Republic of South Africa

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

Case No: 15766/13

Before: The Hon. Mr Justice Binns-Ward

In the matter between:

STEPHEN MALCOLM GORE N.O.	First Applicant
MARIO PAUL WALTERS N.O.	Second Applicant
GAVIN NEIL GAINSFORD N.O.	Third Applicant
(cited in terms of s 32(1)(b) of the Insolvency Act 24 of 1936 in their capacities as co-liquidators of A Million Up Investments (Pty) Ltd (in liquidation),	
TESSA MARGOT WOLPE	Fourth Applicant

and

GARY NEIL SHAFF	First Respondent
PETER MARTIN SHAFF	Second Respondent
PROTEA HOTEL GROUP (PTY) LTD	Third Respondent
ABSA BANK LTD	Fourth Respondent

JUDGMENT: DELIVERED: 13 DECEMBER 2013

BINNS-WARD J:

[1] Describing the cast in this case is somewhat complicated because all but one of the parties who are nominally applicants are opposing the application, and thus in fact playing the role of respondents. The narrative will be easier to follow therefore if I refer to the protagonists by their names or positions, rather than with reference to their citation as applicants or respondents as the case might be.

[2] The matter before court at this stage has been described variously as an interim, or an interlocutory application. The labels attach by reason that the relief sought is directed at regulating the treatment of certain funds pending the final determination of a separate application brought in terms of the same notice of motion. The separate application, to which I shall refer as 'the principal application', involves proceedings which Mrs Tessa Wolpe has purported to institute in the name of the liquidators of A Million Up Investments 105 (Pty) Ltd (in liquidation) ('AMU') to have a pre-liquidation transaction concerning the purchase of the Protea Hotel Group (Pty) Ltd's shares in 15 On Orange (Pty) Ltd by AMU declared to have entailed a collusive transaction within the meaning of s 31 of the Insolvency Act 24 of 1936. Mrs Wolpe alleges that ABSA Bank Ltd ('ABSA'), the Protea Hotel Group and the Shaff brothers (Peter and Gary), as directors of AMU, were party to, or complicit in the alleged collusion. If Mrs Wolpe is successful in the principal application ABSA's very substantial secured claim against AMU will be forfeited, arguably with the result that any claim that ABSA might have against Mrs Wolpe qua surety for AMU in favour of ABSA will be extinguished, and the loan account claim that she had against AMU, which had been ceded *in securitatem debiti* to ABSA as security for her suretyship obligation, would revert to her.

[3] The funds in issue in the interim application constituted part of the proceeds of the sale by the liquidators of the principal assets of AMU, including immovable property in the form of sectional title units in a building in which a hotel, 15 on Orange, is operated. The mortgage is a 'special mortgage', as defined in s 2 of the Insolvency Act.[1] The immovable property had been mortgaged by AMU in favour of ABSA. ABSA is consequently, as mentioned, a secured creditor in the liquidation, which is being conducted in terms of the provisions of chapter 14 of the Companies Act 61 of 1973 ('the Companies Act'). Proof of ABSA's claim has been accepted in the liquidation in the amount of R569 million. The deed of agreement in terms of which the assets were sold describes itself as the '*Sale of Assets Agreement*'. The selling price was R203 million. Provision was made in sub-clause 4.2.2 of the agreement for a payment of R193 250 000 by the purchasers (Blend Property 15 (Pty) Ltd) to ABSA against transfer of the immovable property by the liquidators into the purchaser's name. The purpose of the payment was to constitute an advance award by the liquidators in reduction of ABSA's secured claim. That much was expressly recorded in the

[1] '**special mortgage**' means a mortgage bond hypothecating any immovable property or a notarial mortgage bond hypothecating specially described movable property in terms of section 1 of the Security by Means of Movable Property Act, 1993 (Act 57 of 1993), or such a notarial mortgage bond registered before 7 May 1993 in terms of section 1 of the Notarial Bonds (Natal) Act, 1932 (Act 18 of 1932), but excludes any other mortgage bond hypothecating movable property.

sub-clause, which also records ABSA's undertaking, as a party to the agreement, to repay the amount, or any part thereof, to the liquidators if so directed by a court or by the Master. The terms of the undertaking by ABSA were set forth in annexure F to the agreement.

