IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE HIGH COURT)

CASE NO. 6174/2009

in the *ex parte* application of:

XOLISWA EUNICE DAKU N.O. **FIRST APPLICANT**

EUGENE BRYAN WALLACE N.O. **SECOND APPLICANT**

LOUISE GROENEWALD N.O. **THIRD APPLICANT**

And

In their capacities as joint provisional Trustees of:

PLASWRAP (PTY) LTD an Liquidation)

And

BERMY PACKAGING (PTY) LTD **RESPONDENT**

JUDGMENT DELIVERED ON TUESDAY, 07 DECEMBER 2010

DLODLO.J

[1] On 14 March 2007 a company known as Piaswrap (Pty) Ltd ("Piaswrap") was placed under provisional liquidation. Provisional liquidators were appointed. The Applicants in this matter were appointed final liquidators of Piaswrap on 26 May 2008. Benny Packaging (Pty) Ltd, the Respondent in the instant matter, was at all relevant and material times represented by one Patrick Norman. Prior to the provisional liquidation of Piaswrap DF Malan Attorneys ("DF Malan") were the attorneys acting for Piaswrap. DF Malan has also been the attorneys for the Applicants in their capacities as provisional and final liquidators.

[2] On 26 March 2009 the Applicants launched an application against the Respondent the purpose of which was to secure an order in terms of section 69 (3) of the Insolvency Act 24 of

1936 ("the Insolvency Act") authorizing the Sheriff to seize the movable assets listed in Annexure "A" to the Notice of Motion from the Respondent, and deliver same to the Applicants. The Application also seeks a punitive costs order against the Respondent. The Respondent resists the application on various grounds including but not limited to the following:

(a) That on 29 October 2007 an agreement was concluded between it and Plaswrap in terms of which it purchased both the assets and the business of Plaswrap as a going concern for One million three hundred thousand rand (Rl 300 000.00) ("the October Agreement") and that the Applicants confirmed the October agreement and thus that it exists, binding and of legal effect.

(b) That pursuant to the October Agreement on 14 November 2007 the Respondent paid the Nine hundred and ninety seven thousand five hundred rand (R997 500.00) attributable to the assets but that the amount was released back to the Respondent by agreement

(c) That the Applicants took it upon themselves to "circumvent" the October Agreement and seek to seize the assets in terms of Section 69 (3) of the Insolvency Act.

Mr. Olivier and Mr. Howie appeared for the Applicants and the Respondent respectively. The nature of this matter is such that one would deal with it better if one first summarizes the papers. What follows is such summary.

[3] **THE FOUNDING AFFIDAVIT** was deposed to by one Mr. Eugene Bryan Wallace ("Mr. Wallace"), a liquidator employed by Wallace Trust. Mr. Wallace stated that Plaswrap was placed under liquidation on 14 November 2007 and that on 26 May 2008 Louise Groenewald, Xoliswa Eunice Daku and himself, were appointed as joint liquidators by the Master of the High Court - this being evident from the Masters' certificate of appointment Annexure "Wl" to the Founding papers. Mr. Wallace defined the Respondent as a company with a share capital, duly incorporated in terms of the Act with registered office at 2nd Floor, 47 Strand Street, Cape

Town, inter alia, trading at 4 Eagle Street, Okavango Park, Brackenfell, Western Cape.

[4] As the liquidator, Mr. Wallace is tasked with the day to day administration of the company in liquidation. He described the application as being in terms of section 69 (2) of the Insolvency Act, read with section 339 of the Companies Act for a warrant in terms of section 69 (3) of the Insolvency Act, the purpose of which is to obtain an order to search, attach and take possession of the movable assets of Plaswrap as set out in Annexure "A" to the Notice of Motion. Mr. Wallace averred that the assets relevant to these proceedings arc in possession of the Respondent company at its premises and that the latter unlawfully refuses to hand possession thereof to the Applicants. According to Mr. Wallace, on 29 October 2007 Plaswrap and the Respondent signed a written agreement, copy of which is Annexure "W2" to the Founding papers.

[5] According to Mr. Wallace the Respondent paid the purchase price into the trust account of DF Malan Attorneys as envisaged by the agreement. This was, however, at a later date upon the insistence of the Respondent, repaid against an undertaking by the Respondent that the purchase price would be repaid within one month into the DF Malan trust account. This, however, never happened. Mr. Wallace gave a historical overview of the matter by stating that after the appointment of provisional liquidators an agreement which would replace Annexure "W2" was proposed and a draft prepared. This proposed agreement is annexed to the Founding papers as Annexure "W3'\ As clause 3.5 of Annexure "W3" shows, the Respondent had since 1 December 2007 (with the permission of joint provisional liquidators) conducted the business for its own account pending the conclusion of an envisaged transaction whereby it would (with effect from 1 December 2007) purchase the assets of Piaswrap on a going concern basis for R1.3 million subject to certain conditions.

