THE REPUBLIC OF SOUTH AFRICA

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

CASE NO: 19604/2013

In the matter between:

QUESTEK TRANSIT TECHNOLOGIES (PTY) LTD **Applicant**

Versus

LUMEN TECHNOLOGIES cc **Respondent**

And in the in limine application between:

LUMEN TECHNOLOGIES cc **Applicant**

and

QUESTEK TRANSIT TECHNOLOGIES (PTY) LTD **First Respondent**

THE HONOURABLE JUDGE ERASMUS **Second Respondent**

JUDGMENT: 12 JUNE 2014

BOZALEK, J

[1] There are three applications before me in this matter. Firstly, case 19604/2013 in which the applicant (which I shall refer to throughout as *'Questek'*) seeks a provisional liquidation order against the respondent (which I shall I refer to throughout as *'Lumen'*). That is the main application. Secondly, there is an in limine application brought by Lumen for the rescission of the order of Dlodlo J, made in the main application on 27 February 2014. Finally, Questek has brought a conditional counter-application, now no longer conditional, in terms of section 23 of the Arbitration Act, 42 of 1965 (*'the Act'*) seeking to extend the time period provided for the conclusion of an arbitration conducted largely before retired Judge Erasmus. At an earlier stage Lumen sought a postponement of the main application pending the outcome of the rescission application but the postponement application has now become moot. Questek also seeks an order for costs *de bonis propriis* against Lumen's attorney.

[2] All three applications are opposed and first came before me in the urgent lane on 15 May 2014 when by agreement they were postponed for hearing to 20 May 2014. On that day argument was heard but not completed and, as a result of illness on the part of Lumen's counsel, only took up again and was concluded on 29 May 2014.

[3] These three applications are but the latest chapter in a long and tortuous saga of litigation between the parties. In order to determine the liquidation application, as well as Questek's application for costs *de bonis propriis*, it is necessary to set out the background to and course of the litigation as briefly as possible.

BACKGROUND TO AND HISTORY OF THE LITIGATION

[4] Lumen was employed by the City of Cape Town on a contract known as the 25 G contract, being in respect of certain work required on the City's My Citi bus service. Lumen failed to pay Questek, its sub-contractor, several million rand for work done by Questek and its own sub-contractors on the contract. Questek subsequently initiated arbitration proceedings in this regard and obtained an arbitration award in its favour from Erasmus J (retired) together with interest and costs. Prior to the conclusion of the arbitration proceedings Questek concluded that Lumen was dissipating the funds which formed the subject matter of the arbitration and applied to this Court for an anti-dissipation order.

[5] On 21 June 2013 this Court granted a rule nisi ordering Lumen to pay into the trust account of an attorney the sum of R2mil as well as 92% of certain retention monies which were at that stage still to be paid by the City of Cape Town. Pursuant to this order the sum of R2mil was duly paid into the trust account of the firm of attorneys and was ultimately paid over to Questek.

[6] The anti-dissipation application was duly argued on the return date and on 2 September 2013 the rule nisi was confirmed as well as an additional order to the effect that a further R4 426 687.29 be paid into the attorneys trust account pending the finalisation of the order. Lumen failed, however, to pay the outstanding balance into trust and to date has not done so. Instead it unsuccessfully sought to appeal this part of the order but its petition to the Supreme Court of Appeal was dismissed in late January 2014.

[7] A related contempt of court application arising out of Lumen's failure to pay the monies into trust was dismissed when the judge hearing the matter found himself unable to reject Lumen's contention that it was unable to comply with the order because of an inability to pay.

[8] Questek was ultimately successful in the arbitration proceedings obtaining an award for the payment of the capital sums of R1 969 541.30 and R4 603 908.90 together with interest and costs of the proceedings up to 31 October 2013.

[9] Questek then brought an application to make the arbitration award an order of court which was opposed by Lumen which in turn brought a counter-application to have the matter remitted back to the arbitrator.