[4] The relief sought by Mrs Wolpe in the interim application is set out in paragraph 3 of the amended notice of motion in the principal proceedings as follows:

> 3. [An order o]rdering the fourth respondent to pay the liquidators, within five (5) days of an order being made to this effect, all amounts paid to it, whether as an advance secured award or otherwise, in terms of sub-clauses 4.2.2, 4.3 and 4.4 of the *"Sale of Assets Agreement"* concluded between the liquidators, Blend Property 15 (Proprietary) Limited and the fourth respondent on 13 June 2013, and directing that such amounts shall be placed by the liquidators in an interest bearing trust account in the name of AMU, pending the final determination of this application, and shall not be paid out by the liquidators or received by any of the respondents prior, whether in terms of any liquidation and distribution account, or as an advance award, or in terms of any agreement concluded between any of the respondents and the liquidators, or at all.

[5] The opposing parties, ABSA and the liquidators, contend that Mrs Wolpe is not a creditor in the liquidation and that she does not have standing to claim the interim relief because she lacks standing in terms of s 32 of the Insolvency Act to proceed in the liquidators' names in terms of s 31 of the Act for the setting aside of the alleged collusive transaction. It would obviously be necessary to decide the issue of Mrs Wolpe's standing if the court were to decide the interim application in her favour. However, in view of the adverse result at which I have arrived, it is unnecessary, and - in the face of the pending hearing of the principal application (which has been set down in May 2014, and in which the question of her standing is also in issue) – thus undesirable for me to make any determination of that question.

[6] The interim application is founded on the allegation that the 'advance payment' to ABSA effected in terms of the aforementioned provisions in the 'Sale of Assets Agreement' was beyond the powers of the liquidators, and having been made *ultra vires*, consequently unlawful. Mrs Wolpe's counsel sought to support the allegation by contending that the effect of s 409 of the Companies Act was that the liquidators could lawfully pay a liquidation dividend to ABSA only in terms of a confirmed liquidation and distribution account.

[7] Section 409 of the Companies Act (which falls to be read with ss 402-408, which provide for the duty of a liquidator to prepare a liquidation and distribution account and for the advertisement and confirmation of such account subject to the consideration and determination of any objections that might have been raised) reads as follows:

> **409. Distribution of estate.**
> (1) Immediately after the confirmation of any account the liquidator shall proceed to distribute the assets in accordance therewith or to collect from the creditors and contributories liable to contribute thereunder the amounts for which they may respectively be liable.
> (2) The liquidator shall give notice of the confirmation of the account in the Gazette and shall in such notice state, according to the circumstances, that a dividend is being paid or that a contribution is to be collected and that every creditor and contributory liable to contribute is required to pay to the liquidator the amount for which he is liable and the address at which the contribution is to be paid.

[8] The liquidators contended in response that the making of the advanced payment was unexceptionable, and in accordance with long established insolvency practice. Mrs Wolpe's counsel acknowledged the existence of the longstanding practice, but submitted that it was nevertheless unlawful because it was impossible to reconcile it with s 409.

[9] The existence of the practice on which the liquidators rely is confirmed in Meskin, *Insolvency Law* (Magid et al, ed.) at 11-8, s.v. '*Contents of accounts*':

> It should be observed that the claim of a creditor secured by a mortgage of immovable property which is to be paid by the trustee (i.e. where he neither "takes over" nor abandons it to the creditor in settlement of such claim)…in practice is paid as soon as the trustee receives the proceeds of the realisation of the property, i.e., notwithstanding that no plan of distribution providing for such payment has been drawn, the payment being expressed to be made subject to adjustment: the reason for this is to stop the accrual of interest to the prejudice of other creditors.