[6] According to Mr. Wallace the Applicants are still prepared to enter into an agreement with the Respondent on the terms set out in Annexure "W3". On the other hand, the Respondent

contends that it had made certain payments which are deductions to be made from the purchase price of R1.3 million. According to Mr. Wallace, upon hearing this he requested a breakdown of these claimed deductions and the Respondent presented to him annexure "W4" attached to the Founding papers. Mr. Wallace remarked that the Applicants are, subject to substantiation, prepared to accept that these payments appearing on Annexure "W4" were made and fall to be deducted from the purchase price. Mr. Wallace made it clear that the agreement envisaged as per Annexure "W3" did not materialize and was not entered into. According to Mr. Wallace on 27 October 2008, Van der Ross & Motala Inc. ("RM"), acting on behalf of the Respondent, addressed a letter annexed to the Founding papers as Annexure "W5", to DF Malan wherein an amount of Fifty thousand rand (R50 000.00) was offered in full and final settlement of what the Respondent termed its "obligations in terms of the original contract" and its "right to claim rectification of the original contract" are reserved. The original contract is clearly Annexure "W2" which has become known as the October Agreement.

[7] According to Mr. Wallace, the reliance on the provisions of the October Agreement is but misplaced in that the sale of the assets was not confirmed by the Applicants and the purchase price was not repaid to DF Malan's trust account. In Mr. Wallace's view, either the Respondent did not become entitled to the assets, as the purchase price had not been paid, or. by virtue of the provisions of clause 5.8 of the October Agreement (Annexure "W2"), the assets vest in Plaswrap and no party has any other claim against the other. In Mr. Wallace's averment, the Applicants continued in their attempts to find an amicable resolution to the impasse that had been reached due to the Respondent's refusal to pay for the assets and its unlawful retention of the assets. Numerous meetings were held and correspondence exchanged. One of such correspondence is Annexure "W6" to the Founding papers which is a copy of a letter addressed to the Respondent's attorneys by DF Malan. The following represents the contents of Annexure "W6":

1 The Respondent was notified that the concession to use the assets had been revoked;

2 The Applicants demanded the return of the assets and requested the Respondent to confirm in writing that the concession had been withdrawn and that the Respondent would cease using the assets;

3 The Respondent was requested to place the assets at the disposal of the Applicants at the premises and to provide the Applicants with free access so as to enable them to display same to prospective purchasers;

4 The Respondent was requested to confirm that the undertaking given in regard to the removal of the assets remain in force (this undertaking is set out in Annexure "W7", a letter from the Respondent's attorneys).

[8] On 13 March 2008, the Respondent's attorneys responded to Annexure "W6" by means of Annexure "W8" (also attached to the Founding papers), wherein it was pointed out that the meeting referred to in Annexure "W6" was held without prejudice. This was confirmed by DF Malan by means of Annexure "W9" and all relevant references to what was said at the meeting was removed from Annexure "W6". As it appears on Annexure "W10*\ the Respondent demanded payment of cenain amounts before it would be prepared to hand over the assets to the Applicants. There is a letter received from the Respondent's attorneys which is also annexed to the Founding papers as Annexure "Wll" in which the Respondent among other things reiterated its stance that clause 5.7 and 7.1 of the October Agreement (Annexure "W2") had been "compromised" and that the October Agreement had not been adhered to. The Respondent also contended that in view of its money expended on refurbishing of the assets it is entitled to continue using them.

[9] Mr. Wallace drew the Court's attention to that in terms of clause 5.2 of the October Agreement, the purchase price for the assets is stated to be an amount of Nine hundred and ninety seven thousand five hundred rand (R997 500.00) and that not a single cent of that has

been paid to the Applicants. He reiterated that in terms of clause 5.7 of the October Agreement, the purchase price had to be paid and the agreement had to be confirmed. No purchase price was paid and that in any event the October Agreement was never confirmed. All agreements having been of no force and effect and the Respondent still refusing to deliver possession of the assets to the Applicants, Mr. Wallace concluded that the Applicants are enjoined by the Act to secure the assets of Plaswrap, to realize same and distribute the proceeds amongst the creditors. In his contention the retention by the Respondent of Plaswrap's assets is unlawful under the circumstances. He expressed a view that in any event the Respondent cannot be permitted to hold the liquidators to ransom by refusing to return the assets until it receives payment.