[10] Argument in that matter commenced before Freund AJ on 11 February 2014.

[11] In the meantime, in November 2013, Questek instituted the present liquidation proceedings against Lumen on the grounds that the latter was unable to pay its debts as they became due and payable and secondly, on the basis that it was just and equitable for Lumen to be wound up. On 27 February 2014 and by agreement between the parties Dlodlo J granted an order in the following terms which I summarise:

1. All claims enjoyed by Questek and Lumen arising out of the 25 G tender contract were fully and finally settled subject to Lumen complying with various obligations and, failing which, Questek would be entitled to pursue the liquidation application

and any other remedies it might have as well as their respective claims and counter-claims in the arbitration proceedings.

2. The arbitration award of retired Judge Erasmus together with a further subsidiary costs award was made an order of court.
3. Respondent was ordered to make payment of the capital amount stipulated in the arbitration award by release of the sum of R2mil from the attorneys trust account and the balance, an amount of R4 573 450.00, within thirty days.
4. Lumen undertook to pay the taxed bills of costs in the liquidation application, all costs as provided for in the arbitration award and the costs of at least three other high Court cases and certain costs awards in the arbitration within 14 days of taxation.
5. Questek authorise and instructed the City of Cape Town to pay over to Questek 92% of any retention monies to Questek as and when these sums became payable to Lumen vis-a-vis the City.
6. The hearing of the liquidation application was postponed sine die in a clause which contained the following stipulation: *'Respondent (Lumen) consents to applicant (Questek) setting the matter down for hearing in Third Division on the next available date after payment becomes due and payable in terms of (certain paragraphs) in the event of respondent failing to make payment as contemplated therein, whether in part or in full or in any other respect failing to comply with this Order. Respondent consents to applicant taking a final order of liquidation in such event'*.

[12] Thereafter Lumen failed to make the payments as stipulated in the order of Dlodlo J. The liquidation matter was set down on an unopposed basis on 29 April 2014 when, against a promise by Lumen to make certain other payments, a further postponement to 9 May 2014 was agreed to between the parties.

[13] The payments were not received, however, and Questek gave notice of its intention to seek the provisional liquidation of Lumen on 9 May 2014.

[14] On the day preceding that hearing Lumen asked for a further postponement which was refused. Shortly thereafter Lumen filed what it termed an in limine application for rescission in which it sought the rescission of the order made by agreement by Dlodlo J on 27 February 2014. It also brought an application for the postponement of the liquidation application pending the termination of the application for rescission. The main ground in Lumen's rescission application was that the order of Dlodlo J was incompetent inasmuch as it had been discovered that the arbitration award of Erasmus J (rtd) was a nullity for non-compliance with section 23 of the Arbitration Act, 42 of 1965 by reason of a period of more than four months having elapsed between the making of the award and the entering into the reference by the arbitrator. After further postponements Questek launched on 12 May 2014, in response to the rescission application, a conditional counter-application in terms of section 23 of the Arbitration Act, seeking an extension of the period within which the arbitrator was entitled to make his award to 16 November 2013, this being the date on which the second part of the initial award was handed down.

[15] As mentioned the three applications were argued on 20 and 29 May 2014, the application for a postponement having become moot.

[16] I propose to deal firstly with the rescission application.

APPLICATION FOR RESCISSION

[17] As mentioned the basis for the application for the rescission of Dlodlo J's order is that more than four months passed between retired Judge Erasmus entering into the reference and the date on which he made the arbitration award. Erasmus J (rtd) commenced the arbitration proceedings, taking over from Adv Farber, on 4 June 2013 and the hearing concluded on 25 September 2013. Erasmus J (rtd) issued an unsigned copy of his arbitration award on 31 October 2013 and a signed copy of the award on 6 November 2013. The arbitration proceedings before him thus lasted a little more than five months.