It is also discussed in Bertelsmann et al, *Mars, The Law of Insolvency in South Africa*, 9th ed. at p. 541 as follows:

> Until an account has been confirmed a creditor even though preferent, e.g. in respect of funeral expenses, has no right to be paid. **A trustee may pay a creditor before confirmation of the account, but he does so at his own risk**. Although it has been said that a trustee may pay a creditor before his claim has been proved such payment would be improper and it has been decided that it is improper for a trustee to pay out a dividend before confirmation of an account, and that the court may restrain him from so doing and even order him to repay such dividends. The exception to this rule is a secured creditor who has realised his own security and who has proved his claim. **Premature payment is sometimes made to a secured creditor where the trustee has realised the security and wishes to limit the estate's liability for payment of further interest, but a prudent trustee would make such payment conditional upon immediate repayment upon demand if for any reason the Master refuses to confirm the account in which payment is eventually awarded to the creditor**. (emphasis supplied)

[10] The judgments cited in support of the observation in the aforegoing passage from *Mars* that 'it has been decided that it is improper for a trustee to pay out a dividend before confirmation of an account' are *In re Estate Keefer* 1 HC 208; *Steytler v Brink* 1 Searle 123; *In re Estate Martin & Griffiths* 4 EDC 30; *Fennel v Willoughby* 3 SC 265 and *Williams'*

Trustee v Wilson 1911 CPD 132. Those cases are all distinguishable on their facts. In *Keefer*, for example, which seems to be closest in point, the trustee of the insolvent estate had, after taking legal advice, borrowed funds and applied them in settling concurrent creditors' claims before the confirmation of the liquidation and distribution account. That was held to have been improper, but the judgment is not clear as to why that conclusion was reached. Buchanan JP's remarks on the point were limited to the observation '*…it is very difficult to understand how an experienced trustee, like the present respondent, can have thought himself justified in anticipating the course of the law, and paying away money before the account was confirmed. A careful perusal of all the sections in point* [the learned Judge-President did not identify the provisions to which he had regard] *has convinced me that the trustee, on whatever legal advice he may have relied, has exceeded his statutory power in this respect*'. Jones J confined himself to saying '*It certainly is a very remarkable and, as far as I am aware, unprecedented thing for a trustee to pay out dividends before his account has been confirmed, as has been done in the present case. When the account is confirmed, it really operates as a judgment against the trustee in favour of the creditors, who can compel him to pay them forthwith the amount to which they are shewn to be entitled by the distribution account; but by anticipating the order of the Court the trustee runs a very considerable risk, and if the account should not be confirmed he would be in a very embarrassing position*'. The third judge, Laurence J, stated '*I think there can be no doubt that the conduct of the trustee in paying dividends before confirmation of the account, and in raising loans to pay dividends for which he had not sufficient assets in hand, was highly irregular and altogether ultra vires*'. None of the cases cited concerned a set of facts in which the practice described in Meskin's work was involved.

[11] The authority on which Mrs Wolpe's counsel relied for the submission that the liquidators' advance payment to ABSA had been *ultra vires* was the judgment of Harms JA in *Bowman, De Wet and Du Plessis NNO and Others v Fidelity Bank Ltd* 1997 (2) SA 35 (A). That matter concerned proceedings by liquidators and trustees, who had made an advance payment to a secured creditor, to recover part of the amount advanced which had been erroneously overpaid. The remedy of which the liquidators and trustees sought to avail to recover the overpayment was the *condictio indebiti*. The court of first instance had held that both the payment and the overpayment had been *ultra vires*, and that that the *condictio indebiti* was not available to recover a payment made *ultra vires*. In determining the matter on appeal, the Appellate Division expressed itself willing for the purposes of deciding the question to assume in favour of the respondent that the advance payment had been made *ultra*

vires. The Court thus did not consider whether the advance payment of the claim, as distinct from the overpayment, was in point of fact *ultra vires*, and the judgment therefore does not really serve the object for which Mrs Wolpe's counsel sought to invoke it. In the current case there is, moreover, no contention that the amount paid to ABSA as an advance on its entitlement to the net proceeds of the realisation of its security was not an amount that had been owing to it. Mrs Wolpe's point is that if the s 31 application that she has instituted succeeds the ABSA claim will be forfeited.

