IN THE HIGH COURT OF SOUTH AFRICA
WESTERN CAPE DIVISION, CAPE TOWN

Before: The Hon. Mr Justice Binns-Ward
Case no. 9282/2014

In the matter between:

THE TRUSTEES FOR THE TIME BEING OF THE
BERMACK TRUST (NO. IT 1730/1996) First Applicant
CHRISTOPHER PETER VAN ZYL N.O.
(in his capacity as the joint liquidator of
Kingfield Aviation Leasing One (Pty) Ltd (in liq.) Second Applicant

And

MOHAMED ISMAIL PATEL N.O.
(in his capacity as the joint liquidator of
Kingfield Aviation Leasing One (Pty) Ltd (in liq.) First Respondent
THE MASTER OF THE HIGH COURT
CAPE TOWN Second Respondent

JUDGMENT DATED 8 JULY 2014

BINNS-WARD J:

Introduction

[1] An outline of the background to this matter was given in the directions judgment delivered on 2 June 2014 after the preliminary hearing on 29 May. To facilitate the narrative in this judgment, which is given after hearing full argument on 20 June 2014, I shall, by way of introduction, repeat here some of the background

described in the earlier judgment. I should also acknowledge at the outset that this judgment might seem unduly detailed in certain respects having regard to the fact that it effectively decides only the alternative application for essentially procedural relief and postpones the application for the substantive relief for determination by another court. I have entered into the detail for two reasons: in the hope that my labours might to some extent relieve the burden on my colleague who will have to decide this case together with two other related matters that have already been consolidated for hearing; and also to try to do justice to the argument I heard from counsel on 20 June. I thought it sufficiently important in the context of that argument to make it clear to the parties that full attention was given to the ably advanced submissions, and that the decision to postpone the determination of the substantive question was arrived at only after very earnest consideration. Obviously, nothing that I say should be misunderstood in any way to pre-empt the exercise of independent judicial discretion that will be involved in the determination of the application for substantive relief.

[2] The case concerns an application for an order, sought at the instance of the first applicant, which is a proved creditor of Kingfield Aviation Leasing One (Pty) Ltd (in liquidation) ('KAL'), for the removal of the first respondent (Mr Patel) from office as the joint liquidator of the company. Contingent upon that relief not being granted, the second applicant (Mr van Zyl), who is the other joint liquidator, has applied for an order directing the joint liquidators to proceed with the litigation in which they are currently engaged and which is set down for hearing on 6 October 2014, together with directions authorising him to act alone in doing everything that might be necessary to implement the order.

[3] The application arises out of the first respondent's conduct in respect of a claim against KAL by Boland Trust, represented by one Pieter de Villiers Ebersohn, which, although accepted at proof, is contentious. The claim was investigated by a commission established in terms of ss 417 and 418 of the Companies Act, 1973. The commissioner was the Hon. M.M. Joffe, a retired High Court judge. The commission was established by this court upon the application of the joint liquidators of KAL in terms of an order made by Fourie J on 30 April 2012. The order directed that the costs of the application for the establishment of the commission and those involved in the conduct of the commission's enquiry should be treated as costs of administration

in the winding-up of KAL. As directed by the court, Judge Joffe in due course compiled a report on the commission's investigations.

[4] The commissioner indicated at para 32.13 of his report that 'it does not appear that the Boland Trust has a claim against [KAL]…and that the claim should be expunged'. The commissioner's report founded this indication on the evidence adduced at the enquiry, which was amply summarised in the document. An expungement of the nature contemplated in the commissioner's report falls to be effected in terms of s 45(3) of the Insolvency Act 24 of 1936, which is applicable in the winding-up of KAL by virtue of s 339 of the Companies Act, 1973 (read with item 9 of Schedule 5 to the Companies Act 71 of 2008). An expungement does not debar the creditor from thereafter establishing his claim by an action at law, subject only to the provisions of s 75 of the Insolvency Act.

[5] The joint liquidators thereafter duly applied to the Master to expunge the claim. The application was contained in a letter to the Master by attorneys Edward Nathan Sonnenbergs Inc. ('ENS'), dated 4 April 2013, which enclosed a copy of the commissioner's report. The letter was copied to Assheton-Smith Inc. ('ASI'), the attorneys who represent the Boland Trust.

[6] ASI in turn made representations to the Master on behalf of the Boland Trust in a letter dated 17 May 2013. They took issue with the content of the commissioner's report in a number of respects. They contended, amongst other matters, that the commissioner had misapprehended the character of the Trust's claim against KAL. He had treated it as a purported shareholder's claim, whereas, according to ASI, it was predicated on the purchase of the aircraft that was KAL's only asset using funds invested by Boland Trust for that purpose.[1] ASI pointed out that the commissioner had not dealt in his report with how the acquisition of the aircraft by KAL had been funded. They challenged the commissioner's omission to deal with the funding of the difference (approximately R3,35 million, according to ASI) between the ascertained purchase price of the aircraft and the contribution by the Bermack Trust. They emphasised that the investments made by both the Bermack

[1] It is not clear precisely how the Boland Trust will formulate its claim against KAL in any action that might follow upon the expungement of its claim. The claim submitted to proof by the Boland Trust purported to be based on a fraudulent representation by KAL. The description of the claim is cross-referenced in the proof of claim affidavit to paragraphs 41-44 of the founding affidavit in the winding-up application. The papers in that application were not before me.

Trust and the Boland Trust for the purpose of obtaining a proprietary interest in the aircraft to be acquired by KAL had both been paid into the same third party banking account, namely that of Phindana Properties 103 (Pty) Ltd.

[7] The Boland Trust also impeached the independence and impartiality of the joint liquidators and the propriety of their employment of ENS as attorneys. This was because ENS also acted for the trustees of the Bermack Trust (the first applicant in the current proceedings and the petitioners in the winding-up application), who were alleged by ASI to have used the commission as a device to promote the exclusion of Boland Trust's claim, and also to gather evidence for claims that the Bermack Trust – as distinct from KAL - might establish against third parties whose representations may have played a role in the Bermack Trust's decision to invest in the company in liquidation.[2]

[8] ASI accordingly applied to the Master of behalf of their client, in terms of s 379(1) of the Companies Act, 1973, for the removal of Messrs Patel and van Zyl as liquidators of KAL. They requested that in the event that the Master was not inclined to accede to their application, she should defer determining the liquidators' application for the expungement of the Boland Trust's claim until the determination of an application by the Trust to court in terms of s 379(2) for the removal of the liquidators. They also indicated that if the Master did not accede to that request, the Trust would be constrained to apply for interdictal relief to protect its position.

[9] It should perhaps be mentioned that ASI also contended in their letter that the Bermack Trust's claim lay against the en commandite partnership, of which Bermack was a member, and which, according to ENS's letter to the Master, had formed 'part and parcel of the business structure' in respect of the Trust's investment in KAL1. The contention appears to have been that the Bermack Trust's claim, properly characterised, was for the recoupment of its capital contribution to the en commandite partnership, and not one that properly lay against the company in liquidation. It has not been for me to get to the bottom of these allegations. When the current matter was argued, counsel for the first respondent appeared to accept, for the purposes of this matter at any rate, that the Bermack Trust's claim against KAL was good.

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[2] The commissioner's report did state (in para 6) that '[s]*ubsidiary issues were also canvassed. These related in the main to potential claims against Fifth Generation, de Klerk* [Bermack Trust's investment advisors] *and Snyman personally, BGR Aucamp Scholtz Inc* [KAL's auditors] *and Aucamp personally. These claims do not appear to vest in KAL 1. They appear to vest in the Bermack Trust*'.

[10] The Master responded as follows on 7 June 2013 to the correspondence concerning the expungement sought by ENS and the removal of liquidators sought by ASI:

> Kindly be advised that I have read all the correspondence from all the parties. It is clear that there is a dispute of facts which can only be decided upon after hearing evidence by a court of law and therefore I refrain myself from giving a ruling on this matter. The parties are advised to refer this matter to the High Court.

[11] The trustees of the Boland Trust thereafter instituted an application in this court for the removal of the second applicant and the first respondent as joint liquidators of KAL (WCC case no. 10223/13). That was followed shortly by an application by the joint liquidators for orders (i) reviewing the Master's refusal to expunge the claim of the Boland Trust and (ii) disallowing the claim (WCC case no. 11666/13). The Deputy Judge President directed, in February 2014, that the applications should be heard together. The latter order was made in an opposed consolidation application brought by the joint liquidators.

[12] The consolidated applications were set down for hearing before Yekiso J on 14 May 2014. I have not seen the papers in those applications,[3] but it would seem reasonable to infer, in the absence of any indication to the contrary, that the liquidators' expungement application is predicated on the content of the commissioner's report, and the Boland Trust's removal application on the allegations set out in ASI's letter of 17 May 2013. Indeed, Mr Katz of ENS confirmed in the applicants' replying affidavit, jurat 17 June 2014, that the ASI letter had formed the basis of the removal application and that the allegations contained therein had been the subject matter of a two hour consultation held by him with Messrs Patel and van Zyl on 18 July 2013 for the purpose of drawing the answering affidavits.

[13] On 30 April 2014, ASI addressed a letter to ENS, as attorneys for the joint liquidators, in which they proposed that the consolidated applications:

> '… be addressed on a practical basis in the following manner:

[3] They are described briefly in a few paragraphs in the founding affidavit in the current application, and, as related below, excerpts from the papers in those applications were also quoted in the replying papers. I was informed from the bar during argument that the papers in the two matters run in total to well over 2000 pages.

1. our client withdraws the removal application without admission as to the allegations made by your clients in their opposing papers;
2. our client will withdraw its opposition to the review application without admission as to the allegations made by your clients in their founding and replying papers;
3. the costs of the removal application and the costs of opposition of the review application be held over for determination by the trial court in an action to be instituted by our client within 20 days of the review application being granted'.

Had it been accepted, the proposal would, save for the formality of obtaining the court's order in the review application, have disposed of the substantive issues in the litigation set down for hearing on 14 May 2014. The costs would have stood over for later determination. The proposal did in essence amount to a capitulation by the Boland Trust on the merits, but its provision in respect of costs impliedly reserved to the Trust the position to argue later (presumably after it had succeeded in establishing its claim by action) that the institution of the applications had nevertheless been reasonable and it should not be penalised in costs. An acceptance by the liquidators of the proposal would have expedited the liquidation process and probably saved to some extent on the costs of the hearing scheduled for 14 May. It would not have entailed a waiver of their right to claim their costs in the consolidated applications against the Boland Trust.

[14] On Sunday, 4 May 2014, ENS responded to the Boland Trust's proposal in an email to Mr Assheton-Smith of ASI, which stated simply, 'Your proposal is rejected'. The email was sent by the attorney at ENS in charge of the litigation on behalf of the joint liquidators, Mr Leonard Katz. The email was copied to the joint liquidators, amongst others, but it is conceded that Mr Patel had not previously been informed of the proposal, or consulted concerning the decision to reject it. Accordingly, Mr Patel could have had no idea, when he received the email, of its significance.