[18] The parties did not specifically agree, during the arbitration proceedings, to extend the time for making an award as contemplated in section 23 of the Act. Lumen now contends that the parties agreed to the order before Dlodlo J on the basis of a common mistake, namely, that Erasmus J (rtd) had the requisite jurisdiction when he made his award, and this mistake vitiated any apparent consent. Lumen ascribes its failure to raise the issue of the four month period to *'an oversight by its legal representatives'*.

[19] Questek strongly opposes the application for rescission pointing out that Lumen had never previously raised any difficulties with the time that was taken in concluding the arbitration proceedings and pointing out that given the extensive scope of the evidence, the

ambit of the matter and the issues before the arbitrator it could hardly have been expected of him to make his award within four months of 4 June 2013. Erasmus J (rtd) eventually ruled only on certain parts of the arbitration which were made the order of Court now sought to be rescinded by Lumen. Questek submits, furthermore, that through its conduct, Lumen had waived any right it may have had to rely on the award having been made more than four months after 4 June 2013.

[20] To the extent that it might be necessary Questek asked the Court, through its counter-application, to extend the four month period until the date on which the award was actually made. In this regard it was contended on its behalf that if the entire arbitration was to be undone the proceedings would be required to commence *de novo* and this would be an extremely unfair and unsatisfactory result. Questek alleged further that Lumen did not give its full co-operation at all times in the arbitration process and in fact sought to delay the proceedings. Whatever delays outside of the four month period took place these were, it contended, attributable to Lumen's conduct of the matter.

[21] In Lumen's affidavit in reply in the rescission application and in its opposition in the conditional counter-claim, I can find no reference to what it envisages must take place if the rescission application is successful and the counter-application is unsuccessful, more specifically whether it envisages that the entire arbitration proceedings must commence anew. Neither was Ms Ferreira, who appeared on behalf of Lumen, able to advance any reason how such a state of affairs would advance the resolution of the disputes between the parties. In this regard it is most relevant that Lumen has exhausted all its remedies in its attempts to challenge

the arbitration award made by Erasmus J (rtd) by way of an application to review same, to have it remitted back to the arbitrator by way of an application in the High Court and its attempts to appeal unfavourable rulings in these respects.

[22] Relying on a dictum of Kroon J in *Van Zijl v Von Haebler* to the effect that in such a situation the arbitrator's award is of no force and effect until an extension is obtained, Lumen's application for rescission is premised on Rule 42(1)(c) of the Uniform Rules, namely, a common mistake and the common law ground of justus error.

[23] In terms of Rule 42(1)(c) a Court may rescind or vary an order or judgment that has been granted based on a mistake common to the parties. That mistake, says Lumen, was that the parties had the power effectively to confer jurisdiction upon the arbitrator by agreeing to make the award an order when they clearly lacked the power to do so under section 23 of the Act. However, on a proper analysis there was, in my view, no such common error as to the facts. Both parties knew when the arbitration had commenced and concluded before Erasmus J (rtd). When they took the order by agreement from Dlodlo J, at best for Lumen, both parties were unaware that the four month period had elapsed. There is, however, no evidence before me as to what the state of mind of Questek or its legal representatives was at the time that the order was taken. On the probabilities it was the same as that of Lumen's legal representatives, namely, the question of the elapse of the time period had simply not occurred to them given that the parties had concluded a lengthy and difficult arbitration process over a period of little more than five months and neither party had raised the point in question at any prior stage.

[24] I do not regard this as a *'mistake'* common to the parties such as warrants a Court rescinding an order pursuant to the provisions of Rule 42(1)(c). The purpose of the rule is to correct an obviously wrong judgment or order, not to assist a party whose legal representatives failed to take a legal point at the time that they entered into the agreement which was made an order of court[1]. The dictum in Van Zijl's case is distinguishable inasmuch that case was not concerned with an award which was being made an order of court by agreement. Furthermore, a Court has no power to recall or amend an order which was deliberately made, in the absence of fraud in the course of the proceedings[2]. There is no suggestion at all in this matter that there was any fraudulent misrepresentation on the part Questek.

