit, grant leave to a liquidator to do any (other) thing which the Court may consider necessary for winding up the affairs of a company and distributing its assets".

Ms Davis submitted that it was incumbent, given the powers which the applicants already possessed, that the applicants set out facts and circumstances which show that those powers were necessary as opposed to merely useful or convenient for the purpose of winding up the affairs of the company. She further submitted that the Court must exercise a discretion in light of the trite principle that the primary duties of a provisional liquidator are to look after the property of the company in liquidation and to preserve the *status quo,* pending the appointment of a final liquidator.

[36] There can be no quibble with any of these submissions. The question is whether in fact they can be justified in terms of the factual matrix of this case. In Mr Moodliar's founding affidavits, she states that applicants would require legal advice, *inter alia*, applying in terms of section 69 of the Insolvency Act in order to take charge

of the stock, fixed assets and the equipment encumbered(?) in favour of Standard Bank.

[37] In regard to the equipment which has been encumbered in favour of Standard Bank, Stander stated, *inter alia*, the following:

> "I refer to paragraph 70.10 of my founding affidavit in the intervention application which (for the sake of convenience) I quote hereunder:
>
> 'Although this is an issue which I will discuss directly with the applicants, I wish to state that I have reached an agreement with Standard Bank to take over the two machines in respect of which monies are owed to it by taking them and to pay the arrears in instalments going forward. I refer in this regard to paragraph 5 of Katz's letter of 15 March 2009 being Annexure E hereto. It is therefore no longer incumbent on the applicants to take possession of the machines and to hand them over to Standard Bank in terms of section 84(1) of the Insolvency Act...
>
> The machines concerned are a self-adhesive label dispenser and a shrink-wrap machine are in the former packing premises in Paarl. I have assumed Cape Kingdom's liability under the relevant

instalment sale agreement for payment of month end instalments and arrears to Standard Bank. Consequently Standard Bank is no longer insisting that the machines be handed over in terms of section 84(1) of the Insolvency Act. I am happy to cooperate fully with the applicants in regard to any queries or requests which they may have in regard to the machines or the arrangements which I made with Standard Bank".

Ms Moodliar pointed out in her affidavit that the facts in relation to Standard Bank's claim and its assets are the following:

"On 1 July 2009 I contacted Basil Borain at the Standard Bank, he is the credit manager of Standard Bank vehicle and asset finance in Cape Town. I told Borain of the allegations made by Stander to the effect that Stander had assumed Cape Kingdom's obligations to Standard Bank under the instalment sale agreements. Borain informed me that on 20 May 2009. Their Shamim Adams received an email from Stander advising that payment of the arrears would be made before the end of May 2009 and that Stander intended to take over the machines' finance. Stander also stated that he was waiting for confirmation from Korber.

The second applicant, had no objection or was in favour of this arrangement.

Borain told me that settlement figures were sent to Stander on 21 May 2009. He also told me however that no payments whatsoever had been received from Stander. I am aware that what Borain told me constitutes hearsay evidence, I have however no reason to disbelieve Borain and, to the contrary, believe that he has told me the truth. Stander is invited to respond to what Borain has told me".

[38] On the 29th July 2009, Standard Bank wrote to applicants and advised that Mr Stander had failed to respond to numerous correspondences relating to the arrears and requested that the provisional liquidators urgently take possession of the assets and hold them as security. In the light of these facts, Mr Manca, who appeared on behalf of the applicants, submitted that Mr Stander had misled them in relation to the ownership of the machines and that the applicants required legal advice as to how they are to take charge of these assets. In his view, there could be little doubt that they required the advice of attorneys and counsel with regard to this question. Similarly, he contended that there could be little doubt that the applicants required legal advice on the

termination of leases and any executory contracts should they be granted such powers.

[39] With regard to the ferocity of the litigation which had broken out between the parties, Mr Manca referred to the following exchange of correspondence between the respective attorneys to justify the need for the power sought to the notice of motion. These letters are indeed instructive. On the 1st July 2009, Mr Katz, acting on behalf of the applicants, wrote to Mr Korber, acting on behalf of Mr Stander,:

> "In paragraph 14.3 of the answering affidavit Stander states that the stock can be delivered to the applicants on request. Can you please urgently advise us when our clients can uplift the stock".