[15] On 9 May 2014, ASI delivered certain documentation to ENS relating to the proceedings due to commence on 14 May. It included an affidavit deposed to by the Mr Patel earlier that day. The affidavit disclosed that Patel had been approached by Mr Ebersohn, representing the Boland Trust, some months earlier (the date of their first meeting was given in the affidavit as 6 March, but the first respondent

subsequently conceded that it had in fact been 14 February). It is contextually evident, however, that the crux of the affidavit concerned an exchange between Ebersohn and Patel that must have occurred subsequent to the aforementioned rejection of the proposal made in ASI's letter of 30 April 2014.[4] It is convenient to set out the most relevant of the first respondent's averments in full:

> 2. …[Ebersohn] advised me that the Boland Trust was embroiled in protracted and costly litigation pertaining to the manner in which it and its claim had been dealt with. He also wanted me to ask me (sic) what my views were and whether I was aware of the fact that a proposal had been made to curtail the extent and legal costs of the proceedings up to now which I understand have been extensive. I have also been advised that the proposal made by Boland Trust with regard to a possible settlement has been summarily rejected by the attorney of record.
>
> 3. I was not aware of such settlement proposal or consulted on the reasons for the rejection thereof. I find this state of affairs, and actions taken without my consent and approval by the attorney of record to be most unsatisfactory. Mr van Zyl [the second applicant] has been in charge of the administration of the company in liquidation from the beginning and I have not been made aware of the comprehensive and exact details of what had transpired with regard to certain aspects of the administration more particularly with regard to the current litigation. I was merely requested to sign documents from time to time and not been fully apprised of the circumstances that led to the current litigation. As joint liquidator I am however required to be consulted on these matters, especially where expensive litigation is being pursued on behalf of the insolvent estate as I am jointly and severally liable for the administration thereof.
>
> 4. I understand from Mr Ebersohn that this matter and a further application for review under case number 11666/2013 is (sic) set down for argument on 14 May 2014.
>
> 5. I require time to consider the papers as I have not been fully consulted thereon, and thereafter to discuss the position with my joint liquidator

[4] See para [13] above.

> Mr Van Zyl. Until such time as I have had the opportunity to do so I deem it necessary for me to have an opportunity to make an informed decision together with Mr Van Zyl as to whether or not to support proceed (sic), and believe that the proceedings ought to be postponed until I have been able to consider my position and that of the company in liquidation fully.

[16] Two days later, on Sunday, 11 May 2014, the Boland Trust gave notice of its intention to amend its notice of motion in the removal application so as to apply only for the removal of Mr van Zyl as joint liquidator. Its objection to Mr Patel would appear thus effectively to have been withdrawn.

[17] Mr Katz then urgently made arrangements for a meeting with both liquidators at the chambers of the senior counsel engaged to represent them in the proceedings due to commence on 14 May. The meeting was scheduled to take place on the afternoon of 12 May. The first respondent, who had confirmed that he would attend, failed to arrive. He also failed to give his excuses or, after it was learned that he had left for Johannesburg, to respond to telephone and email messages asking him to contact Mr Katz or senior counsel. In an email sent to Katz on 13 May, Mr Patel stated that he did not come to the meeting because he had been required to travel to Johannesburg urgently to attend to a family emergency. He confirmed that information in the affidavit that he made in answer to the current application. He ventured that little point would have been served by his attendance at the meeting in any event because the battle lines had already been drawn between him and Katz. (In this regard it may be noted that the first respondent was clearly affronted by Katz's failure to have referred the ASI proposal to him for consideration, while Katz, in quite trenchant language, had questioned the propriety of the first respondent's undisclosed meetings with Ebersohn and also, briefly, with the Boland Trust's attorney, Mr Assheton-Smith.)

[18] The hearing of the consolidated applications before Yekiso J set down for 14 May could not proceed because the first respondent indicated on that day that he had withdrawn ENS's mandate to represent the liquidators and required time to consider his position concerning the litigation. Mr Katz has averred that the postponement of the proceedings has occasioned wasted costs in the sum of

approximately R200 000 and delayed the finalisation of the winding-up. Mr Patel challenges Mr Katz's estimate of the amount of the wasted costs.

[19] The current application was brought as a matter of alleged urgency on Thursday, 29 May 2014. The founding papers, which were fairly voluminous (328 pages), were served on the respondents during the course of Monday, 26 May 2014. The applicants failed to comply with the practice prescribed in this Division, in terms of which, consistently with the guideline laid down in Gallagher v Norman's Transport Lines (Pty) Ltd 1992 (3) SA 500 (W), the notice of motion should provide a timetable, reasonably formulated in accordance with the exigencies of the given matter, for the exchange of answering and replying papers. In the result, the first respondent delivered what was labelled a 'provisional answering affidavit' on the morning of the day on which the matter had been set down for hearing on the 'fast track' motion roll.

[20] In heads of argument filed by senior counsel on the afternoon of 28 May, the applicants adopted a position at variance with that reflected in the notice of motion. The heads indicated that '[i]n the event the application is opposed, the applicants propose moving for the alternative relief empowering [the second applicant] to continue with the litigation involving [KAL]. This relief will be sought pending the [later] adjudication of the application for [the first respondent's] removal'. Having regard to the nature of the relief sought by the first applicant against the first respondent, which included a prayer that an order be made that the first respondent forfeit his fee and pay the costs of the application de bonis propriis, it could hardly have been cause for surprise that the application was indeed opposed.

[21] When the matter was called before me in the 'fast track' court in the Third Division on 29 May 2014 it soon became apparent during argument that it was not ripe for hearing. The first respondent's request that, if the matter were to be entertained as one of urgency, he should be afforded time to supplement his answer was eminently reasonable. The less than three days' notice of the application that he had been given was manifestly unreasonable in the circumstances. Moreover, it was also desirable, in my opinion, that the Master should apprise herself of the problems that had arisen in the conduct of the winding-up and that the court's further consideration of the application should occur with the assistance of a detailed report from the Master's Office. The hearing was therefore postponed until 20 June 2014 in

terms of the directions given in the earlier judgment referred to at the start of this judgment. The directions given required service of the papers by no later than noon on 3 June directly on the official who is responsible for the matter at the Master's Office. The Master was directed to file a report by 18 June. In that regard I said the following in paragraph 1 of the judgment:

> This judgment is directed at describing the context of the postponement and giving the motivation for the postponement and the attendant directions for the conduct of the matter in the lead up to the resumption of the hearing. Nothing in its content should be understood to pre-empt any of the substantive issues in the litigation. The judgment is primarily intended to assist the parties, in particular the Master, in engaging in the further conduct of the matter within the stringent time frame provided in the order made at its conclusion. That requires a summary of the application as it appears currently to stand.

Service on the relevant official at the Master's Office was duly effected by the applicants' attorneys in compliance with the order. I shall comment on the report subsequently furnished by the Master's Office later in this judgment.

[22] The directions given on 2 June called upon the first respondent 'to set forth in his supplemented answering papers (i) his position in respect in regard to the continued prosecution of the review application (under WCC case no. 11666/13) and the opposition by the joint liquidators to the removal application (under WCC case no. 10223/13); (ii) without derogating from the generality of (i), … the circumstances in which his contention that the current application should be postponed for determination together with the aforementioned applications, as proposed in his provisional answering affidavit, could feasibly occur in the context of his unilateral withdrawal of the mandate of the joint liquidators' attorneys of record; (iii) the nature and bases of the deadlock he contends exists between the joint liquidators and (iv) his contentions as to how such deadlock should be resolved'.

[23] I should also record that it had been made known by that stage that the proposal concerning the disposal of the pending removal and review applications communicated in ASI's aforementioned letter of 30 April was no longer held open for acceptance.

[24] In the course of the exchange of further affidavits between the parties subsequent to the adjournment on 2 June, described below, it was indicated that the first applicant would move, on 20 June, for the principal relief in terms of the notice of motion, viz. the removal of the first respondent as joint liquidator.

The grounds for removal advanced in the founding papers

[25] The principal founding affidavit on behalf of both applicants was deposed to by attorney Katz. The essential basis made out for the application by the first applicant was the making of the affidavit to which Mr Patel deposed on 9 May 2014 and his behaviour in respect of the subsequent events that culminated in the forced postponement of the hearing of the removal and review applications that had been set down on 14 May. After relating the events summarised above, Mr Katz concluded (at para 192 of his founding affidavit) that 'There can be no doubt that Patel has played a major part in the delay of the winding-up and his conduct has cost KAL1 a significant amount of money. The first applicant respectfully submits that Patel is unfit to remain a liquidator of KAL1. Furthermore, Patel has made common cause with the Boland Trust whose claim has been described as fraudulent by Van Zyl and Patel. The fact that Patel has joined forces with Ebersohn and Assheton-Smith renders him unfit to carry out his obligations in a proper manner'.

The first respondent's answer

[26] Mr Patel's position prior to the postponement of the proceedings scheduled for 14 May was set out in his affidavit of 9 May (which has been quoted above[5]) and in a lengthy email he sent to Mr Katz on 13 May. The email was handed up to Yekiso J when the consolidated applications were called before the learned judge on 14 May. It reads as follows:

> Dear Mr Katz
>
> I was unable to meet with you yesterday. The reason being that I had to attend to an urgent matter that required my attention and I had to travel to Johannesburg yesterday afternoon. I am sure that you sometimes find yourself having to deal with similar situations as they crop up.
>
> I apologize for any inconvenience caused, as this was out of my control.

[5] At para [15].

With regard to the Application on Wednesday I confirm having informed you that I was approached by Mr Ebersohn (who represents the Boland trust as a creditor in the KAL1 insolvent estate upon which these very papers are premised) and who had me informed (sic) of the circumstances that led to the rejection by Chris Van Zyl of the Trust's claim. He furthermore made me aware of many other alleged irregularities in the administration of the estate, including but not limited to a conflict of interests of your firm acting in the matter.

Despite your protestations to the contrary there is no provision in law or otherwise to prevent a creditor from approaching a liquidator with information that may be relevant and of value to the administration of an estate. In fact the Act places an onus on interested parties to make all relevant information available to liquidators.

It was with this in mind that I deposed to an affidavit and requested that I be given a reasonable opportunity as joint liquidator (and which I am duty bound to do) to assess the position and to verify the information brought to my attention before embarking on or incurring any further substantial legal costs. I am also satisfied that the deposing to of the affidavit by me which so enraged you was so done so as to serve the best interest of the general body of creditors.

Your comments that I signed confirmatory Affidavit/s authorizing the review and removal applications are of course correct. As such the affidavit/s were signed at your request and also after having been apprised with the limited information which you and Chris Van Zyl elected to share with me. The other information which was recently brought to my attention quite clearly contradicts your version and hence as joint liquidator I was obliged to take the necessary steps to test the veracity of the information to the application which both Chris Van Zyl and you requested me to support.

In this regard I draw your attention to the fact that the entire administration was conducted by Chris Van Zyl and that I was excluded from the process. I only had limited access to the information which Chris Van Zyl made available to me from time to time.

One of my concerns is also the massive amount of legal fees with which this estate has been burdened.

I re-iterate that I have only very recently been made aware of the alleged irregularities associated with inter alia a conflict of interests that may or may not exist insofar as the relationship between your firm and the Bermack Trust who you also represent as a claimant in this estate. You will appreciate that insofar as there are serious allegations against my co-liquidator and your firm that there is an onus on me to fully investigate such allegations and to independently apply my mind in deciding whether to support the applications and whether the current litigation is in the interests of the estate.