[10] **THE ANSWERING AFFIDAVIT** in this matter was deposed to by one Patrick Manuel Terrence Norman, a director of the Respondent who was duly authorized to do so per the resolution of the Respondent annexed to the Answering papers. Mr. Norman stated that the Respondent's opposition to the application is premised on essentially four grounds. On the first ground, Mr. Norman contends that Plaswrap was wound-up in terms of section 344 (a) of the Companies Act 61 of 1973 pursuant to a special resolution and not on the basis that it was unable to pay its debts. In his view therefore the law of insolvency including section 69 of the Insolvency Act 24 of 1936 ("the Insolvency Act*') cannot be applied to the winding-up of Plaswrap. In his contention therefore the relief sought by the application in terms of section 69 (3) of the Insolvency Act is not competent. In Mr. Norman's view, the Applicants only have the power to launch legal proceedings of a civil nature on behalf of a company in terms of section 386 (4) (a) of the Act if they have acquired the necessary authority to do so from either the creditors and members or contributors of the company or from the Master in terms of section 386 (3) of the Act. In his averment the Applicants have failed to establish such authority, thus rendering the application fatally defective.

[11] He further pointed out that the liquidators can only succeed in obtaining relief in terms of section 69 (3) if they can establish, inter alia, that any property of the company in liquidation is

being unlawfully withheld from them. He referred to the October Agreement concluded between Plaswrap (prior to liquidation) and the Respondent for the sale of the assets identified in Annexure "A" to the Founding papers. He contended that a contractual dispute exists between the parties to the application. Mr. Norman concluded that the Applicants have failed to establish that the Respondent is unlawfully withholding the assets from them and their concomitant entitlement to relief in terms of section 69 of the Insolvency Act. In his contention there exists a real and genuine dispute of fact such that this matter cannot properly be decided on Affidavits, thus leaving the Court with only one option, namely, to dismiss the application and enable the Applicants to proceed by way of action. Mr. Norman referred to clause 7.1 of the October Agreement where it is stated that the Respondent wished to acquire control of Piaswrap as a going concern in such a manner that it could proceed with Plaswrap's activities and supply agreements uninterruptedly. He also referred to clause 8.5 stating that the provisions of the agreement would be binding on the liquidators and clauses 5.7 and 5.8 recording that the purchase price of the assets would be paid after both the liquidation of Piaswrap and the liquidators' confirmation of the sale such that the operation of Piaswrap would not be interrupted after the date of liquidation. According to Mr. Norman it was pursuant to the said October Agreement and the liquidators' confirmation of the agreement that since 1 December 2007 the Respondent has been in possession of the assets. Concluding on this aspect Mr. Norman contended that the October Agreement was confirmed by the Applicants and is of full force and effect. Mr. Norman quoted the provisions of section 339 of the Act thus:

"In the winding-up of a company unable to pay its debts the provisions of the law relating to insolvency shall, insofar as they are applicable, be applied mutates mutandis in respect of any matter not specifically provided for by this Act. " Mr. Norman concluded on this aspect as follows: *"In the circumstances, section 69 (3) of the Insolvency Act is not one which can be invoked by the applicants in the winding-up of*

> *Plaswrap. The kind of relief which would have been available to the applicants had they not confirmed the agreement would have been that contained in section 361 (3) of the Act which provides that in relation to the winding-up of a company, with the Court's*

leave a liquidator may institute legal proceedings for the recovery of what is alleged to he movable property belonging to the company. "

[12] Responding to paragraph 9 of the Founding Affidavit. Mr. Norman responded as follows:

"34. The purchase price was originally paid into the trust account of DF Malan attorneys in accordance with the agreement. By agreement, it was later repaid to the respondent. The parties then delayed in finalizing the execution of the October Agreement, and by that time the respondent was owed substantial sums arising from the business of Plaswrap it was operating. These include:

34.1. R140 851.58for rentals owing to the respondent for use of the factory[1] premises by Plaswrap;

34.2. R439 352.54 for raw materials supplied by the respondent in order to ensure that the business of Plaswrap during its liquidation was operated on a going concern basis uninterruptedly (as contemplated in clause 7.1 of the October Agreement):

34.3. R37 877.52for amounts which debtors of Plaswrap paid to the applicants incorrectly instead of to the respondent in accordance with the cession annexed to the October Agreement: and