[25] There is a further important consideration and that is the reliance which is placed on agreements reached between legal representatives. This was expressed as follows by Traverso DJP in the *National Director of Public Prosecutions v Yolande Brandt*[3]*: 'I cannot simply, because the applicant's counsel realised at a later stage that she had made an error of judgment in entering into the agreement, permit her to renege on that agreement. Agreements entered into between parties, and particularly legal representatives, are sacred and should be enforced.'*[4] These considerations are of course, all the weightier when it is borne in mind that the agreement between the legal representatives representing their clients was embodied in an order of court.

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[1] See Promedia Drukkers en Uitgewers (Edms) Bpk v Kaimowitz 1996 (4) SA 411 (C)
[2] De Wet v Western Bank Ltd 1979 (2) SA 1031 (A) at 1044
[3] Unreported judgment Case No 2837/2006, handed down on 9 July 2007
[4] At para [25]

[26] In the commentary in Erasmus, Superior Court Practice[5] the authors states that a common mistake would cover the case of a judgment entered into by consent where the parties consented in justus error. They qualify this statement by saying, however, that it is not sufficient, however, if the error is that of one of the parties only, adding that if a litigant by mistake of himself or his legal advisors abandons relief to which he is or may be entitled, the Court has no power, in the absence of fraud of the other party in the course of the proceedings, to recall or amend the order it had made. Where the Court has given judgment on mistaken facts the judgment can only be set aside if the error was due to fraudulent misrepresentation and, as previously mentioned, no such case is made out in the present matter. It may be added that in any event the author's note that the mistake must relate to or have been based on something relevant to the question to be decided by the Court or to something in the procedure adopted: *'this means that there must be a causative link between the mistake and the grant of the order or judgment'.* That element has not in my view been established in the present matter since, on the overwhelming probabilities, had this point been raised by Lumen any earlier it would have successfully been met by the counter-application presently before this Court.

[27] Lumen's reliance on the common law ground of justus error takes its case no further. Such an error must firstly be material and have the effect of excluding consensus between the parties. In my view there was consensus between the parties that the award would be put in the form of an order of court and made binding. But even if I am incorrect in this regard an error is justus when it is reasonable or excusable in all the circumstances of the particular case.

[5] At B1 – 310B

Lumen engaged in arbitration proceedings over a protracted period of time and, before eventually agreeing to the award being made an order of court, in litigation in which it sought to avoid the award. In this process Lumen used a number of legal advisors including half a dozen counsel. If none of these legal representatives was ever alive to the fact that the award had to be made within four months after the arbitrator's entry into the reference such a mistake is neither reasonable nor excusable.

[28] In the result I consider that Lumen has failed to make out any case for the rescission of the order of Court made by agreement by Dlodlo J. My conclusion is strengthened when I have regard to Questek's counter-application for an extension in terms of section 23 of the Arbitration Act. That section, under the heading **Time for Making Award** provides as follows:

> *'The arbitration tribunal shall, unless the arbitration agreement otherwise provides, make its award –*
>
> *a) in the case of an award by an arbitrator or arbitrators, within four months after the date on which such arbitrator or arbitrators entered on the reference or the date on which such arbitrator was or such arbitrators were called on to act by notice in writing from any party to the reference, whichever date be the earlier date; and*
>
> b) ...
>
> *or in either case on or before any later date to which the parties by any writing signed by them may from time to time extend the time for making the award:*

Provided that the Court may, on good cause shown, from time to time extend the time for making any award, whether that time has expired or not'.