I have furthermore been made aware of the Commissioner's report regarding the 417 enquiry and certain statements that were made on affidavit in that forum which may amount to perjury. I place on record that I was not even aware that such en enquiry was conducted nor was I made aware that there was a prima facie dispute regarding the evidence led at the enquiry or of the resultant commissioner's report. To date I have also not been informed of the costs associated with the 417 enquiry and how this impacts on the administration of the estate.

This information was only brought to my notice very recently and with the time available before the hearing of the matter on Wednesday I was not able to give my full attention to it.

I have received the affidavits and other documents that you emailed to me over the week-end and confirm that same are already in my possession.

I am surprised that as an experienced attorney you have adopted your current stance and I also do not appreciate the fact that in my absence you have been intimidating my staff with threats of them having to depose to affidavits regarding my whereabouts. I find your actions in this regard totally unprofessional and unacceptable.

As far as the costs are concerned both counsel would have been entitled to such costs anyway, and I have in any event been made to understand that the Boland Trust may have tendered the wasted costs of the postponement.

In the circumstances and in view of your repugnant attitude and threats I formally advise you that I am withdrawing your mandate to act or represent me in this matter and will also make this letter available to the Judge to be read with your affidavit.

> I am also surprised that at attorney of your calibre will go to the lengths of deposing to an ineffectual affidavit with such frivolous complaint and to be present same (sic) to the Judge.
>
> You are also welcome to masquerade (sic) on a frolic of your (sic) by approaching the Law Society and the Master of the High Court or any other forum that you may elect to do with frivolous complaints and I reserve my rights to deal with it at the appropriate time.
>
> I have in the meantime instructed my own counsel to appear on my behalf on Wednesday to hand this email up to the Judge, as I regard your mandate representing me as terminated.
>
> Yours faithfully
>
> MOHAMMED PATEL

[27] The first respondent returned to the subject of the rejection by Mr Katz of the Boland Trust settlement proposal in his 'provisional' answering affidavit delivered on 29 May. He stated that 'Katz did not even seek instructions from me, his client, before rejecting the proposal. What is worse, Katz goes on [to] disclose what appears to be a bona fide settlement offer to this court on the basis that it is "bogus". I do not share Katz's view of the settlement offer.' He contended that the subsequent events, outlined above, had resulted in 'a cross-liquidator removal dispute', with the Bermack Trust and Katz seeking his removal as liquidator and the Boland Trust seeking the removal of Mr Van Zyl. He pointed to the untenability of Katz representing the Bermack Trust against him in the removal application and acting for Van Zyl in the latter's application for authority to proceed, effectively alone, with the litigation before Yekiso J that has been postponed to October.

[28] Mr Patel also averred that he had only recently (in March 2014) become aware of alleged impropriety in the liquidation. The context suggests that this awareness had resulted from the approach to him by Mr Ebersohn. He sought to explain that 'until recently, [I] took a back seat in the liquidation. I signed documents and accepted the limited information provided by Katz and Van Zyl'. He denied the allegations in Mr Katz's affidavit that he (Patel) had been involved in arranging the sale of the aeroplane that comprised KAL's only asset. In that regard he averred that he 'was not involved in the sale process at all. Being copied in on an email chain does not amount to involvement. I receive a great many emails and I do not read

them all'. In regard to the litigation fixed for hearing on 14 May, he stated that he had not had time to study the documentation in detail. According to Patel, Van Zyl had taken the lead in dealing with the removal and review applications, which he 'essentially rubber-stamped'. Elsewhere in the affidavit, the first respondent described his involvement in the court applications as having been 'limited to scanning affidavits and signing confirmatory affidavits'. He confirmed that he had agreed to the launching of the enquiry in terms of ss 417 and 418 of the Companies Act, but stated that he had not been 'aware that the enquiry was being conducted at the time nor was [he] aware of the outcome'. He said that he had approved the despatch of ENS's abovementioned letter of 4 April 2013 to the Master,[6] but that he had not been aware 'that a section 417 enquiry had been undertaken or concluded'. He continued 'I was under the impression that this was another formality in the process of setting aside an obviously bad claim, as this is how the state of affairs was conveyed to me by Katz and Van Zyl'. He stated that he had agreed that the Boland Trust's claim should be expunged 'because this is what Katz and Van Zyl told me. [He] did not, at that stage, suspect that anything was amiss'.

[29] The first respondent explained that he had made his 9 May affidavit after having been approached by Mr Ebersohn, who had told him that 'Katz was exploiting his position as liquidators' attorney and a creditor's [the Bermack Trust] attorney to the advantage of ENS and "his" creditor to the prejudice of the competing creditor [the Boland Trust]'. He asserted that his reservations about proceeding with the litigation without further investigation were vindicated when he was provided by Katz with a copy of the proposal contained in ASI's letter to ENS of 30 April 2014 only on 10 May. He stated that he would have accepted the proposal, as it constituted what he considered to have been a sensible way forward that would have saved on litigation costs. He claimed that if Van Zyl had differed from him in this regard, their deadlock would have been referred to the Master for a ruling, and a postponement of the hearing would then have occurred in any event.

[30] Apart from its highlighting of the failure to have referred ASI's settlement proposal to him, the content of the first respondent's provisional answering affidavit was notably lacking in information as to the nature of the improprieties that had allegedly coloured the conduct of Messrs Van Zyl and Katz in the liquidation.

[6] See para [4] above.

Mr Patel went no further than to point to the allegations and accusations set out in ASI's abovementioned letter to the Master, dated 17 May 2013. It was, in part, for that reason that the court afforded him the opportunity to deal in a supplementary answering affidavit with the issues specifically identified in the order made on 2 June, and thereby provide some substantiating detail for what appeared to be his change of stance on the merits of the review application.[7]

[31] As mentioned in the earlier judgment, the first respondent adopted various, not entirely consistent, positions to the current litigation in his 'provisional' answering affidavit: that the application should be struck from the roll with costs, alternatively, that it should be dismissed with costs against the Bermack Trust, or, that it should be heard together with the consolidated applications now due to heard by Yekiso J on 6 October.

Supplementary affidavits filed by the applicants' attorneys on 5 June 2014

[32] The first respondent had been directed to deliver his supplementary answering papers by 9 June 2014. On 5 June, the applicants' attorneys filed a further affidavit by Mr Katz and an affidavit by Mr Roy Gillespie of ENS Forensics (Pty) Ltd, which, judged by its name and business address, would appear to be a business associated with ENS attorneys. Leave was not sought for the admission of these affidavits, but there was no application by the first respondent for them to be struck out.

[33] The only matter contained in the affidavits that I consider to be relevant to the current application concerned the ascertaining by Mr Katz from correspondence received from Mr Assheton-Smith at the end of May that Mr Patel's first meeting with Mr Ebersohn of the Boland Trust had been on 14 February 2014, and not 6 March, as had been alleged by Mr Patel. There is no reason to suspect that there was anything sinister about Mr Patel's confusion of the dates, but the point that Mr Katz sought to make was that the meeting had predated the hearing of the application for the consolidation of the removal and review applications before Traverso DJP on 20 February. Mr Katz pointed out that Mr van Zyl had reported the outcome of the application to the first respondent in an email dated 24 February. The email (which was in fact addressed to someone called 'Ronel' at the first respondent's insolvency practice) included the following statements concerning the two applications:

[7] See paragraph [22] above.

> The legal advice that we are given is that they believe that we cannot lose the application for the expungement of Boland trust's claim and if this is so then their application for the removal of the liquidators from office will fall away as they would have no locus to proceed with that application on the basis that they are not proved creditors.
>
> We in any event stand by our submissions that there is no merit their application for our removal in the first instance.
>
> We have carried out our duties in accordance with the legal advice that we have been given as well as that provided to us by Retired Judge Joffe who acted as the Commissioner in terms of the 417 enquiry.

In the context of the first respondent's probable receipt of the email, Mr Katz emphasised the significance of Mr Patel's failure to have communicated with his joint liquidator about his meeting with Mr Ebersohn, or to have conveyed any concerns he might have had arising out of what Ebersohn might have told him, and his subsequent first disclosure of his meetings with the Boland Trust parties only in his affidavit of 9 May. He contended that this showed that the first respondent's professed concerns were not bona fide.

[34] The remainder of Mr Katz's further affidavit was given over to describing adverse comments about Mr Patel in a judgment given by Traverso DJP on 16 November 2012 in an unrelated matter and in raising questions about the probity of Mr Patel's conduct in the administration of an insolvent estate of which he had been a co-trustee together with Mr van Zyl's son, Thomas van Zyl. There was no explanation why, if these matters were truly germane, they had not been put up in the founding papers. Mr Patel provided an explanation of his conduct in the first matter, and it would appear that Thomas van Zyl must have accepted the explanation provided by him during 2013 in the second matter. As neither matter appears to have been pursued further at the time, it seems that reference to them in the current matter has been introduced only for the purpose of atmosphere. That is to be deprecated. It served only to give rise to numerous counter-allegations by the first respondent concerning the second applicant's, and indeed, also Mr Katz's, conduct in other matters, which appear to be equally irrelevant, save, no doubt, for the costs involved in the generation of reams of paper in explanation and rebuttal.

[35] The affidavit by Mr Gillespie stated that he had been instructed by Mr Katz on 1 June 2014 to conduct an investigation into the background of the first respondent. The investigation included the first respondent's application for admission as an attorney. It drew attention to the fact that there is confusion as to the first respondent's identity in that he appears to have two identity numbers (one of which is indicated on the Home Affairs website as pertaining to a deceased person) reflecting two completely different dates of birth. There is also confusion as to his registered name. These issues were developed further in the applicants' replying papers, which included allegations questioning whether Mr Patel held the university law degree referred to in his attorney's admission application. The replying papers were delivered on 17 June 2014. Explanations were furnished by the first respondent in his supplementary answering papers concerning the allegations in the affidavit by Mr Gillespie filed on 5 June, but he did not have the opportunity to respond to the new allegations made in Mr Katz's affidavit in reply. This court is thus in no position to go into these allegations on the papers. It would be inappropriate to do so in any event because they predicate a case that the founding papers did not ask the first respondent to meet. The allegations contained in Mr Katz's replying affidavit concerning the propriety of Mr Patel's status as an attorney are nevertheless of the gravest nature and he is under an ethical obligation, in my view, to report them to his professional body.

[36] It is not clear on the papers at whose instance the investigations by Mr Katz into the first respondent's personal background and alleged misconduct in other insolvency matters were undertaken. One might assume that it was at the instance of the first applicant, upon the advice of ENS, because the exercise was plainly directed in support of the relief sought by the Bermack Trust. However, the probability, in the absence of any explanation to the contrary, is that the information concerning the incident in the estate co-administered by Mr Thomas van Zyl and the first respondent would have emanated from the second applicant. The application papers were noticeably structured to cast the second applicant in an apparently neutral role concerning the removal of his joint liquidator. The likelihood that he provided information to support the relief sought ostensibly only by the Bermack Trust calls this appearance of neutrality into question. (This impression is reinforced by certain

other parts of the papers. For example, it appears in the replying affidavit[8] that the second applicant is opposed to the consolidation of the application for the first respondent's removal from office with the applications due to be heard in October. It is difficult to understand why the second applicant would adopt this position if he were truly neutral in respect of the application for Mr Patel's removal. It is a position that is explicable only if he wants the first respondent removed now, and not later; in other words, a position fully aligned with that of the first applicant.)