In paragraph 40.4 of the answering affidavit Stander refers to the fixed assets:

> "Can you please urgently advise when our clients can uplift same. In this regard we attach hereto a fixed asset summary".

[40] On the 1st July the following reply was generated by Mr Korber:

> "Although reference is made in your letter to the answering affidavit in case number 7403/09, the

questions contained in your letter may clearly not competently be requested in the context of the application (or any application). In any event the list of liabilities requested in paragraph 5 of your letter constitutes Annexure SM9 to your client's own founding affidavit.

Insofar as the question relating to the winding up of Cape Kingdom we are referring your letter to Mr Stander who is now back from Mauritius and will deal directly with Mr van Zyl".

[41] The point of citing these letters is that they reveal very little cooperation from Stander. Clearly the dispute was a matter which was now being conducted through Stander's own legal advisers, a very experienced attorney. As Mr Manca submitted, in these circumstances, it was manifest that the liquidators would require the assistance of attorneys and counsel in order to negotiate the tricky obstacles which had been placed before them by Stander.

[42] I turn therefore to the question of the power to terminate the leases and other executory contracts. Mr Manca submitted that there could be little doubt that the applicants ought to be clothed with the powers to

terminate the lease and other contracts if it is in the best interests of the creditors. The point made by Stander was that this decision should await the final outcome of the application for the final order. However, if the company was unable to pay its debts and therefore was in a financially perilous situation and there could therefore be little prospect of the company being placed into final liquidation, the speedy resolution of these questions with regard to leases and other executory contracts would, in fact, be in the best interests of the creditors.

[43] According to Mr Manca, Stander failed to address why (1) the lease to the premises should stand in circumstances where the company had effectively ceased operating, and (2) why the executory contract should remain in force in the same circumstances. It was therefore clear that the resolution of this particular obstacle depends on the third of the questions which were raised in argument, namely the financial health of the company.

[44] I turn therefore to deal with the two related questions being the *locus standi* of CBT and the company's ability to pay its debts.

[45] It is not in dispute that Cape Biotech lent the sum of R10 million to the company. This amount represented what was referred to as a "CBT loan" in terms of the shareholders' agreement. What Stander and the Vetulina Trust effectively contend is that, immediately prior to the commencement of the winding up, the loan was not due and payable as 75% of the shareholders had not consented thereto. Mr Manca contended that the fact that the CBT loan was not due and payable immediately prior to the commencement of the winding up did not mean that Cape Biotech was not at that time a creditor of the respondent. All it meant was that the loan was not due and payable and could not be lawfully called up by Cape Biotech until such time as 75% of the members had agreed thereto or a trigger event, as defined in the agreement, occurred. A trigger event was defined to mean *inter alia*, "the company being placed in provisional liquidation or being placed under provisional judicial management".

[46] Ms Davis, in dealing with this particular question, relied upon a judgment of Goldstone, JA in *ex parte* De Villiers & Another NNO: *in re* Carbon Developments 1993(1) SA 493 (A) at 504-505 to contend that a loan in which the trigger event takes place upon a provisional liquidation

cannot constitute a debt sufficient to justify that particular party bringing the application. In that case, Goldstone, JA said at 504-505:

> "Save possibly in exceptional circumstances, the terms of the subordination agreement will have the following effect, the debt comes in to existence or continues to exist (as the case may be) but its enforceability is made subject to the fulfilment of a condition, usually the condition is that the debt may be enforced by the creditor only if and when the value of the debtor's assets exceeds his liabilities, excluding the subordinated debt. The practical effect of such a condition, particularly where, for example, the excess is less than the full amount of the subordinated debt would depend upon the terms of the specific agreement under consideration and need not be considered now".

[47] The present case, however, did not concern a subordination agreement couched in terms to that which applied in Carbon Developments. In this case there was a debt owing to CBT, of which the time for payment depended on a trigger event. Accordingly, such a debt was to be taken into account in the liquidation

proceedings. It is correct that Goldstone, JA says in Carbon Development at 505:

> "In the event of the insolvency of a debtor sequestration normally means that the condition upon which the enforceability of the debt depends will become incapable of fulfilment. The legal result of this would be that a debt dies a natural death".