[29] The good cause shown by Questek is, in essence, that a full arbitration process was concluded, that a reasoned award was made which withstood litigation and appeal and that the only *'shortcoming'* in the process was that the award was handed down approximately a month after the expiry of the four month period. However, both parties appeared to be unaware, until shortly before the application for rescission that this shortcoming existed and both parties had, prior to Lumen taking the point, reconciled themselves to the process to take as long as it did. During the arbitration process various postponements were granted at the instance of both parties. In fact Questek alleges that the proceedings were unduly protracted by Lumen. It is unnecessary, however, to consider whether these latter averments are correct or not. Lumen has made out no case which has been brought to my attention that it will suffer any unfairness or prejudice as a result of the requested extension being granted.

[30] In *Bester v Easigas (Pty) Ltd and Another* 1993 (1) SA 30 (C) Brandt AJ (as he then was) found that a Court can extend the time period contemplated in section 23(a) of the Act notwithstanding that the award has already been made. The Court relied in this regard on the decision in *Naidoo v Estate Mohamed and Others* 1951 (1) SA 915 (N) where the Court quoted with approval from the case of *Lord v Lee* (1868) LR 3 QB 404 at 409 as follows:

'Surely it is a very salutary enactment which enables a Judge to cure a defect which he thinks are mere defect or form, and which the parties might have cured themselves. I

am, therefore, clearly of the opinion that the section gives power to the Judge to enlarge the term for making the award at any time, and under any circumstances in which he thinks there is good cause for his intervention (of course he would not grant an order if he saw that an injustice might be done thereby)…'

[31] In the result, and for these reasons, the counter-application is granted. I might add that it may well be that, by clear implication, Lumen waived any right which it had to rely on the award being made four months after 4 June 2013 but, in view of Questek's counter-application, I find it unnecessary to decide this question.

[32] This leaves the main application for a provisional order of liquidation and the question of costs to be considered.

THE LIQUIDATION APPLICATION

[33] As mentioned Questek brought the application for liquidation on the basis that the respondent was unable to pay its debts or that it was just and equitable that the respondent should be wound up. The debts on which it rely were the arbitration awards made by Erasmus J (rtd) which, together with interest and excluding costs, exceeded R7 700 000.00.

[34] The principal ground upon which the provisional order of liquidation is now resisted by Lumen, if I understood Ms Ferreira's argument correctly, was on the basis that since the arbitration award was a nullity at the time that the liquidation proceedings were instituted, (this in turn as a result of the fact that the award had been handed down more than four months

after the reference was entered into) there was no question of any debts being owing at the relevant time and therefore no grounds for the liquidation order.

[35] Mr Stelzner, on behalf of Questek, countered this line of argument in two ways; firstly, he submitted that, should the arbitrator's awards be validated by a successful application in terms of section 23 of the Act, that validation took place with full retrospective effect thereby curing any defect in Questek's initial reliance on the award in the liquidation application. In my view this is a complete answer to the point raised on behalf of Lumen, particularly taking into account that when the liquidation papers were initially received Lumen was also under the impression that the award was valid and treated with it on that basis. Hence there was no question of Questek not raising a proper defence to the liquidation application based on this misconception. Furthermore, and in any event, section 346(1)(b) of the Companies Act provides that such an application may be brought *'by one or more of its creditors (including contingent or prospective creditors)'*. Whatever view one takes of the status of the award at the time that the liquidation proceedings were launched Questek was then, on the strength of that award, at the very least a contingent or prospective creditor of Lumen.

[36] Mr Stelzner's second response was to point out that even if no reliance was placed on the award the liquidation proceedings evidenced Questek's reliance on other liquidated debts, namely, costs awards against Lumen not only in the arbitration but in other High Court applications. In addition Questek has a further damages claim against the respondent amounting to some R24mil which currently stands over for later arbitration. In *Gillis Mason Construction Co (Pty) Ltd v Overvaal Crushers (Pty) Ltd* 1971 (1) SA 524 at 528D it was held

that an applicant who has a valid claim against a company for damages for breach of contract is a contingent or prospective creditor of such company and as such, has locus standi to bring a winding up application.