34.4. RI17 430.11 in interest in respect of the aforesaid amounts. "

[13] According to Mr. Norman these amounts totaling Seven hundred and thirty five thousand five hundred and eleven rand and seventy five cents (R735 511.75) are payable to the Respondent by the Applicants in their administration of Piaswrap in liquidation, and can be set off against any amount which the Applicants allege to be owing to them by the Respondent. In the view of Mr. Norman events had overtaken and the parties are at odds over the payment of the full purchase price to DF Malan Attorneys as originally contemplated in clause 5 of the October Agreement. Mr. Norman contended that by proposing an agreement to replace the October Agreement, the Applicants are merely confirming the fact that the October Agreement is binding. He reiterated that the proposed agreement to replace the October Agreement

evidenced by Annexure "W3" to the Founding papers was never concluded between the panies. He admitted that with the permission of the Applicants, in their capacities as joint provisional liquidators, the Respondent conducted the business of Piaswrap for its own account since 1 December 2007. He added, however, that this was on the basis of what is contained in the October Agreement which makes express provision in clause 5 to 7 for the acquisition of Plaswrap's assets, a cession of Plaswrap's debtors to the Respondent, and the latter s acquisition of Piaswrap as a going concern in order to proceed with its current activities and supply agreements uninterruptedly.

[14] In response to the averments contained in paragraph 12 of the Founding Affidavit, Mr. Norman made it abundantly clear that the Respondent is not prepared to replace the October Agreement with the proposed agreement, Annexure "W3" to the Founding papers. In response to averments contained in paragraph 15 of the Founding Affidavit, Mr. Norman contended that by invoking clause 5.8 of the October Agreement, the Applicants have by necessary implication conceded that it is binding. Concluding on this aspect, Mr. Norman reiterated that *"in the circumstances, although the applicants may be in a position to obtain the necessary section 386 (3) authorization to seek contractual relief, there is absolutely no basis upon which they can obtain search and seizure relief in terms of section 69 on the basis that the respondent is unlawfully withholding the assets from them."* Mr. Norman emphasized that the Respondent reiterates that its use and possession of the assets arose from the conclusion of the October Agreement and not as a result of some concession given by the Applicants.

[15] Commenting on clause 5.8, Mr. Norman stipulated that it provides that *inter alia,* ownership in the assets would automatically vest in Plaswrap only if the liquidators did not confirm the sale of the assets. Because the Applicants, in Mr. Norman's contention did confirm the October Agreement, they cannot seek to rely on the provisions of clause 5.8 in an attempt to establish that the assets vest in them, and that therefore the Respondent is in unlawful possession of the assets. Mr. Norman was concerned in that section 69 (1) prescribes that relief

in terms of the section must be invoked as soon as possible after a liquidator's appointment (including a provisional liquidator) but in the instant matter the Applicants were appointed as final liquidators on 27 May 2008 and as provisional liquidators far earlier and they did not act at all. In his contention it is highly inappropriate at this late stage to seek the extraordinary form of relief in terms of section 69 of the Insolvency Act. His conclusion is that the application falls to be dismissed with costs payable by the Applicants personally because they were not authorized to launch these proceedings.

[16] **THE REPLYING AFFIDAVIT** as to be expected was deposed to by the same Mr. Wallace who deposed to the Founding Affidavit. The Replying Affidavit as a starting point dealt with Mr. Norman's averment that the liquidators cannot avail themselves of the provisions of the Insolvency Act because the company was wound-up in terms of section 344 (a) of the Act and not on the basis of its inability to pay its debts. Mr. Wallace set the record straight by stating that Piaswrap was in fact liquidated under section 344 (h) of the Act and solely on the basis that it was unable to pay its debts. To evidence this fact he enclosed a copy of the Founding Affidavit by Thomas Matthew Leak in Case Number 16117/2007 used in support of the application for Plaswrap's liquidation and this is marked as Annexure "W13" to the Replying papers. He contended that on this basis the Applicants are entitled to avail themselves to the relevant provisions of the Insolvency Act.

[17] Mr. Wallace maintained that the Applicants never confirmed the October Agreement and referred to the sequence of events in the Founding papers illustrating this particular aspect. Mr. Wallace referred to the contents of paragraph 43 of the Answering Affidavit wherein the Respondent admits that it conducted the business of Piaswrap with the permission of the Applicants. Mr. Wallace regards the aforegoing admission as important in that if the Respondent had a genuine belief that the October Agreement was in force, then no such permission could conceivably have been necessary. Mr. Wallace agreed with the proposition that the liquidators are entitled to relief in terms of section 69 (3) of the Insolvency Act if they

establish that the property of the company is being unlawfully withheld by the Respondent. He submitted that upon a proper reading of the contents of the Founding Affidavit, that fact has been established. According to Mr. Wallace the simple fact is that the Applicants did not confirm the October Agreement. Mr. Wallace dealing with the allegation of refurbishment of the assets lambasted the Respondent as follows: *"If the October Agreement had been binding on Applicants (which it is not) a dispute with regard to the refurbishment of the Assets could not justifiably have formed a dispute with regard to that agreement, as it does not deal with the subject of refurbishing at all. Clause 8.3 of the October Agreement requires that any amendments, deletions or additions thereto must be in writing and signed by the parties, but there is no such signed instrument, and the subject of refurbishment could not have become part of the October Agreement by amendment or otherwise."*