The first respondent's supplementary answering affidavit

[37] In the supplementary answering affidavit that the first respondent was granted leave to deliver by 9 June 2014, he protested that the supplementary papers filed by the applicants without leave on 5 June had 'shifted the goal posts', as it had been indicated at the hearing on 29 May that only the relief sought by the second applicant was being pursued at this stage, and that counsel had engaged in preparing his supplementary answer accordingly. It was only after the delivery of the applicants' supplementary papers that it was first made apparent that a removal order was being sought against him at this stage. This required substantial amendments to the draft under preparation, which in turn had made it impossible for him to deliver the affidavit within the court-directed timeframe. He sought condonation. This was not opposed. To the extent necessary, it may be taken to have been granted.

[38] It will be recalled that the order made on 2 June 2014 had called upon the first respondent to indicate his position with regard to the applications postponed for hearing before Yekiso J in October. His indication was that 'ideally' he would prefer for those applications to be further postponed 'while some form of investigation into the conduct of this liquidation takes place'. He said he was mindful, however, of the urgency inherent in winding-up proceedings and therefore, subject to the views of the Master, proposed that –

1. the second applicant be authorised to prosecute the review application and oppose the application for his removal on his own ('but not that he be authorised to proceed with the conduct of the liquidation on his own');
2. the review and removal applications proceed on 6 October 2014;

[8] At para 55.

3. the current application for his removal be consolidated with the matters to be heard on 6 October 2014; and

4. he be authorised to oppose the application for his removal without the participation of the second applicant.

The first respondent made some additional proposals concerning the conduct of the hearing of all three applications together in October, but it is unnecessary for present purposes to set them out. They relate to aspects that would fall in any event to be decided by the judge who will hear the matters. (He does not need authority from the court, or the second applicant's consent to oppose any application for his removal as joint liquidator.) In the alternative, he proposed that both he and Mr van Zyl be removed as liquidators. He provided certain grounds in motivation of the alternative proposal. The option of removing both liquidators is, however, not available in the current proceedings as the application before this court is one only for the removal from office of the first respondent. The position might be different were this application determined together with the pending application for Mr van Zyl's removal.

[39] The first respondent stated that the nature of the deadlock that he had indicated in his provisional answering affidavit existed between the joint liquidators, and which he said should be referred to the Master for determination in terms of s 382(2) of the Companies Act, was, in a single word, 'Katz'. He asserted that while he had no difficulty with Mr van Zyl personally, 'the difficulty [was] that van Zyl is squarely within Katz's camp….and happy to give Katz (and Katz's other client, the Bermack Trust) free reign over the litigation'. He suggested that what he termed the 'incestuous' relationship between Mr van Zyl and Mr Katz prevented the former from exercising 'an independent will' and looking to the interests of the creditors as a whole. The first respondent also expressed his reservations about the fees that had been charged by Katz, but he did not provide any particularity by which the cogency of his concerns could be assessed.

[40] Notwithstanding his profession of the ability to maintain a viable working relationship with Mr van Zyl if the services of Mr Katz were disposed of, the first respondent proceeded call his fitness to remain in office in doubt by raising allegations in respect of Van Zyl's conduct in other matters, which are alleged to be

under investigation. He furthermore stated that Mr van Zyl should have referred the deadlock between the liquidators concerning the further conduct of the consolidated applications and Katz's role as the joint liquidators' attorney of record to the Master, rather than proceeding for the alternative relief sought in the current application.

[41] The first respondent sought to explain his belated intervention shortly before the consolidated applications were due to be heard on 14 May 2014 by saying that his first meeting with Mr Ebersohn had been only 'exploratory and brief'. Indeed, Mr Patel stated that his first meeting with Ebersohn (at which Mr Assheton-Smith was also present for a short time at the commencement) 'did not concern the consolidated applications'. He said that it was 'only closer to the date of 14 May 2014 that [he] perused some of the papers, and considered the matter, and was able to form the view that [he] could not support Katz's stance in then impending applications'. He did not identify which papers he studied, or to which considerations he had regard. In his 'provisional' answering affidavit he had given the impression that he still needed time to form a view. The allegations are self-evidently vague and contradictory.

[42] Mr Patel described several instances of his alleged exclusion from the administration of the winding-up. These included the sale of the company's sole asset, the aircraft. In this regard he averred:

> 66. Van Zyl, prior to the first meeting of creditors at the behest of the Bermack Trust and ENS, entered into an agreement of sale of the aircraft with Cronos Airlines.
>
> 67. Similarly, I was excluded from this decision, and I only learned of this when I had sight of the first distribution account on or about 15 December 2011. The sale of the aircraft raises serious questions and stands to be investigated. Ebersohn alleges that van Zyl failed to consider alternative offers for the aircraft and effectively rubber stamped the agreement of sale drafted by ENS.

[43] The first respondent also alleged that he had not been informed that the enquiry in terms of ss 417 and 418 had been convened. He stated that he would have had 'difficulty with ENS representing a creditor and the liquidators in such an enquiry, given its potentially adversarial nature'.

<u>The applicants' replying papers</u>

[44] Mr Katz deposed to the principal replying affidavit on behalf of both applicants. He dealt in detail with rebutting the suggestions by Mr Patel that he had not been involved in the sale of the company's aircraft and that he had not been involved in or aware of the proceedings in the ss 417-418 enquiry.

[45] It is unnecessary for present purposes to go into the detail. Suffice it to record that it is abundantly apparent from the copies of the extensive email correspondence attached to Mr Katz's replying affidavit (annexures 'RA 1' to 'RA 15') that the first respondent was not only involved in, but also regularly updated during the period February to June 2011 on developments concerning the sale of the aircraft. His claim not to have been aware of the sale of the aircraft before December 2011 is wholly irreconcilable with the content of the correspondence. In an email dated 22 February 2011, Mr Richard de la Harpe, a director of ENS, advised a number of persons apparently engaged in the sale of the aircraft that Messrs Patel and Van Zyl had signed the sale agreement, which had been delivered to DHL the previous day to be couriered to 'Equatorial Guinea for execution on behalf of Cronos'. The email recorded, amongst other things, that 'Patel required the inclusion of a provision that should Cronos fail to procure the required insurance [KAL] would be entitled to procure such insurance and claim the costs, which we did'. De la Harpe forwarded a copy of the email to the first respondent later the same day with the message 'Hi Mohamed. Please see email below for your information. I had to first hunt down your email address. Kind regards.'

[46] It seems that problems arose subsequently with the sale of the aircraft and it proved necessary to execute an addendum agreement. One of the emails annexed to Mr Katz's affidavit concerned the signing of an additional agreement concerning the sale of the aircraft (frequently referred to in the papers as the 'SOP agreement'). It was an email sent internally between members of the ENS support staff. It was dated 23 June 2011 and apparently transmitted at 11.30. Under the subject line 'Mohamed Patel – Signing of SOP Agreement', it read 'Mohamed Patel indicated that he is in office all day and will be available to sign. His address is 22nd (sic) Golden Acre Office Tower …. Farouk, would you be able to collect the agreement from Tracy [van Wyk, an associate at ENS] and take it to Mohamed Patel for signature?'. A further email sent later that day (at 15.44) from Tracy van Wyk to a number of addressees, including Mr Katz, Mr Paul Berman of the Bermack Trust and the first

respondent, read 'Dear All. Kindly find attached a copy of the SOP sale agreement signed by all the parties.'

[47] Mr Katz also averred that the allegations made on behalf of the Boland Trust, to which Mr Patel professed in these proceedings to have afforded sufficient credence to warrant investigation, to the effect that Mr Van Zyl had failed to consider alternative offers for the company's aircraft and had effectively rubber-stamped the agreement drafted by ENS, had been comprehensively rebutted in the papers in the consolidated applications and in the application for the consolidation of those matters. In substantiation of his averments Katz quoted at some length from the content of those papers in the replying affidavit. Mr Patel, of course, had signed confirmatory affidavits in those proceedings. He could not properly have done so if he had not satisfied himself of the content of the evidence that he was confirming. As mentioned earlier, Mr Katz averred - and his evidence in this regard is corroborated by the content of some of the email correspondence attached to his affidavit - that he attended on a two hour long consultation with Messrs van Zyl and Patel on 18 July 2013 to take instructions on the founding papers in the review application and the answering papers in the removal application. In the circumstances it is difficult to credit the first respondent's recently adopted attitude of ambivalence towards the position of the joint liquidators in the consolidated proceedings in the absence of any cogent explanation by him in these proceedings of the cause of his change of heart.

[48] As to the first respondent's repeated claims not to have been aware of the ss 417 – 418 enquiry, the email exchanges between Mr Katz and Mr Patel on 14 and 15 June 2012 (annexures 'RA 16' – 'RA 19') reflect that the latter was well aware that the enquiry had been scheduled to be conducted before Judge Joffe at the ENS offices on 25 and 26 June 2012. Mr Patel was invited to attend at a meeting in counsel's chambers on 18 June for the purpose of preparing for the enquiry.

[49] It is evident from the emails that the first respondent had expressed reservations about the costs of the enquiry. In this regard Mr Katz stated as follows in his email to the first respondent of 14 June 2012:

> I understand from Chris [van Zyl] that you have an issue with our fees and disbursements. Can you please advise me urgently what the problem is so that I can try and deal with the difficulties which you have.

> This has to be resolved by close of business on Monday as I am not in a position to continue with the enquiry unless I have an undertaking that our fees and disbursements will be discharged in full in terms of our mandate letter which was accepted on behalf of the joint liquidators.
>
> If this is not the case, regrettably, I will have to cancel the enquiry as ENS is not prepared to go on risk in respect of our fees and disbursements. I will then have to release counsel and Judge Joffe from their briefs.

[50] Mr Patel's reply indicated his unavailability to attend the meeting with counsel on 18 June due to another commitment. As to the issue of the costs of the enquiry and the objects to be achieved by it, the first respondent stated the following in an email to Mr Katz on 15 June 2012:

> As you can probably understand as a joint liquidator in this matter I was never a party to any fee arrangement regarding the matter, and secondly the Master of the High Court would require the account to be taxed as is the case in all matters where legal Bills of Costs are submitted with Liquidation accounts for confirmation.
>
> I have also not been properly briefed on what the enquiry is all about and would appreciate it if you could let me have details of what it is that we hope to achieve out of the enquiry.
>
> At the risk of being held jointly liable for a Bill of Costs that is paid before taxation I cannot, as much as I would like to, agree to payment or guarantee that this matter will be resolved by the close of business on Monday (which comment sounds like a threat rather than a request) and I suggest therefore that you look to Chris van Zyl who instructed you in the first place, for such authorization.

[51] Mr Katz replied to the first respondent as follows later the same day:

> The court applications for the extension of powers and the convening of the enquiry were forwarded to you and you signed confirmatory affidavits. I therefore do not understand why you say you were not party to any fee arrangement. The order which was obtained at your instance and that of Chris van Zyl provided that our fees and disbursements do not need to be taxed.

> The Master does not require the bill to be taxed where attorneys represent the liquidators on an attorney and client basis as is the case in this matter.
>
> I shall ask Lisa [Melis, Katz's assistant] to email you both applications (without annexures).

(I have quoted only the relevant portion of the email.)