[37] As far as the costs orders are concerned, Ms Ferreira argued that these had as at the date of the proceedings not yet been taxed. However, it is common cause that two of these orders were agreed in round sums.

[38] I turn now to the second requirement which Questek was required to show, namely, that Lumen was unable to pay its debts. Inasmuch as Questek sought the liquidation of Lumen on the basis that it was not a solvent close corporation, the weight of authority is that this concept refers to both actual and commercial insolvency[6].

[39] In the present matter not only has Erasmus J (rtd) made a final award to the effect that the respondent is indebted to the applicant in an amount in excess of approximately R6 500.00 plus interest and costs, but Lumen was ordered by this Court to pay the amount of approximately R6 500 000.00 into trust pursuant to the anti-dissipation application. Notwithstanding this Lumen ultimately only paid the amount of R2mil into trust, which has since been released to Questek, and Lumen refuses or is unable to pay the balance into the trust account or to Questek.

[6] See Standard Bank of South Africa v R Bay Logistics cc 2013 (2) SA 295 (KZB) and Firstrand Bank Ltd v Wayrail Investments (Pty) Ltd [2013] 2 All SA 295 KZB and Scania Finance South Africa (Pty) Ltd v Kommetjie Road Carries and Another 2013 (2) SA 439 (FB) and various unreported judgements of this Court.

[40] Even after reaching a settlement agreement and obtaining some grace, Lumen was unable to meet the financial obligations it undertook in that agreement embodied in a court order made by Dlodlo J.

[41] I consider that these facts largely speak for themselves as regards Lumen's insolvency i.e. it would appear that Lumen is unable to meet the current demands upon it and as such is in a state of commercial insolvency. See *Rosenbach and Co (Pty) Ltd v Singh's Bazaar (Pty) Ltd* 1962 (4) SA 593 (D) at 597G. This conclusion is strengthened by the following additional factors: in a contempt of court application Lumen admitted that it was unable to pay its debts as they became due and owing and painted a dismal financial picture regarding its future financial situation. Secondly, it is common cause between the parties that, since these proceedings were launched, the City of Cape Town has cancelled the 25 G contract between it and Lumen with the result that this no longer provides any stream of revenue or income for Lumen. Finally, Lumen's counsel was unable to refer me to any indications in the papers that Lumen had any other significant of source of income other than the contract in question or to dispute the contention made on behalf of Questek to this effect.

[42] In its original opposing affidavits Lumen resisted the application for its winding up on the grounds that none of the various debts owed by them to Questek were due and payable, that they had an unliquidated counter-claim exceeding all of Questek's claims and that Questek had an ulterior motive in bringing with the application.

[43] I have already dealt with the first defence raised. A reading of the arbitrator's award suggests that Lumen's contention that it has a counter-claim well in excess of Questek's claim

has no foundation in fact. All that is quantified on the papers before the Court are claims in respect of defects allegedly uncovered for which Questek is said to be liable and one based on an alleged over-invoicing which, even if they succeed to their fullest extent, do not extinguish those in respect of which Questek has already succeeded in obtaining an arbitration award. This does not even take into account Questek's further claims for damages against Lumen arising out of cancellation of the subcontract.

[44] What must also be taken into account in this regard is that Lumen was a close corporation formed specifically for the purpose of the 25 G contract with the City of Cape Town and that is has no significant assets of its own.