[48] But in this case, the purpose of the agreement was clearly that a debt which had been incurred would be paid upon the trigger, in this case the provisional order having been granted. In Mars: The Law of Insolvency (9th ed.) at 394 the following is stated with regard to these kinds of debts:

> "A conditional claim must not be confused with a claim which is owing but not payable at the date of sequestration. The former may never at any time have to be paid whereas the latter will have to be paid, the only uncertainty being as to the date of payment. The promissory note payment three months after the debt of the insolvent's father is not a conditional or contingent claim because the debt is one which will have to be paid...

> If a debt, though not conditional, is due only after the date of sequestration, the creditor may prove a claim for the full amount of that debt as if it were payable as at the date of sequestration".

See also Taylor & Steyn NNO v Koekemoer 1982(1) SA 374 (T) at 381 in which the following *dictum* appears:

> "(I)n the determination of whether or not a company which has been wound up is able to pay those debts, regard must be had to all such liabilities, (including contingent, prospective and unliquidated liabilities) as the liquidator is lawfully oblige to take into account before he is entitled to discharge any concurrent debts."

The trigger event, that is the provisional liquidation of the company, had occurred, and the debt was, at the date of provisional liquidation, no longer a conditional claim in the sense that was becoming due and dependent on a future uncertain event. It was now a debt that was owing but not payable at the date of liquidation. It would become due 180 days after the date of the provisional liquidation".

It appears to me that the R10 million could most certainly be taken into account in the liquidation proceedings for the reasons that I have thus advanced.

[49] I turn to deal with the related question, that is the company's inability to pay. Applicant showed, with reference to a schedule prepared by Stander himself, that as at 30th November 2008 the company's liabilities amounted to R1 643 272.12 excluding the R10 million claim of Cape Biotech. The applicants also showed that the value of the company's assets was R671 383.13. Mr Manca therefore contended that it was clear that, even if the R10 million claim was excluded, the company was hopelessly insolvent. Its liabilities exceeding its assets by some R971 883.99. Of course, if Biotech's claim was included the deficit increased to close to R11 million.

[50] Ms Davis countered these submissions by referring to the following averments made by Stander:

1. The liability sought to be reduced by an amount of R359 388, insomuch as Bio Buchu Ventures (Pty) Ltd ('company controlled by Stander') had waived its claim against Cape Kingdom and undertaken not to prove a claim in the estate.

2. The assets fell to be increased by an amount of R105 931.41 standing to the credit of Cape Kingdom in its current banking account.

In the premises Ms Davis contended that the apparent deficit between assets and liabilities amounted to R506 558.58 as opposed to R971 883.99. Stander averred in addition that applicants had failed to take into account the value of Cape Kingdom's work in progress pertaining to the Synexa and UCT agreements and the significant intellectual property resulting from the work done in terms of these agreements. His averment reads thus:

> "In the event the completion of Phases 1 and 2 coupled with the value of the work in progress in respect of Phase 3 is in excess of R506 558,58 being the deficit of R971 883.99 in the Standard Bank account and the claim of R359 388.00 as waived by Bio Buchu Ventures (Pty) Ltd.
>
> Therefore in the circumstances I respectfully submit that Katz's assurance that it is 'clear that Cape Kingdom is hopelessly insolvent and unable to pay its debts' is glib and unreliable".

[51] But these averments are themselves glib, bald and unsubstantiated and without any substantiation. The Court is at least allowed to take account of the fact that

there is, even on respondents' substantiated version, a deficit of more than R500 000.

[52] That, therefore, raises ultimately the question of section 386(5) Meskin writes the following pursuant to this section:

> "The Court has an unrestricted discretion save that it must be satisfied that the Act leave to perform which is sought is necessary for winding up the affairs of the company and distributing its assets".

In this case, this Court does not have to, and should not, determine whether a final order will be granted. That manifestly is for another Court, on different papers, and on argument specifically targeted to deal with that question. What this Court is required to determine is whether on the probabilities, based on the evidence as I have outlined it, the powers sought are ultimately necessary for the liquidators to perform their fiduciary mandate.