[52] The first respondent had also signed a confirmatory affidavit in support of the application for an extension of the joint liquidators' powers and the establishment of the enquiry before the commissioner. It is evident from the passages of the founding affidavit in that application, quoted at length by Mr Katz in the replying affidavit in the current matter, that part of the business of the contemplated enquiry would be to investigate the probity of the Boland Trust's claim against KAL. The basis upon which an investigation was considered appropriate was spelled out in the founding papers. Without in any way suggesting that the Boland Trust may not have a good claim against KAL – an issue to be determined by action if the pending review of the Master's refusal to uphold the liquidator' expungement application succeeds – the information concerning the backdated issue of shares in KAL to the Boland Trust and the basis of its deposit of funds into a third party account against which it had originally received shares in another company controlled by Louw were certainly matters that prima facie warranted investigation by the liquidators. Mr Patel has not provided any information in these proceedings that would suggest that a proper basis for undertaking the enquiry had not existed. Moreover, his stated position that he would have accepted the proposal contained in ASI's letter to ENS of 30 April 2014 is consistent only with a continued adherence to the view that the Boland Trust claim should be expunged and subjected to proof by action. The only logical basis for his not wanting the proceedings on 14 May to proceed would be an opinion that some of the costs attendant thereon should have been averted by acceptance of the ASI proposal. It is peculiar that he has not said as much, and instead has sought to explain his position by feigning ignorance about the circumstances in which the review application had been instituted.

Affidavit of Paul Raymond Berman jurat 19 June 2014

[53] On the morning of the hearing on 20 June, an affidavit deposed to Paul Berman, one of the trustees of the Bermack Trust, was filed of record. At the

commencement of the hearing senior counsel for the first respondent informed me that he had not yet had the opportunity of reading the affidavit. Nothing more was made of the issue, however, and I assume therefore that counsel's disability must have been addressed before he was called on sometime after the mid-morning tea adjournment.

[54] The only significance of Mr Berman's affidavit was that it confirmed that the first respondent did not enjoy the majority support of the company's proven creditors by value. That, of course, had been implicit from the very beginning in the very fact of the Trust's application for the removal of Mr Patel from office. The concerns expressed by Mr Berman are, however, a matter that should enjoy the consideration of the Master, and be squarely addressed in the further report that the Master undertook to provide if the application for Mr Patel's removal were postponed for hearing with the consolidated applications in October. It is appropriate for the Master to engage with the issues raised by Mr Berman on behalf of the major creditor because Mr Patel is the Master's special appointee, not having been elected by the creditors.

The Master's Report

[55] As mentioned in the introduction, one of the reasons for the postponement of the matter to 20 June was so that a report could be obtained from the Master. I thought that this was important because the Master is charged under the 1973 Companies Act with a number of relevant responsibilities. So, for example, in terms of s 381(1) of the Act, 'The Master shall take cognizance of the conduct of liquidators and shall, if [s]he has reason to believe that a liquidator is not faithfully performing his duties and duly observing all the requirements imposed on him by any law or otherwise with respect to the performance of his duties, or if any complaint is made to him by any creditor, member or contributory in regard thereto, enquire into the matter and take such action thereanent as [s]he may think expedient'. The Master has the power, given in terms of s 382(2), to determine issues on which joint liquidators are unable to agree, or to give directions as to the procedure by which such disagreements should be resolved. She also has the power in terms of s 391 to obtain information from the liquidators. She could thus request the first respondent to provide her with the details of any fresh information he has obtained from Mr Ebersohn.

[56] The official in the Master's Office responsible for oversight of the KAL winding up filed a report as directed in terms of the order made on 2 June 2014. He reported as follows:

1. Copies of the Notice of Motion, applicant's affidavit and supporting annexures have been lodged with me.
2. I have perused my record of the correspondence on file and wish to state that no complaint has been received by me as required by Section 382(2). I am therefore not aware of the details of complaint and or the reasons of any such complaint which the liquidators may have. As a result I'm not in a position to offer any opinion or recommendation in this regard.
3. This matter is one of the subsidiary companies, which may have either been liquidated or which may have a bearing in this matter. In one of these matters, KAL5 Kingsfield Leasing Five I have started an enquiry in terms of Section 381 against Mr Van Zyl which is pending. In his response to me in respect of the enquiry, he made reference to KAL1 (reference number C 1424/2010) which is the subject matter of this application. His response necessitated further investigation into KAL1.
4. Furthermore, I need to highlight that the outcome of this forensic investigation may have an impact on the First Respondent. I would therefore recommend that, this matter should also be heard on 6th October 2014 with the First Application.
5. It is my request that copies of all the applications relevant to this matter be provided to me to enable me to submit a comprehensive report to the Court.
6. The determination whether the costs should be costs in the winding up of the estate, alternatively by the liquidators in their personal capacity cannot be decided at this point as am not in possession of a formal complaint hence I am not fully apprised of the subject matter of this application before the Court.
7. I have nothing further to add to this application and abide by the decision of the Honourable Court.

[57] The report is unhelpful. The Master is the second respondent in these proceedings and thus should have been in possession of the papers. The official concerned must have been aware of the identity of the applicants' attorneys because of the email correspondence directed to him by ENS concerning service of the order

on him as directed in the order made on 2 June. Thus, even if he had not been placed in possession of a complete set of the papers, there was no reason why he could not have obtained anything that he was lacking. A certain lack of conscientiousness may be discerned in his failure to do so, especially in the context of the insight he had been given into the 2 June judgment, which expressed the court's evident concern to be provided with assistance by way of an informed report from the Master. Even in the limited respects with which it engages the matter at all, the report is singularly uninformative. It does not disclose anything about the nature of the investigation into Mr van Zyl in respect of the winding-up of another company in the Kingsfield group, or explain how that investigation is thought to be relevant to the current matter. There is also no indication of why, or how, the outcome 'may have an impact on the First Respondent'.

Applicable considerations and principles

[58] The application for the first respondent's removal as joint liquidator falls to be considered in terms of s 379 of the Companies Act, 1973, which provides:

> Removal of liquidator by Master and by the Court
>
> (1) The Master may remove a liquidator from his office on the ground-
>
> (a) that he was not qualified for nomination or appointment as liquidator or that his nomination or appointment was for any other reason illegal or that he has become disqualified from being nominated or appointed as a liquidator or has been authorised, specially or under a general power of attorney, to vote for or on behalf of a creditor, member or contributory at a meeting of creditors, members or contributories of the company of which he is the liquidator and has acted or purported to act under such special authority or general power of attorney; or
>
> (b) that he has failed to perform satisfactorily any duty imposed upon him by this Act or to comply with a lawful demand of the Master or a commissioner appointed by the Court under this Act; or
>
> (c) that his estate has become insolvent or that he has become mentally or physically incapable of performing satisfactorily his duties as liquidator; or

(d) that the majority (reckoned in number and in value) of creditors entitled to vote at a meeting of creditors or, in the case of a members' voluntary winding-up, a majority of the members of the company, or, in the case of a winding-up of a company limited by guarantee, the majority of the contributories, has requested him in writing to do so; or

(e) that in his opinion the liquidator is no longer suitable to be the liquidator of the company concerned.

(2) The Court may, on application by the Master or any interested person, remove a liquidator from office if the Master fails to do so in any of the circumstances mentioned in subsection (1) or for any other good cause.

It seems that the current matter resorts under the 'any other good cause' provision in subsection (2), although the first applicant appears also to invoke paragraphs (b) and (e) of subsection (1). The Master had not been requested to remove the first respondent from office on any of the grounds described in paragraphs (a) to (e) of subsection (1).

[59] It is obviously important in any application for the removal of a liquidator to be mindful of what is expected of a liquidator. That no doubt explains why in the very first paragraph of its judgment in Standard Bank of South Africa v The Master of the High Court and Others 2010 (4) SA 405 (SCA) concerning an appeal against a judgment at first instance in which the application for the removal of joint liquidators had been refused, the appeal court (per Navsa JA) observed: 'In the winding-up of companies liquidators occupy a position of trust, not only towards creditors, but also the companies in liquidation whose assets vest in them. Liquidators are required to act in the best interests of creditors. A liquidator should be wholly independent, should regard equally the interests of all creditors, and should carry out his or her duties without fear, favour or prejudice'. The court also emphasised, at para 96-97 of its judgment, the duties of liquidators to make themselves thoroughly acquainted with the affairs of the company under administration, and to suppress nothing and conceal nothing that has come to their knowledge in the course of the investigation, which is

material to ascertain the exact truth, and also to exercise particular professional skill, care and diligence in the performance of their duties.[9]

[60] The principles that govern the approach adopted by the courts in applications for the removal of liquidators have been considered in a number of judgments of the South African courts. A useful survey of the jurisprudence (unaffected by the reversal of the judgment on appeal) was provided by Liebenberg and Plaskett JJ in Standard Bank of SA Ltd v The Master of the High Court 2009 (5) SA 13 (E) at para 7-10; see also Ma-Afrika Groepbelange (Pty) Ltd and Another v Millman and Powell NNO and Another 1997 (1) SA 547 (C), at 561. Our law in this regard, in common with that of England and Australia,[10] applies the approach articulated in the dictum of Bowen LJ in Re Adam Eyton Ltd ex parte Charlesworth (1887) 36 Ch D 229, at 306, when treating of the then pertaining English equivalent of s 379(2) of our 1973 Companies Act: 'In order to define "due cause shewn" you must look wider afield, and see what is the purpose for which the liquidator is appointed. To my mind....the due cause is to be measured by reference to the real, substantial, honest interests of the liquidation, and to the purpose for which the liquidator is appointed. Of course, fair play to the liquidator himself is not to be left out of sight, but the measure of due cause is the substantial and real interest of the liquidation'.

[61] The salient considerations commonly entailed in the application of that approach were quite recently reviewed by Neuberger J in AMP Music Box Enterprises Ltd v Hoffman [2003] 1 BCLC 319, at para 23-27, in a passage that has been cited with approval in a number of subsequent judgments in England and Australia:

> [23] In an application such as this, the court may have to carry out a difficult balancing exercise. On the one hand the court expects any liquidator, whether in a compulsory winding up or a voluntary winding up, to be efficient and vigorous and unbiased in his conduct of the liquidation, and it should have no hesitation in removing a liquidator if satisfied that he has failed to live up to those standards at least unless it can be reasonably confident that he will live up to those requirements in the future.

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[9] In this regard the court quoted approvingly from Blackman *et al*, *Commentary on the Companies Act* vol 3, at 14-376 and 14-378 and cited *Ex parte Clifford Homes Construction (Pty) Ltd* 1989 (4) SA 610 (W) at 614.

[10] Compare the English and Australian jurisprudence cited in *Ma-Afrika Groepbelange*.

[24] Support for this approach is not only to be found in Keypack [Keypack Homecare Ltd [1987] BCL 409], but also in some cases where the court has compulsorily wound up the company and appointed a new liquidator in circumstances where there is already a voluntary liquidator in place – see for instance, Re Zirceram Ltd [2000] 1 BCLC 751, especially at para 25(5). Also where the liquidator could not be seen as independent – see, for instance, Re Lowestoft Traffic Services Ltd [1986] BCLC 81 (where the liquidator concerned seems to have been the same liquidator as in Keypack).

[25] It may also be right to remove a liquidator where the circumstances are such that, through no fault of his own, he is perceived to be – even though he may not be – biased in favour of, say, one or more of the creditors – see per Robert Walker J in Re Gordon & Breach Science Publishers Ltd [1995] 2 BCLC 189, another case concerned with a compulsory winding-up order in circumstances where there was already a voluntary liquidator in place.