[18] Mr. Wallace disputed that paragraph 21 of the Founding Affidavit confirms "the existence of the contractual dispute." He contended that in as much as paragraph 21 refers to a dispute, such dispute concerns the unlawful withholding of the Assets from the Applicants as contemplated by section 69 (3) of the Insolvency Act. He emphatically denied that there are disputes of fact between the parties contending that the disputes are of a legal nature. Mr. Wallace proceeded to point out what he called "the inaccuracies" contained in the Answering papers and these are in connection with the alleged scheme of arrangement - which is disputed by the Applicants.

[19] Mr. Wallace stated that the Respondent however, nevertheless wished to acquire the assets, but only if the operations of Piaswrap carried on without interruption and certain disbursements which were not provided for in the October Agreement, would be subtractable from the purchase consideration of R1.3 million. According to Mr. Wallace the Applicants were prepared to make the concessions which the Respondent desired and therefore did not confirm the October Agreement, but rather gave the Respondent permission to use the Assets in the conduct of Piaswrap for own account as from 1 December 2007 pending the conclusion of the "W3"-

Agreement and so that the operations of Piaswrap would not be interrupted. He thus denied that the Respondent has been in possession of the Assets since 1 December 2007 by virtue of the Applicants' confirmation of the October Agreement. Responding to paragraph 34 of the Answering Affidavit, Mr. Wallace admitted that the purchase price was originally paid into the trust account of DF Malan Attorneys in accordance with clause 5.3 of the October Agreement and he added that this took place prior to the liquidation of Piaswrap on 14 November 2007. He emphatically denied that the purchase price was repaid by virtue of any agreement with the Applicants. In Mr. Wallace's view it is quite preposterous to suggest that the Applicants would have repaid the purchase price after confirming the October Agreement which (according to the Respondent) already occurred prior to 1 December 2007.

[20] Mr. Wallace, responding further on the content of paragraph 34 of the Answering Affidavit remarked that it is not clear what the Respondent meant by stating that the parties delayed the October Agreement. Mr. Wallace stated that if the Respondent intended to say that the implementation of the October Agreement was delayed then it needs to be made clear that there is nothing in the October Agreement which the Applicants were able to delay (except perhaps delaying confirming it). Mr. Wallace reiterated that the amount of Seven hundred and thirty five thousand five hundred and eleven rand and seventy five cents (R735 511.75) is not owed to the Respondent on any basis, not even on the basis of the October Agreement if it had been confirmed, let alone as a cost of administration of the insolvent estate.

[21] Mr. Wallace denied that the reference by him to replacing the October Agreement with "W3"-agreement meant that the October Agreement was in force. According to Mr. Wallace, that simply meant that the October Agreement (which was not in force) was to be replaced with one that would be in force. Mr. Wallace accepted that the Respondent by way of the October Agreement prior to 31 December 2007 purchased the Assets from Plaswrap but not from the Applicants. But the true position is that the ownership of the Assets in accordance with clause 5.7 and 5.8 of the October Agreement automatically reverted to Plaswrap when the October

Agreement was not confirmed and the purchase price was not paid. The possession by the Respondent of the Assets as from 1 December 2007 was by virtue of the permission granted by the Applicants. Concluding on this aspect, Mr. Wallace stated the following:

> *"When the Applicants gave their aforesaid permission, the Respondent had already been in possession of the Assets and was already conducting the company pursuant to the October Agreement...It stands to reason, under these circumstances, that the aforesaid permission would not have been required if the Applicants confirmed the October Agreement. "*
>
> The Respondent introduced a further Affidavit with leave of the Court in which it attached Annexure "PN3.2" which is intended to show that the October Agreement was confirmed. Mr. Wallace dealt with how Annexure PN3.2" came about in a subsequent Affidavit.

DISCUSSION

[22] It shall perhaps be helpful to first set out the provisions of section 69 (3) of the Insolvency Act. It provides as follows: *"*

(1) A liquidator shall, as soon as possible after his appointment...take into his possession or under his control all movable property...belonging to the estate of which he is trustee and shall furnish the Master with a valuation of such movable property by an appraiser appointed under any law relating to the administration of the estates of deceased persons or by a person approved of by the Master for the purpose.