[12] The governing legislation applicable in all the cases cited in *Mars* was the Insolvency Ordinance No. 6 of 1843.[2] I have perused the Ordinance and found that its provisions are not materially distinguishable from those of the currently applicable insolvency legislation in the respects relevant. It is nevertheless not clear to me how any of its provisions would prohibit a trustee from competently making an advance to a proved secured creditor at his own risk.

[13] The general duties of a liquidator are set out in s 391 of the Companies Act; they are 'to proceed forthwith to recover and reduce into possession all the assets and property of the company, movable and immovable, to apply the same, so far as they extend, in satisfaction of the costs of the winding-up and the claims of creditors, and to distribute the balance among those who are entitled thereto'. Creditors are not entitled to enforce payment from the trustee (or liquidator) other than to the extent that their claims have been recognised in terms of a confirmed liquidation and distribution account; and the trustee is obliged to make payment of the dividends awarded in terms of a confirmed account. The purpose of the framing, advertisement and confirmation of such an account is to facilitate the achievement of accountability, finality and certainty in the winding up of the estate in issue. A liquidator who has made an advance payment of claim is obliged to account for it in the liquidation and distribution account. The account must include an account of his receipts, payments and a plan of a distribution. Confirmation of a distribution account has the effect of a judgment in favour of creditors against the trustee. It is a procedure that renders payment of a proved claim due. Confirmation of the liquidation and distribution account obliges the trustee or liquidator to make payment of the dividends awarded in terms thereof according to the tenor of the account; it does not, in terms, prohibit him from making a payment of an amount owing in terms of a claim before it falls due. In making a payment before it is due, a trustee or liquidator should, of course, act responsibly and conscious of his duty to administer the

[2] The 'Ordinance for regulating the due Collection, Administration and Distribution of Insolvent Estates within this Colony'. The Ordinance was repealed in terms of the Insolvency Act 32 of 1916, which was the statutory predecessor of the currently applicable 1936 Act.

estate for the benefit of the *concursus* of creditors. It is open to any person aggrieved by a decision by a liquidator to approach the court, which may grant any relief it considers just (s 387(4) of the Companies Act[3]). In a case in which the trustee or liquidator is unable to meet his obligations from the liquidation proceeds by reason of having made an imprudently judged advance payment to a creditor, he would be personally liable to make payment in accordance with the account, and the interests of creditors potentially prejudiced thereby should be safeguarded by the security that every trustee or liquidator is required to furnish before assuming office.

[14] The relevant effect of the realisation of property that was subject to a special mortgage in favour of a proven creditor on the framing of a liquidation and distribution account is generally definitively predictable by reason of the provisions of s 95(1) of the Insolvency Act[4] (which applies in the compulsory winding up of companies by virtue of s 339 of the Companies Act) read with ss 92 and 94. Upon realisation of the security, the net proceeds become owing by the liquidator to the secured creditor.

[15] The general duties of a liquidator are defined in s 391 of the Companies Act as follows:

> A liquidator in any winding-up shall proceed forthwith to recover and reduce into possession all the assets and property of the company, movable and immovable, shall apply the same so far as they extend in satisfaction of the costs of the winding-up and the claims of creditors, and shall distribute the balance among those who are entitled thereto.

By making payment of an amount owed to a secured creditor whose claim has been admitted to proof it cannot be said, in my view, that a liquidator would be acting outside his powers merely because payment is not yet due to, or exigible by the creditor. The liquidator undertakes a risk that he may be render himself personally liable to make good on the advance payment if the dividend is subsequently not confirmed in the a relevant liquidation and distribution account and he is unable to recover the amount from the creditor, but in dealing with the proceeds of the realisation of mortgaged immovable property in favour of the secured creditor whose claim has been formally accepted, the risk will usually be negligible; *a fortiori*, when, as usually is the case, the mortgagee is a registered financial

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[3] 'Any person aggrieved by any act or decision of the liquidator may apply to the Court after notice to the liquidator and thereupon the Court may make such order as it thinks just.'