[26] While the removal of the liquidator is not necessarily based on any fault on his part, most such cases will involve a degree of criticism. Although in Keypack Millett J emphasised there was no criticism of the general ability, experience and professionalism of the liquidator, and that, even in relation to the particular case, there was no evidence of his being biased or dishonest, it is nonetheless clear that he was removed because the judge took a dim view of the way in which he had conducted the particular liquidation. As the judge said, the fact that this may to some extent resound to the discredit of the liquidator, does not mean that the court should shy away from making the order. On the contrary, in an appropriate case it is the duty of the court to make such an order, not merely on the merits of the particular case, but also because it sends out a clear message to liquidators that they have an important function which they should conduct in a vigorous, effective and independent manner.

[27] On the other hand, if a liquidator has been generally effective and honest, the court must think carefully before deciding to remove him and replace him. It should not be seen to be easy to remove a liquidator merely because it can be shown that in one, or possibly more than one, respect his conduct has fallen short of ideal. Otherwise, it would encourage applications under s 108(2) [of the English Insolvency Act, 1986 (c 45)] by creditors who have not had their

> preferred liquidator appointed, or who are for some other reason disgruntled.[11] Once a liquidation has been conducted for a time, no doubt there can almost always be criticism of the conduct, in the sense that one can identify things that could have been done better, or things that could have been done earlier. It is all too easy for an insolvency practitioner, who has not been involved in a particular liquidation, to say, with the benefit of the wisdom of hindsight, how he could have done better. It would plainly be undesirable to encourage an application to remove a liquidator on such grounds. It would mean that any liquidator who was appointed, in circumstances where there was support for another possible liquidator, would spend much of his time looking over his shoulder, and there would be a risk of the court being flooded with applications of this sort. Further, the court has to bear in mind that in almost any case where it orders a liquidator to stand down, and replaces him with another liquidator, there will be undesirable consequences in terms of costs and in terms of delay.

[62] It is clear that the court must have regard to the full conspectus of relevant considerations in the case and make a balanced decision with the interests of the efficient liquidation foremost in mind; cf. Joubert et al (ed.), Law of South Africa First Reissue vol. 4(3) at para 281, s.v. 'Removal of liquidator by the court'.

Evaluation

[63] In my view the blame for the postponement of the hearing of the consolidated applications on 14 May 2014, which was the genesis of this application, was far from one-sided. The failure to have referred ASI's proposal of 30 April to Mr Patel played a material part. Mr Katz has described the omission as a mistake. It is difficult to understand, however, how such a mistake could have been made if the first respondent's position as joint liquidator were being taken seriously. Mr Katz was, formally at least, as much the first respondent's attorney, as he was the second applicant's. The mistake was of a nature that would have justified the first respondent in terminating Katz's employment. Mr van Zyl would have been hard-pressed to resist accepting as much, had the first respondent taken the matter up with him.

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[11] Section 108(2) of the Insolvency Act, 1986 c 45 provides: '*The court may, on cause shown, remove a liquidator and appoint another*'.

[64] The failure to refer the proposal to the first respondent also reflects poorly on Mr Van Zyl. He had a duty, quite independently of that of Katz, to react to the proposal jointly with his co-liquidator. He has not explained his failure to do so. That has lent some credence, even if the truth might be otherwise, to the accusation by Patel that the second applicant dances to Katz's tune. Van Zyl should have been especially alert to the importance, in the circumstances in which the Bermack and Boland Trusts were in a sense mutually contesting claimants to a limited fund under administration, of avoiding cause for any perception that the attorney, who also acted for the Bermack Trust, rather than himself acting jointly with his co-liquidator, had been the responsible decision-maker in rejecting the proposal.

[65] The second applicant's decision to employ Mr Katz for the purpose of the current application was also ill-considered, in my view, for the same reason. I remarked earlier on some of the indications in the papers that notwithstanding the neutral role in which it was sought to portray Mr van Zyl, he appears in fact to be supportive of, and to have co-operated in, the application by the Bermack Trust to have the first respondent removed from office. His decision to use the services of Bermack Trust's attorney in the peculiar circumstances that had arisen after Mr Patel had made his affidavit of 9 May could reasonably give rise to perceptions of bias. The danger had been heightened by Mr Katz's unfounded accusation that the first respondent had acted improperly in agreeing to meet with representatives of the Boland Trust, a matter to which Mr Patel had referred in his email of 13 May, quoted above.[12] That Van Zyl should have been astute to the dangers of allowing even a perception of bias to be created, whether well-founded or not, is illustrated by the observations of Neuberger J at para 25 of the judgment in AMP Music Box Enterprises, quoted above.[13]

[66] The first respondent's inclination to accept the proposal was, for the reasons I have mentioned earlier, objectively not lacking in cogency. Acceptance could have saved costs and lent some expedition to the process of resolving the Boland Trust's contentious claim. The out of hand rejection by Mr Katz of the proposal as 'bogus', on the other hand, has not been motivated, save for the statement that it was supported by senior counsel. The basis for counsel's opinion has not been disclosed. The only

[12] At para [26].
[13] At para [61].

advantage to rejecting the proposal that I have been able to identify is that (assuming judgments in their favour) the liquidators' costs in the consolidated applications might be recovered sooner than would be the case if the proposal were accepted. It is an advantage that fell to be weighed in the bigger picture against the countervailing considerations of limiting the costs of the pending proceedings and expediting the resolution of the issue that is holding up the finalisation of the winding-up, namely the determination of the Boland Trust's claim.

[67] The first respondent's manner of dealing with his discovery of the proposal made by ASI and its rejection and his evidence in opposition to the current application has, however, highlighted serious shortcomings in his own discharge of the functions of a joint liquidator.

[68] There is no excuse for him not to have been fully informed as to the content of the commissioner's report and the basis for the subsequent application, to which he was party, for the expungement of the Boland Trust's claim. He subsequently deposed to a confirmatory affidavit in support of the application to review the Master's refusal to expunge the Boland Trust's claim and for a substitutive decision by the court expunging the claim. His assertion that he did not know that the commission had conducted its enquiry and produced a report just does not bear scrutiny. In the context of the first respondent's correspondence with Mr Katz described earlier concerning the conduct of the enquiry, it is inconceivable that the first respondent was ignorant about it. His request to Katz at that time to be informed what the objects of the enquiry were was extraordinary. He had deposed to a confirmatory affidavit in support of the application to establish the enquiry. I have not seen that application, but it is standard practice that such applications set out the applicant's reasons for considering the establishment of an enquiry to be expedient. It is improbable that any judge, let alone one with the commercial law background and considerable experience of the learned judge who made the order in the current case, would have appointed the commissioner if he were not sufficiently informed about the objects of the contemplated enquiry.

[69] If the ignorance as to the state of affairs concerning the treatment of the Boland Trust's claim professed in the first respondent's affidavits in the current matter (including that deposed to on 9 May 2014) is to be accepted, the only inference to be made is that the first respondent cannot have read the founding papers in the

application to which he was party for the establishment of the commission, that he did not read the emails sent to him by Katz concerning the conduct of the enquiry, that he did not read the report to the Master on the enquiry submitted in his name, and that he did not read the supporting papers in the review application and the opposing papers in the application by Boland Bank for the removal of himself and Mr van Zyl as joint liquidators of KAL that he endorsed under oath. Such conduct would fall signally short of compliance with the duty of liquidators to thoroughly acquaint themselves with the affairs of the companies in liquidation they are appointed to administer.

[70] The first respondent was not entitled to take refuge in a claim that he had been excluded from a meaningful role in the winding-up by Katz and Van Zyl. I have described some of the material put in evidence that tends to rebut the first respondent's claims to have been excluded. But even if he had been excluded to any material extent, it behoved him not to suffer such exclusion in silence. At the very least he should have formally taken the issue up first with his co-liquidator, and if that did not resolve the problem, with the Master. There is no indication that he did so.

[71] So too should the concerns that the first respondent had about the fees and attendances of ENS as the attorneys acting for the joint liquidators have been confronted squarely if they had a cogent basis. It is apparent from the correspondence to which reference has been made above that Mr Katz had invited Mr Patel to identify and discuss the issues about which he had been reported to be concerned. The indications are that the first respondent was content not to pursue the matter. His failure to have done so detracts materially from the force of the expression of concern about 'the massive amount of legal fees with which this estate (sic) has been burdened' in his 13 May 2014 email that was handed in at the hearing before Yekiso J on 14 May.

[72] It is convenient, while on the matter of the first respondent's misgivings about the employment of ENS as the joint liquidators' attorneys, to address his allegations about the firm having a conflict of interest. This was also a point pressed on his behalf in argument before me. The first respondent has not particularised the basis for the allegation of a conflict. It may be inferred, however, that at least one of his reasons is the fact that ENS are also the attorneys for the Bermack Trust, which, as mentioned, was the applicant in the winding-up application.

[73] I had occasion earlier this year in another matter to consider a concern expressed by the Master about the propriety of the engagement by liquidators of the services of the attorneys who had acted for the petitioning creditor in a compulsory winding application; see Ex parte Steenkamp N.O and others: In re Monoceros Trading 111 CC (in provisional liquidation) [2014] ZAWCHC 82. In that judgment I held that there was nothing inherently untoward about such an engagement. I noted that whether a conflict of interest presents in any matter is dependent on the facts. If, on an analysis of the facts, the interests of the petitioning creditor and those of the liquidator correspond with each other, there will ordinarily be no conflict of interest. On the contrary, there will often be much to be said in favour of the employment of the petitioning creditor's attorneys because they may be steeped in the complexities of the issues with which the liquidator will have to engage, and it would be unduly costly and time consuming in such circumstances to appoint other attorneys with no prior involvement to qualify themselves afresh. The fact that the liquidator may, as in the current matter, adopt a position adverse to the position of one or more of the other creditors does not, without more, derogate from the conclusion just stated. It is in the nature of a liquidator's responsibilities to interrogate creditors' claims and in that context he may have to adopt an adversarial position; cf. Receiver of Revenue, Port Elizabeth v Jeeva And Others; Klerck And Others NNO v Jeeva and Others 1996 (2) SA 573 (A). The position would obviously be different if the attorney had also previously acted for the creditor against whom an adverse position was adopted and, in that connection, had been made privy to any relevant confidential information of that creditor. There is also a duty on legal practitioners to be ever astute to the possibility of a conflict of interest not identified at the outset of their engagement subsequently presenting itself, in which case, of course, they are bound to withdraw. In a context like the present, liquidators too are bound to exercise their independence in giving and overseeing the carrying out of instructions to attorneys who act also for one or more of the creditors in the winding-up. It may be necessary or prudent in a given case that separate attorneys be employed to deal with certain questions that may arise in the liquidation. In that manner conflict situations may be managed and grounds for perceptions of partiality avoided.

[74] My apprehension of the position appears to be consistent with the approach adopted by the English courts in matters in which closely analogous complaints to

those expressed by ASI in their abovementioned letter to the Master of 17 May 2013, and now apparently supported by the first respondent, were raised. Reference to the English jurisprudence is helpful because, as noted in E.A.L. Lewis, Legal Ethics: A Guide to Professional Conduct for South African Attorneys (1982),[14] the principles of legal ethics in South Africa are largely derived from English law.