(2) If the liquidator has reason to believe that any such property ...is concealed or otherwise unlawfully withheld from him, he may apply to the Magistrate having jurisdiction for a search warrant mentioned in sub-section (3).

(3) If it appears to a Magistrate to whom such application is made...that there are reasonable grounds for suspecting that any property... belonging to an insolvent estate is

concealed...or is otherwise unlawfully withheld from the liquidator concerned...he may issue a warrant to search for and take possession of that property..."

It would appear that there is some measure of confusion caused by the fact that there was an *ex parte* application for liquidation. It emerges from the papers that *Ex parte* application was withdrawn and Piaswrap was liquidated on the allegations contained in the Founding Affidavit deposed to by Mr. Leak on 8 November 2007. The contents of the said Mr. Leak's Affidavit make it abundantly clear that Piaswrap was wound-up on the grounds that it was unable to pay its debts. It was also contended initially on behalf of the Respondent that the Applicants had no *locus standi* to launch these proceedings. I must, however, mention that this contention was not at all pursued by Mr. Howie on behalf of the Respondent in his oral submissions. In any event, the papers show that the resolutions adopted at the second meeting of creditors (held on 22 August 2008) particularly Resolution 4 clearly authorize the Applicants to institute these proceedings.

[23] Mr. Howie contended that the contents of the further Answering Affidavit of the Second Applicant ("Wallace") confirm that there are material disputes of fact which were known to the Applicants prior to them launching this application, particularly in regard to the existence of the October Agreement. In Mr. Howie's submissions an application in terms of section 69 of the Insolvency Act is an application for final relief and accordingly, the determination of this application is subject to the rule stated in ***Plascon-Evans Paints Limited v Van Riebeeck paintis (Pty) Ltd.*** Relying on ***TMT Bulk Co. Ltd v Bunkers*** laden aboard the MV "Vogerunner" 2010 (3) SA 138 (C) paragraph [13], Mr. Howie contended that the result is that, in the absence of any basis to reject the factual assertions of the Respondent as obviously untenable, the Court is able to accept their validity and probity and can also accept the documentation filed in support of its opposition at face value. The crux of the Respondent's submission is essentially that it is not in unlawful possession of the assets belonging to Plaswrap in that the October Agreement is alive and kicking - that is it exists and has a binding effect as mentioned earlier

on in this Judgment. It is a fact that Plaswrap concluded the October Agreement with the Respondent and that was prior to its liquidation. The October Agreement is annexed to the Founding papers and is marked Annexure "W2". It is necessary to set out some of the provisions of the October Agreement, namely:

"5.3 Bermy shall pay the Purchase Price into the trust account of DF Malan Attorneys to be held by such attorney on Bermy's behalf pending fulfillment of the provisions set out in **5.7** *below;*

5.4 Upon payment of the Purchase Price the Assets will be deemed automatically to have been delivered to and vest in Bermy."

We know from the same October Agreement that the purchase price that should have been paid to DF Malan is the sum of Nine hundred and ninety seven thousand five hundred rand (R997 500.00)

[24] The following provisions of the October Agreement also deserve to be quoted in this Judgment:

> *"5.7. The Purchase Price will be paid to Piaswrap after the liquidation of Piaswrap once the Liquidator confirms the sale of the Assets in a manner that renders Bermy's title to the Assets indisputable, and the business operations of Piaswrap shall not have been interrupted after the date of liquidation.*
>
> *5.8. In the absence of such confirmation by the Liquidator the Purchase Price will be repaid to Bermy and ownership in the Assets will again vest in Piaswrap and no party will have any claim against the other parry by virtue of the failure of the purchase. "*
>
> It does not appear that the Respondent complied with the provisions of the above quoted clause 5.3 of the October Agreement. Whilst it is true that a certain amount (not the agreed R997 500.00) was indeed paid into DF Malan Trust account towards this end, the same sum of money was returned to the Respondent on its request. The Respondent does not deny this. All the Respondent says in this regard is that it was returned to it in terms

of the agreement subsequently entered into. I understand that to mean an agreement other than the October Agreement. The fact of the matter is that neither Piaswrap nor the Applicants had received payment of the purchase price in terms of the October Agreement. I hardly understand the stance taken by the Respondent in this regard because it contends that events had overtaken and that the parties were at odds regarding the payment to the attorneys of the full purchase price.