[4] 'The proceeds of any property which was subject to a special mortgage, landlord's legal hypothec, pledge or right of retention, after deduction therefrom of the costs mentioned in subsection (1) of section eighty-nine, shall be applied in satisfying the claims secured by the said property, in their order of preference, with interest thereon calculated in manner provided in subsection (2) of section one hundred and three from the date of sequestration to the date of payment, but subject to the provisions of subsection (4) of section ninety-six.' (Section 96(4) of the Insolvency Act, which relates to the settlement of funeral expenses, finds no application in the winding up of companies.)

institution. The practical reason for taking the risk is usually that by making the payment before it is due the liability for payment of interest on the claim is limited, which no doubt explains how the practice of making such advance payments in the circumstances described in Meskin's work became established and has stood the test of time. In my view, in making a reasonably determined upon advance payment to a secured creditor from the proceeds of the realised security, a trustee or liquidator is acting within the ambit of his general duties.

[16] As mentioned, any person aggrieved by any act or decision by a liquidator may seek the court's intervention in terms of s 387(4) of the Companies Act. Notwithstanding that the provision was not expressly relied upon by Mrs Wolpe, I consider that the so-called interim or interlocutory application is in essence one of the nature contemplated by it. I therefore agree with the contention by Mrs Wolpe's counsel that the application –at least insofar as the repayment element thereof is concerned - does not fall to be decided on the approach applicable in interim interdict applications as argued by ABSA's counsel.

[17] The term '*any person aggrieved*' employed in s 387(4) is somewhat imprecise, and it is thus perhaps not surprising that its import has been the subject of debate; cf. *Francis George Hill Family Trust v South African Reserve Bank and Others* 1992 (3) SA 91 (A), at 98I – 102E, *Strauss and Others v The Master and Others NNO* 2001 (1) SA 649 (T), at 659H-661G, and *LL Mining Corporation Ltd v Namco (Pty) Ltd (In Liquidation) and Others* 2004 (3) SA 407 (C), at 414A-G. As Beadle ACJ observed in *Concorde Leasing Corporation (Rhodesia) Ltd v Pringle-Wood NO and Another* 1975 (4) SA 231 (R), a person who is able to show that he should be afforded a remedy in terms of s 387(4) (or its equivalent in other statutory regimes) obviously qualifies as a 'person aggrieved' for the purposes of the provision; approached in that manner, attempting to define the term is to beg the question. I shall therefore proceed directly to consider whether Mrs Wolpe has established an entitlement to the remedy.

[18] In their commentary on s 387(4) of the Companies Act the editors of *Henochsberg on the Companies Act* observe that the 'Court will not lightly interfere with an act *bona fide* done or a decision *bona fide* taken by the liquidator; where there is no lack of *bona fides* the question is whether in the circumstances the liquidator has acted in a way in which no reasonable liquidator could have acted, having regard to the objects of winding up and a liquidator's duties in general'; cf. *Concorde Leasing Corporation (Rhodesia) Ltd* supra and *Leon v York-o-Matic Ltd* [1966] 3 All ER 277 (Ch). In *Re Edennote Ltd* [1996] EWCA Civ 1349, [1996] 2 BCLC 389, the Court of Appeal (per Nourse LJ), in applying the closely comparable provisions in s 167(5) of the English Insolvency Act 1986, stated 'the correct

test' as follows: *'(fraud and bad faith apart) … the court will only interfere with the act of a liquidator if he has done something so utterly unreasonable and absurd that no reasonable man would have done it*'.