[75] One of the questions addressed by Robert Walker J in Re Schuppan (a bankrupt) (No 1) [1997] 1 BCLC 211 was 'Is it generally acceptable (and fair as between the petitioning creditor and other unsecured creditors) for the trustee in bankruptcy to retain the petitioning creditor's solicitors to act for him?'. The learned judge had heard submissions from an official receiver (a state appointed official provided for in terms of the English Insolvency Act, 1986, who fulfils the functions that would be carried out by provisional liquidators or trustees under our system of insolvency practice) that 'his own practice, over many years of experience, [had been] not to retain the solicitors acting for the petitioning creditor, even when the petitioning creditor presses for this. This practice was, [the official] said, founded in his perception of the importance of the official receiver being demonstrably impartial in his treatment of debtors and creditors'. The judge noted that the official concerned had conceded that 'this was not an official practice in the sense of being prescribed for official receivers generally, and that it is a more stringent practice than what is required by the official guidance to insolvency practitioners'. In this connection the judge referred to the 'Guidance Notes on Professional Conduct and Ethics for Persons Authorised by the Secretary of State to Act as Insolvency Practitioners' and observed the notes are intended to regulate conduct of the insolvency practitioner himself, not his advisers, but considered that they nevertheless 'provide guidance by analogy'.

[76] In answering the question posed, the learned judge characterised the approach advocated by the official receiver as 'a counsel of perfection' which, he said, 'need not necessarily be followed by all insolvency practitioners in all circumstances.' He proceeded 'In a case where the real difficulties that are foreseen are in connection with the identification, tracing and recovery of assets for the bankrupt's estate, the retainer of solicitors who already have a good grasp of these difficulties can be of great advantage to all the creditors, not just the petitioning creditor. [The trustee] deposes that that would be the case here. If in such a case the petitioning creditor is

[14] At page 59.

very much the largest creditor, and no difficulties are expected in quantifying the provable debts of either the petitioning creditor or the other creditors, the risk of a conflict of interest would appear to be, in the words of Hoffmann J in Re Maxwell Communication Corp plc [1992] BCLC 465 at 468, "a mere distant possibility".'

[77] The judgment in Schuppan also confirms that in instances in which the petitioning creditors attorney is indeed conflicted in certain respects in respect of matters to be attended to by the liquidators, it is competent for such situations to be managed by the appointment by the liquidators of separate attorneys to assist them in those matters. The judge did caution that the engagement by a trustee or liquidator of a petitioning creditor's solicitor in cases in which the likelihood (as distinct from the mere possibility) of any conflict of interest arising was identifiable was 'in general undesirable' because the need to appoint separate legal representatives to address the problem was liable to cause unnecessary expense, duplication of work, and confusion, and therefore should occur only exceptionally. He, however, cited Re Maxwell Communication Corp supra, at 569, and Re Polly Peck International plc (No 1) [1991] BCC 503 as showing 'that in exceptional circumstances a division of responsibility may be the best solution'.

[78] Another English judgment in point is that of Pumfrey J in Re Baron Investments (Holdings) Ltd (in liquidation), Halstuk and another v Venvil [2000] 1 BCLC 272. In that matter it was argued that Schuppan had been wrongly decided. It was submitted by counsel that in any matter in which the solicitor appointed had acted only for the petitioning creditor or for only some, and not all, of the creditors, sufficient potential of conflict existed to exclude the propriety of the engagement of the solicitor by the liquidator. The learned judge summarised the import of the argument advanced before him on this point to be to the effect that 'there is an inherent conflict between the interests of an individual creditor and the interests of the creditors en masse whose interest it is the function of the liquidator to protect'. The court rejected the criticism of the judgment in Schuppan and reiterated the point that the existence or not of a conflict of interest is a facts dependent question that is not amenable to determination on the generalised basis contended for by counsel. The essential questions are whether the attorney is possessed, by virtue of a prior or co-existing attorney-client relationship of the confidential information of a party against whom he is engaged to act, or whether the interests which the liquidator needs to

advance are opposed to those of the creditor for whom the attorney also acts. If so, the attorney is conflicted. (The latter situation is covered squarely by the Cape Law Society rules. Rule 14.3.4 provides that a member must 'refrain from doing anything which places or could place them in a position in which a client's interests conflict with their own or those of other clients'.) The judgment further confirmed the principle that identified areas of conflict can be managed by the appointment of more than one firm of attorneys on the basis of a division of responsibility. The proper approach of a liquidator in deciding on the appointment of legal advisers in such situations is one of proportionality; balancing all the relevant considerations including costs, practical issues and reasonably based third party perceptions.

[79] The first respondent has failed to disclose any facts that would indicate that ENS are conflicted in acting for the liquidators in the applications that have preceded the current litigation and indeed, his counsel were at a loss to identify a rational basis for his allegations when I pressed them in argument.

[80] However, before moving on, I think it would be proper to comment on ENS's engagement by the applicants in the current matter. The application is against the first respondent, who is ENS's former client. It concerns issues in respect of which the content of attorney-client communications between Mr Patel and Mr Katz and his colleagues at ENS in respect of the conduct of the liquidation might reasonably have been expected to, and indeed have, become relevant. The privilege that attaches to such communications is highly valued as a matter of constitutional principle (cf. Thint (Pty) Ltd v National Director of Public Prosecutions and Others, Zuma and Another v National Director of Public Prosecutions and Others 2009 (1) SA 1 (CC), 2008 (12) BCLR 1197 at para 183) and its ambit falls to be determined generously (cf. Balabel and another v Air India [1988] 2 All ER 246 (CA), especially at 254-256[15]). The privilege is that of the client, not of the attorney. The principle that I have in mind was expressed thus (per Wessels JA) in Robinson v Van Hulsteyn, Feltham and Ford 1925 AD 12 at 21-22 :

> In order to advise a client as to his legal position the solicitor must know all the circumstances of his client's case, and therefore a client is often compelled to reveal to his solicitor the most intimate circumstances of his life. The

[15] The pertinent passages from *Balabel* are quoted in *A Company and Others v Commissioner for the South African Revenue Services* [2014] ZAWCHC 33 at para 24.

> solicitor may thus become the repository of the most vital secrets of his client. These confidences reposed in him he may not divulge, and if he does the Court will punish him for his breach of duty towards his client. If a solicitor who in the course of advising a client has become possessed of his client's secrets is engaged by another person to act against his former client, his knowledge of the latter's secrets may be of great advantage to his client's opponent. Although the solicitor may conscientiously endeavour to do his duty to his new client without revealing the secrets of his old client, yet he may find himself in an invidious position and his knowledge of the secrets of his former client may unconsciously affect him in doing his duty towards the other. In order to avoid such a dilemma the Court will restrain a solicitor in whom confidences have been reposed by a client from acting against such client where it is made clear to the Court in the words of COZENS-HARDY, M.R., 'that real mischief and real prejudice will in all human probability result if the solicitor is allowed to act'.

[81] Notwithstanding that Mr Patel has not asked for any relief of the nature sought by the applicants in the two English cases just discussed barring ENS from acting against him in the application (cf. Wishart and Others v Blieden NO and Others 2013 (6) SA 59 (KZP)), I nevertheless have significant reservations about ENS's acceptance of appointment as attorney in the current case. The general principle seems to be that it is for the former client who feels prejudiced by the attorney's conduct to raise the matter, but in Kirkwood Garage (Pty) Ltd v Lategan and Another [1961] 2 All SA 413 (E), the court mero motu declined to entertain an application in which it appeared that the applicant's attorney may have previously acted in a connected matter for the respondents and no explanation for his conduct had been given on the papers. In Zulu and others v Majola 2002 (5) SA 466 (SCA), at para 18, the court identified an evident conflict of interest involving the appellants' attorney of record and noted mero motu (per Mthiyane JA) 'It is further undesirable that the estate's appointed representative should act as the attorney for certain interested parties against another interested party arising out of the administration of the estate. The first appellant [being the also the attorney for the appellants] should therefore cease to act on behalf of the second and third appellants, in his own interests and theirs, and should be precluded from recovering any costs from them in relation to the

present litigation, not recoverable from the respondent, which he might otherwise have been entitled to in his capacity as their attorney'. Compare also Retha Meiring Attorney v Walley 2008 (2) SA 513 (D), in which, at para 42, the text of a relevant rule (presumably of the KwaZulu-Natal Law Society) is quoted as providing 'A member should not act against a former client, without the former client's consent, if the possibility exists that the member may use information obtained from him to his prejudice'. In view of the orders that will be made referring the substantive relief sought in this matter for the determination together with the consolidated applications, and also because I did not hear argument on this question, I shall leave any decision on the point, if one is required, for the court that deals with the consolidated matters.

[82] Reverting to the central issue in the application for the first respondent's removal from office: Whereas the first respondent was entitled to take exception to being excluded from the consideration of the proposal advanced by ASI on behalf of the Boland Trust in regard to the conduct of the consolidated applications, his response to the situation, especially in the context of the imminent hearing date for the consolidated applications, was required to be determined by a bona fide consideration of the best interests of the liquidation and all parties involved in or affected by it. His reaction that he needed time to apprise himself of matters with which he should already have been well acquainted reflects adversely on his suitability to be a joint liquidator of the company and on his diligence in the discharge of his duties. As apparent from the discussion above, Mr Patel's professed ignorance concerning matters germane to the consideration of ASI's proposal and the merits of the consolidated applications is inexcusable. His affidavits and the email he sent to Mr Katz on 13 May 2014 are replete with allegations that information had come to his notice about irregularities and improprieties in the conduct of the liquidation under the aegis of Katz and the second applicant. It is significant, however, that nothing has been offered by way of substantiation of the allegations. He has provided no evidence to suggest that the information apparently imparted to him by Mr Ebersohn went beyond that already furnished in ASI's letter to the Master of 17 May 2013.

[83] In the circumstances I do not consider that the personal difficulties he was experiencing with Mr Katz and his co-liquidator's failure to have consulted him on the ASI proposal constituted a good enough reason for him to have forced the abortion of the hearing of the consolidated applications on 14 May 2014. He should

have appreciated that his conduct would result in wasted costs and in a delay of many months in the finalisation of the company's winding-up. It was his professional duty to place these considerations before his personal sensibilities.

[84] The prejudicial effect of the first respondent's conduct in relation to the litigation due to have been heard on 14 May, judged in the context of his explanation, which, as I have observed, not only lacked substantiating reasons, but also exposed serious shortcomings in his compliance with his duties as liquidator in regard to the administration of the winding-up thus far, affords sufficient justification to order his removal from office. However, the requirement that such a decision should be based on the full conspectus of relevant considerations in the case in order to inform a balanced decision with the interests of the efficient liquidation foremost in mind enjoins taking a broader view. In that regard it is necessary to consider the argument advanced by the first respondent's counsel that the justice of the matter would be best served by postponing the determination of the first respondent's removal for determination with the consolidated applications.

[85] The first respondent's counsel emphasised that the papers in the removal application pending before Yekiso J are not before me. They submitted that to remove the first respondent from office at this stage when there are no pressing considerations in the winding-up exercise that necessitate such a course as a matter of urgency - certainly not if Mr van Zyl is permitted to manage the consolidated applications in the interim, as tendered by the first respondent – could pre-empt the effect of the findings Yekiso J might make in the application by the Boland Trust for the removal of Van Zyl from office. The argument was that the findings that Yekiso J could make might vindicate the position adopted by the first respondent concerning the review application.