[25] The above quoted clauses of the October Agreement that is. clauses 5.3, 5.7 and 5.8 read together make it abundantly clear that the purchase price (which should have been paid to DF Malan) would be paid to Plaswrap after liquidation. There is no dispute on the fact that it did not happen like that. 1 have said above that I do not understand the Respondent's stance of events having been overtaken. This smacks of a clear attempt of avoiding the clear and unequivocal provisions of the October Agreement. I also cannot comprehend the contention that the money paid into the DF Malan trust account was refunded to the Respondent on the basis of a subsequent agreement. If the October Agreement is valid and still has legal force as contended by the Respondent then any alleged waiver or amendment thereto falls foul of the provisions of clauses 8.2 and 8.3 of the same October Agreement. It may be helpful to also set out these clauses *infra:*

"8.2. Except as expressly provided to the contrary in this Agreement, none of the terms and conditions of this Agreement are capable of being waived, amended, added to or deleted, unless such waiver, amendment, deletion or addition is reduced to writing and signed by the Parties hereto.

8.3 No relaxation or indulgence granted by the one Party to the other will in any way limit or prejudice the rights of the Party granting such indulgence, the rights of whom shall remain unaffected as if such indulgence had not been granted at all. Any- such indulgence shall also not constitute an estoppel in favour of or against any of the Parties or constitute a waiver or a novation of any such right or of this Agreement, nor shall any single or partial exercise of any right preclude any other or future exercise

thereof or the exercise of any other right under this Agreement. "

[26] It is contended by the Applicants that they had not confirmed the October Agreement. The Respondent of course contended differently and on its behalf heavy reliance is placed on a letter, Annexure "PN3.2" to the Respondent's papers introduced to these proceedings, by way of an application to file a further Affidavit. This is an e-mail the Respondent apparently found to exist far after having filed its Answering Affidavit. The authors of Annexure "PN3.2" are DF Malan Attorneys. This Annexure reads: *"Dear Mr. Norman*

1. We refer to our telephone conversation of this morning with regard to your taking over of the assets of Piaswrap as set out in the agreement of 29 October 2007.

2. We informed you that the liquidator has instructed us to let you know that you have to duly perform in terms of the aforesaid agreement by no later than Friday 24 October 2008.

3. If you fail or refuse to do so the liquidator will take such further steps as he in the circumstances deem fit. These steps may include, without prejudice to his other rights, cancellation of the said agreement and the sale of the assets concerned by public auction or other private treaty.

4. We record that you responded by saying that you intended to make a new offer to the liquidator by not later than Friday the 24[/]\ "

The above e-mail was addressed to PMT Cell Solutions (Pty) Limited and marked for the attention of Mr. Patrick Norman. Mr. Howie submitted that the Applicants needed to show that the Respondent is in unlawful possession of the assets of Plaswrap. In his submission a fact which is detrimental to their (Applicants') being able to discharge this onus is if the October Agreement was concluded between the parties because then the Respondent took possession of the assets and maintains them pursuant to a contract and therefore not unlawfully. Mr. Howie contended that the "elephant in the room" is the telefax of 21 October 2008 (Annexure "PN3.2") in which the existence of the October Agreement is confirmed. Mr. Howie placed heavy reliance on the following words from

Annexure "PN3.2": *"We informed you that the liquidator has instructed us to let you know that you have to perform in terms of the aforesaid agreement... ".* and contended that there was confirmation and that therefore there is a dispute of facts.

[27] Mr. Wallace, the deponent to the Applicants' Answering Affidavit in the application to file further Affidavit explained the coming into being of Annexure "W2" (an unsigned agreement intended to replace the October Agreement). He was anxious that the Respondent sign this proposed agreement. When it appeared to him that the Respondent was deliberately delaying in order to gain the advantage of using the assets as long as possible without paying anything for them he warned the Respondent that he would have to accept that it had in fact declined the "W2" agreement. According to Mr. Wallace he then directed his attorney to direct "PN3.2" to the Respondent in an effort to encourage the Respondent to finalize the "W2[v] agreement. According to Mr. Wallace, *"for this reason it was stated in paragraph 1 of the e-mail that the assets were to he taken over pursuant to the October Agreement, notwithstanding that the October Agreement had not yet been confirmed, but covertly thereby threatening that Applicants might do so ".*

It is of paramount importance that I quote the following paragraph

4.8 of Mr. Wallace's Affidavit aforementioned:

"4.8 I, however, point out that the e-mail "PN3.2 ", does not in itself confirm the October Agreement, nor does it state that the October Agreement had already been confirmed, and thus the lack of evidence from the side of Respondent on the question of confirmation, in my view, remains unresolved, while there is overwhelming other evidence, as appears from all Applicants' papers in the main Application, that the October Agreement had not been confirmed and that Respondent was perfectly aware of this. "