[19] In my judgment, Mrs Wolpe has not come close to satisfying the requirements to have the liquidators' act of making an advanced payment to ABSA set aside or reversed. The payment was made in terms of the standard practice discussed earlier. The argument advanced on Mrs Wolpe's behalf that ABSA has no entitlement to interest on its liquidation claim because it did not make provision for it in the claim submitted for proof was misconceived; see s 95(1) read with s 103(2) of the Insolvency Act. The implication that the advance payment could not have been legitimately aimed at limimting liability in respect of interest is thus also misplaced.

[20] Mrs Wolpe contends, however, that on any approach the payment should not have been made against the backdrop of her allegations concerning ABSA's involvement in a collusive transaction. A collusive transaction in the relevant context entails an agreement entered into by a company, before its winding up, with the fraudulent purpose of prejudicing the rights of creditors; see *Meyer NO v Transvaalse Lewendehawe Koöperasie Bpk en Andere* 1982 (4) SA 746 (A), at 770-771. In other words, it is not sufficient only that the effect of the transaction is to occasion such prejudice, there must also be a fraudulent intention by the parties to the transaction to cause it. Having regard to the position in which AMU found itself in August 2011, when the allegedly collusive transaction was concluded, it would seem probable on the evidence before me that the only creditor that stood to be prejudiced by it would have been ABSA itself. In the absence of any indication of there having been a likelihood of the possibility that there would be a free residue after the realisation of ABSA's security should winding up intervene, the notion that prejudice to the unsecured creditors of AMU could be occasioned - never mind have been intended to be caused - seems far-fetched on the face of matters.

[21] Courts have traditionally approached allegations of fraudulent conduct on the basis that such behaviour is not readily attributed and, in a sense, it is indeed regarded as inherently improbable; see *Gates v Gates* 1939 AD 150, at 155. In the circumstances the liquidators' circumspection about instituting proceedings to set aside the sale of the Protea Hotel Group's shares is understandable. I am not persuaded that the liquidators' decision to make the advance payment was one that no reasonable liquidator could have made in the circumstances. This is especially so having regard to the fact that the payment was made in the context of the payment structure stipulated in terms of the agreement in terms of which

AMU's property was sold to Blend Property 15 (Pty) Ltd. Mrs Wolpe had not advised the liquidators of her allegations in respect of the Protea Hotel Group's share disposition before the 'Sale of Assets Agreement' was concluded.

[22] As mentioned, ABSA has contractually undertaken in favour of the liquidators to repay the amount, together with interest at a favourable rate, if it is directed to do so by the Master or by a court. It seems quite clear that it is well within ABSA's financial ability to comply with the undertaking should the occasion arise; indeed Mrs Wolpe's counsel, realistically, did not seek to contend otherwise when the matter was argued. In the context of the concession that ABSA is well able, if so required, to reimburse the amount that has been advanced, the argument that Mrs Wolpe is justifiably sceptical about ABSA's *bona fides* does not merit serious consideration. Moral indignation, even if genuinely maintained, does not establish a cognisable basis for being aggrieved when prejudice cannot be shown.

[23] Likewise, Mrs Wolpe's complaint that Absa has failed to give her personally – as distinct from the liquidators - a guarantee that the amount would be repaid if required is groundless. Apart from not being able to demonstrate any prejudice on account of the absence of any such guarantee, she has also been unable to provide any basis for an entitlement to it. Section 104(3) of the Insolvency Act does not found any such entitlement, it merely affords her a potentially preferent claim in the liquidation should she succeed in the proceedings conducted by her in the liquidators' names in terms of s 31 of the Act.

[24] In the result, the application for relief in terms of paragraph 3 of the notice of motion is dismissed with costs, including the costs of two counsel where such were employed.

A.G. BINNS-WARD

Judge of the High Court

Date of Hearing:	**3 December 2013**
Judgment delivered:	**13 December 2013**
Before:	**Binns-Ward J**
First, Second and Third Applicants' counsel:	**G.W. Woodland SC**
Fourth Applicant's counsel:	**A.R.G. Mundell SC**
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