[86] The difficulty with that argument is that the first respondent has failed to explain what his position in fact is in regard to the review application, or to give any reasoned explanation as to why it might have changed from that manifested in his subscription as a party to the review application in his confirmatory supporting affidavit. Moreover, a finding that Van Zyl should be removed as liquidator for any reason would not compensate for, or offset the evident failure by Mr Patel to comply with his obligations as liquidator.

[87] A better argument, in my view, would have been that the conduct of Messrs Van Zyl and Katz in respect of the proposal put by ASI at the end of April and their failure to refer the offer to the first respondent might bolster the position of the Boland Trust in the consolidated applications. The holistic consideration enjoined in the best interests of the liquidation process in any removal application might be better served if this application were to be heard and decided together with the consolidated applications. If both liquidators have to go, it would probably be better that they go together. That might serve, if nothing else, to avoid the insidious effect, having regard to the questions that have given rise to the currently pending litigation, that one of them staying in office a little longer than the other could have on the continuance of the winding-up in new hands.

[88] There is also the consideration whether, having regard to the controversy and its basis in a dispute between creditors, it is in any event appropriate, if a joint liquidator is to be removed at the instance of one of the creditors, that only one of them be removed. In Ma-Afrika supra, Van Zyl J, having noted the observation by Innes CJ in Goldseller v Hill 1908 TS 822 at 827 that 'They [the co-trustees] are in law only one persona. They jointly represent the estate, and together they are the channel through which the estate can sue or be sued and the proper persons to investigate all its affairs. They stand upon exactly the same footing.', proceeded to query whether, when joint liquidators were involved, it was competent to order the removal of only one of them. In that regard the learned judge stated at p. 567C-D:

> The question which must inevitably be asked is whether it is competent to seek the removal of only one of two co-liquidators, particularly where, as in the present case, the second co-liquidator has played a relatively minor role and must needs himself bear at least part of the blame for the alleged ineffective or objectionable conduct of the first co-liquidator. If a proper case is made out, should they not both be removed? For present purposes, on the view I take of the facts before me, it is not necessary to answer this question. I venture to predict, however, that it will have to be resolved judicially at some or other time in the future.

The editors of Henochsberg on the Companies Act 61 of 1973 have expressed the opinion that it is indeed competent for the court to remove only one or some of any number of joint liquidators. I agree.

[89] The judgment in Goldseller cited by Van Zyl J was concerned with a quite different point, namely the competence of a decision by a meeting of creditors which had purported to confer priority in favour of one co-trustee over another. As held by the Transvaal Supreme Court in that case, such as decision was plainly incompetent. The single persona metaphor applied by Innes CJ went to the obligation of co-trustees to act jointly in all matters under their administration, which carries with it the necessary implication that they must be equally empowered in all their actions as such.[16] It does not follow though that where some, but not all, of a number of joint liquidators are found to be no longer suitable to hold the appointment that all of them, even those whose suitability is beyond impeachment, should have to go. If the single persona metaphor were indiscriminately applicable in the removal context, it would also apply in situations such as the resignation or death of a co-liquidator. The position of the other liquidator would also be terminated thereby. The notion has only to be stated to be rejected. The statute does not require there to be more than a single liquidator in place.

[90] I do think, however, that when there are two joint liquidators and separate proceedings with overlapping considerations are pending contemporaneously for their respective removal from office, there is much to be said in favour of the coterminous determination of both applications when regard is had to the broader considerations bearing on the efficiency of the winding-up that need to be weighed. The danger of two judges, within a short period, taking different and potentially conflicting views on how the best interests of the liquidation would be best served in the context of demonstrated shortcomings on the part of the liquidators should, as far as possible, be avoided. There is also the consideration that the decisions made by this court may be subject to appeal. If that were to happen, it would be desirable in the interests of the winding-up that the appeal process be an integrated one.

[91] As mentioned, one of the reasons for the postponement of the application from 29 May to 20 June was to obtain a report from the Master. As noted, the report that was filed was unhelpful. It is clear that the relevant official in the Master's Office had not had regard to a full set of the papers in the application. The report that he put in

[16] Both of the other judgments cited by Van Zyl J in this connection, viz. *Murphy, NO and Benjamin, NO v Semphill and Others* 1954 (3) SA 450 (W) and *Millman NO v Goosen* 1975 (3) SA 141 (O), were also concerned with quite different points, being the necessity for all co-trustees to be joined in proceedings by or against a trust, and the obligation of joint appointees, whether they by trustees, liquidators or judicial managers, to act jointly.

did, however, suggest, even if opaquely, that an investigation currently being undertaken by the Master's Office in another matter, may yield information that could have a bearing on the current matter and the consolidated applications. The Master has recommended that the current application be postponed for determination together with the consolidated applications and has promised a further report. I remain of the view that the provision to the court of a properly informed opinion from the Master is desirable in cases of this nature. It would be a matter for concern, having regard to the responsibilities given to the Master in terms of the Companies Act, if the capacity restraints of the Master's Office are such that it were unable to render meaningful assistance to the courts in matters like this. It is thus to be hoped that the promised further report will represent a considerable improvement on the one provided on 18 June.

[92] All of these considerations, taken together, have persuaded me that the determination of this application should indeed stand over for determination by the judge who is to hear the consolidated applications.

[93] Counsel for the applicants argued against the taking of that course. He submitted that a formal application for the consolidation of this matter with the consolidated application was required. Moreover, joinder of the Boland Trust as an interested party was required.

[94] The papers before me do include an application by the first respondent for the consolidation of this application with the other applications. The application for consolidation might not be in the usual form under an appropriate notice of application, but that does not derogate from its evident substantive existence on the papers as a matter of fact. Furthermore, assuming that notice of the application for consolidation needed to be given to the Boland Trust, I am satisfied that the Trust was sufficiently apprised of its existence and in a position to raise any objection to a further consolidation of matters if so advised. Counsel for the Boland Trust announced his presence at the hearing on 20 June and indicated that he was there on a watching brief. I also noticed that the Boland Trust's attorney, Mr Assheton-Smith, was present in the gallery for most, if not all, of the hearing on that day. The first respondent's counsel indicated that if I should consider myself unable for any reason to deal with the question of a consolidation of the current matter with the consolidated applications, they would desire a postponement so as to bring a separate consolidation

application. It follows from what I have already said that I do not think that is necessary. Such a course would in my view escalate costs unnecessarily, and could even prejudice the chances of the hearing fixed for 6 October proceeding on that date. If the Boland Trust should consider itself prejudiced in any manner by the course that I have chosen in this respect – which I doubt - there would be nothing to prevent it raising any objections it may have at the hearing on 6 October, or earlier. The character of the order for a further consolidation that I propose to make is that of a ruling. It is therefore susceptible to being recalled if there is good reason to do so. (Compare also rule 11(b) read with rule 10(5) of the Uniform Rules of Court.)

[95] The main consideration urged in support of the urgency of the application was the need for the liquidators to deal with certain interlocutory matters in the consolidated applications. It was at those exigencies that the relief sought by the second applicant was directed. The papers provided no particularity about the interlocutory matters, but it is not in contention between the first respondent and the second applicant that Mr van Zyl should be permitted on behalf of the joint liquidators to attend to the requirements of those matters on behalf of the joint liquidators. This seems to me to be a sensible and pragmatic arrangement in the circumstances. An order will thus be made confirming that Mr van Zyl is permitted to act accordingly. The order will provide that Mr van Zyl is to inform the first respondent in writing of every action taken by him in this regard either before, or, if that is not feasible for any reason, as soon reasonably possible after, he takes the action concerned.

[96] I remarked earlier on how the papers have developed in this matter thus far, with sets of affidavits being delivered beyond what is provided in terms of the rules of court regulating the conduct of motion proceedings. I am concerned that there may be a perpetuation of this conduct in the period between now and October. The conduct has already caused the introduction of a significant amount of evidence which has had to be read, but to which I have, for the reasons mentioned, not thought it proper to have regard. In the circumstances, in order to restrain any further undisciplined burgeoning of the papers, I propose to include in the order to be made a direction that further affidavits may be delivered only with prior leave of the court on good cause shown; cf. James Brown & Hamer (Pty) Ltd (Previously named Gilbert Hamer & Co Ltd) v Simmons N.O. 1963 (4) SA 656 (A) at 660F-G.

[97] I am going to direct that the question of costs in respect of the hearings on 29 May and 20 June 2014 shall stand over for determination by the court which hears the consolidated applications. Without in any way purporting to pre-empt the decision of that court, and only by way of assistance, I think it appropriate to indicate that it is my opinion that the bringing of the application on barely three days' notice on 29 May was unduly precipitate and that the applicants should bear the costs incurred in respect of the appearances on that date.

Order

[98] The following order is made:

1. The second applicant is hereby authorised and directed, on behalf of the joint liquidators of Kingsfield Aviation Leasing One (Pty) Ltd (in liquidation), to do all things necessary to proceed with the opposition by the joint liquidators to the application for their removal in case no. 10233/13, and with the prosecution of the application for the review of the Master's refusal to expunge the claim of the Boland Trust in case no. 11666/13, including instituting or opposing any interlocutory applications and instructing attorneys and counsel so as to ensure that the matters are ready for hearing on 6 October 2014.

2. The second applicant is further directed to keep the first respondent advised of any steps taken by him in terms of the authorisation afforded in terms of paragraph 1 by written notice to be given before any such step is taken, or, if prior notice is not feasible by reason of the exigencies of the given situation, as soon as reasonably possible after the step in question has been taken.

3. The application by the first applicant for the removal of the first respondent from his office as joint liquidator of Kingsfield Aviation Leasing One (Pty) Ltd (in liquidation) under case no. 9282/2014 is consolidated for hearing with the aforementioned applications under case no.s 10233/13 and 11666/13, and for that purpose is postponed to 6 October 2014.

4. No party to the application under case no. 9282/2014 shall be permitted to deliver any further affidavit in the matter save with the prior leave of the court on good cause shown to be sought by application on notice to the other parties.

5. Costs, including the costs incurred in respect of the hearings on 29 May 2014 and 20 June 2014, respectively, shall stand over for determination by the court to be seized of the consolidated matters to be heard on 6 October 2014.

6. The Master is directed to report further to this court on the application under case no. 9282/2014 by no later than Thursday, 18 September 2014.

7. The applicants' attorney of record is directed to serve a copy of this order, together with a copy of the judgment delivered on 8 July 2014 on the Master by no later than 11 July 2014, and to file an affidavit confirming compliance with this direction by no later than 19 July 2014.

8. The applicants' attorney of record is further directed to ensure by no later than 11 July 2014 that the Master is possessed of a full copy of the record in case no. 9282/2014, and to file an affidavit confirming compliance with this direction by no later than 19 July 2014.

9. The applicants' attorney of record is also directed to serve a copy of this order on the attorney of record of the Boland Trust in case no.s 10233/13 and 11666/13 by no later than 11 July 2014, and to file an affidavit confirming compliance with this direction by no later than 19 July 2014.

A.G. BINNS-WARD
Judge of the High Court

Dates of hearing:	29 May and 20 June 2014
Date of judgment:	8 July 2014
Before:	Binns-Ward J
Applicants' counsel:	G.W. Woodland S.C.
Applicants' attorneys:	Edward Nathan Sonnenbergs Inc. Cape Town
First Respondent's counsel:	Z.F. Joubert S.C. Zach Joubert
First respondent's attorneys:	Patel and Totos Cape Town