[28] Apart from the interpretation which the Respondent attaches to Annexure "PN3.2" I have come upon no other document in the instant matter that demonstrates that the Applicants did in

fact confirm the October Agreement. Clause 5.8 quoted earlier on in this Judgment makes it abundantly clear what must happen in the event that the October Agreement is not confirmed by the Applicants. It provides that in that eventuality the purchase price will be repaid to the Respondent and that ownership in the assets will again automatically vest in Piaswrap and no party will have any claim against the other party by virtue of the failure of the purchase. 1 have demonstrated above that what purported to be the purchase price was in fact repaid to the Respondent at its request. As matters stand no purchase price was paid therefore. I do not agree with Mr. Howie that Annexure "PN3.2" is or purports to be confirmation envisaged in clause 5.8 of the October Agreement. Annexure "PN3.2" is also, in my finding, no evidence that the October Agreement was ever confirmed by the Applicants. Annexure "PN3.2" is probably badly drafted particularly the portion relied on by Mr. Howie. The explanation tendered by Mr. Wallace quoted in the aforegoing paragraph puts this beyond any possible misinterpretation. My finding having had regard not only to the papers filed in this matter, but also to the submissions made on behalf of the parties is that the October Agreement was never confirmed by the Applicants and that therefore in terms of clause 5.8 thereof the October Agreement fell away or ceased to exist. In terms of clause 5.8 therefore no purchase price needs to be repaid to the Respondent because the latter did not pay the purchase price into the trust account of DF Malan in terms of clause 5.3 of the October Agreement. The ownership in the listed assets therefore automatically vest in Plaswrap in terms of clause 5.8 of the October Agreement.

[29] I am more than mindful of the fact that it is contended on behalf of the Respondent that the October Agreement is still of legal force. Even if it were to be accepted for purposes of argument that the Respondent is correct in the latter regard, the question that almost spontaneously comes to mind is why then did the Respondent not comply with what it contends is a valid and legally binding Agreement? The Respondent cannot point out a single respect in which it complied with the October Agreement. That the Respondent is holding or is in possession of the assets belonging to Plaswrap unlawfully is beyond question. The Respondent has over the years enjoyed the use of these assets in the furtherance of its own business

activities without even paying rentals for such use. It is untenable that the liquidators are alleged to have confirmed the October Agreement without any reference to any such actual confirmation by them. Immediately such an allegation of confirmation is made (as made by the Respondent) then the next question is how did they confirm? Probably the Respondent is intimating that this Court should infer such confirmation from the conduct of the Applicants. But which conduct of the Applicants portraits such confirmation? Certainly not the contents of Annexure "PN3.2" I have already expressed my views on Annexure [K]PN3.2[t]*. I would agree with Mr. Olivier that no date, time, place or person who allegedly confirmed the October Agreement on behalf of the Applicants are given and that therefore the alleged confirmation is and remains vague and unsubstantiated. It is hardly supported by any relevant fact or circumstance. The Respondent clearly failed to pay in terms of the October Agreement but it retained the assets of Plaswrap. On the question of costs I am of the view mat in all fairness costs should follow the cause. It is common cause that when the relationship started between the parties the intentions were good.

[30] **ORDER:**

(a) In respect of the liquidation of Plaswrap (Pty) Limited (in liquidation) ("the company"), the Sheriff is hereby authorized and ordered in terms of section 69 (3) of the Act, read with section 21 of Act 51 of 1977 ("the Criminal Procedure Act"). to enter and search the properties situated at 4 Eagle Street. Okavango Park, Brakenfell, Western Cape, to attach the movable assets set out in Annexure "A" hereto ("the assets") and make an inventory thereof.

(b) The Sheriff is hereby authorized and ordered in terms of section 69 (3) of the Act, to take possession of the assets.

(c) The Sheriff is hereby authorized and ordered in terms of section 69 (4) of the Insolvency Act, to deliver all the attached assets to the Applicants herein, in their capacities as joint liquidators of the company.

(d) The costs of this application as well as all the costs incurred in respect of the

execution of this order (including all costs reserved for later determination), taxed on an attorney and client scale, shall be paid by the Respondent.

DLODLO, J

Annexure A

SCHEDULE OF THE ASSETS SOLD BY PLASWRAP TO BERMY

Quantity	Serial No.	Description	Purchase Price Per Item	
1	12S7	Complete Dole; Extrusion Line	R325.OOO.00	
1	1976	Complete Dolci Extrusion Line	R325.000.00	
1		Complete Recycling Line	R160,OOC.O0	
2		Complete Ribbon Mixers	R25.000.00	1
1		Samsung Forklift	R25.000.0G	
		TOTAL PURCHASE PRICE	R997.500.00	