[53] Obviously, if the granting of a final order was but a remote possibility, as Ms Davis has averred, that would weigh heavily against the exercise of a discretion in favour of the applicants. It is a failure and only that to

be taken into account in the exercise of the court's discretion. In the present case, however, the financial position of the company is clearly tenuous to put it at its lowest. The intensity of the litigation mounted by Stander would indicate that the applicants, if they are to perform their powers within the law and with the confidence necessary to execute their mandate, require legal advice and are therefore necessary.

[54] Furthermore, given the parlous state of the company as emerges from these papers (I again refrain from expressing a view as to the outcome of the final order for those will be predicated on duly supplemented papers) the applicants would be well advised to consider the implications of leases and other executory contracts which will unquestionably impact upon their ability to perform in the interests of the creditors and affected stakeholders.

[55] There was an objection raised about first to seventh respondent being ordered to pay the legal costs incurred by applicants' attorney even though they did not oppose this order.

Ms Davis contended that such an order would be incompetent in that

(1) it was not clear that the company could not pay its debts; and

(2) Section 106 of the Insolvency Act, 24 of 1936, only applied to creditors who had proved claims against the estate. In her view, CBT was not such a creditor. For the reasons already given, both of these arguments stand to be rejected.

[56] In the result, this is a case where the powers which are sought in terms of section 386(5) are necessary in terms of the test that I have outlined. For these reasons, the following order is made:

1. The applicants are authorised to bring this application in terms of section 386(5) of the Companies Act 61 of 1973.
2. The applicants are authorised in terms of section 386(5) of the Companies Act to exercise the following powers in relation to the administration of Cape Kingdom (Pty) Ltd:
   2.1 To be empowered to institute and defend such actions or other legal proceedings as may be necessary;

2.2 To obtain legal advice on any question of law affecting the administration of Cape Kingdom and to engage the services of attorneys and counsel in connection with any matter arising out of or related to the affairs of Cape Kingdom;

2.3 To agree with such attorneys and/or counsel on the tariff or scale of fees to be charged by or paid to such attorneys and/or counsel for the rendering of services to Cape Kingdom and to conclude written agreements with attorneys and/or counsel in the form contemplated in section 73(2) of the Insolvency Act 24 of 1936 (as amended) (the Insolvency Act) as read with section 239 of the Companies Act;

2.4 To pay the attorneys and/or counsel the agreed costs for the disbursements made by the attorneys and/or counsel out of the funds of Cape Kingdom's costs in the administration of Cape Kingdom as and when such services are rendered and disbursements are made;

2.5 To exercise the power to terminate the leases in respect of the premises from

which Cape Kingdom traded prior to liquidation;

2.6 To exercise the power to elect whether to continue with any such agreements entered into by Cape Kingdom prior to liquidation.

3. Ratify and confirm in accordance with section 386(5) of the Companies Act the actions of the applicants to date hereof in respect of the engagement of the services of attorney and counsel, particularly in regard to this application.

4. Costs of this application to be treated as costs in the winding up of Cape Kingdom.

5. First to seventh respondents are ordered:

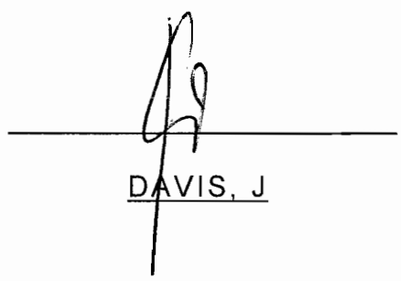
5.1 To make payment to the applicants of the amount of any invoice to be issued by the applicants' attorneys from time to time, such payments constituting contributions towards the costs of liquidation in terms of section 106 of the Insolvency Act as read with section 339 of the Companies Act;

5.2 To make such payments to the applicants care of the first applicant at Sannic Trust Recovery Services (Pty) Ltd on 3rd floor, 5 St George's Mall, Cape Town within 14 days of receipt of each invoice referred to

in paragraph 5.1 above, subject to the following:

5.2.1 Every payment referred to in paragraph 5.1 and 5.2 above shall in due course be reflected in a liquidation distribution and/or contribution account to be filed in terms of section 403 of the Companies Act;

5.2.2 The respondent shall be entitled to lodge an objection in terms of section 407 of the Companies Act.



DAVIS, J