[45] There is a further matter relating to Lumen's insolvency, namely, its claim in these and other papers that it had no other debtors apart from Questek. This assertion has now proved to be incorrect, if not misleading. On the final day of argument Questek's counsel drew the Court's attention to a matter which had appeared on the previous day's Third Division roll in which a Swiss company, Trapeze Switzerland GMBH, sought an order that Lumen make payment to it of the sum of some 78 000 Swiss Franc, which is approximately R900 000.00. Trapeze Switzerland appears to also have been a subcontractor to Lumen in the 25 G contract. Included in the annexures is a letter from Lumen's attorney, Mr Erleigh, dated 19 February 2014 in which Lumen unequivocally admits its indebtedness to Trapeze Switzerland subject only to receiving an invoice and compliance with its exchange control regulations. Notwithstanding the undertaking that amount has clearly not been paid. Various explanations were given from the bar by Lumen's counsel which were then supplemented by affidavits

from Mr Erleigh and Lumen's director seeking to explain the contradiction. Suffice it to say that the attorney ultimately admits that he was mistaken in advising his client that Trapeze was not a creditor and that it was not incumbent upon Lumen to bring Trapeze's debt and its application to the attention of this Court. For good measure at this eleventh hour Mr Erleigh advised that on 29 April 2014 another supplier had served a written demand on Lumen claiming the sum of R141 156.05. Needless to say, Lumen now claims to dispute that such debts are payable on the basis that it has illiquid counter claims against both Trapeze and the additional creditor which exceed those parties' claims. All this additional information constitutes yet further evidence that Lumen is besieged by creditors and unable to pay them.

[46] The second ground upon which Questek seeks Lumen's liquidation is that it is just and equitable that it be wound up and I shall deal with this alternative basis *ex abundante cautelae*. In regard to this question Lumen's initial suggestion was that Questek was abusing the court process by bringing the liquidation application with the ulterior motive of preventing the respondent from pursuing its alleged damages claim against Questek. I can find no credible substantiation for this broad and generalized allegation. As mentioned, upon closer analysis Lumen's alleged damages claim appears to have very limited prospects of success and in any event, as I understand the position, still has yet to be pursued by Lumen through the arbitration process. By contrast, Questek has obtained substantial awards and costs orders against Lumen but to date has managed to recover only the sum of R2mil. Notwithstanding this fact those financial records of Lumen which have come to Questek's attention reveal that very substantial sums of money have been expended by Lumen on legal fees and consultant fees to

Lumen's director's family members. In addition Lumen's transparent attempts at every turn to forestall or avoid the effect of the award made by the arbitrator and, earlier, the anti-dissipation award made by the High Court, present a picture of an entity which will do everything it can to delay or avoid meeting its financial obligations, all the while disbursing the very monies to which Questek lays claim. The longer that this position continues the slimmer Questek's prospects of recovering any meaningful sums from Lumen.

[47] In *Rand Air (Pty) Ltd v Ray Bester Investments (Pty) Ltd* it was held that the phrase *'just and equitable'* in section 344h of the Companies Act is a *'special ground under which ... certain features of the way in which a company is being run or conducted can be questioned to point of requesting the court to wind it up*[7]*'.* In *Kia Intertrade Johannesburg (Pty) Ltd v Infinite Motors (Pty) Ltd*[8], a matter with marked similarities to the present, Wunsh J held that it would be just and equitable that a company be wound up in circumstances where the company had *inter alia* diverted funds in order to excuse the non-payments of its liabilities and set up a contrived and baseless counter-claim and transferred assets outside the ordinary cause of business. I conclude then that there is no abuse of process on the part of Questek or improper motive in its bringing these proceedings has been shown.

[48] Furthermore, in my view, given the circumstances and history of the litigation between Lumen and Questek, it will be just and equitable that Lumen be wound up so that any

[7] 1985 (2) SA 345 W at page 349
[8] [1999] 2 All SA 268 (W)

dissipation of its funds can be brought to a halt and a liquidator can be appointed to investigate whether and to what extent funds have been dissipated up to this point in time.

[49] Finally, under this ground, there is the consideration that Lumen consented to its liquidation failing its compliance with the terms of the agreement which was made on order of court. It is common cause that Lumen failed to meet those obligations.

[50] Questek has complied with the form and requirements of section 326 of the Companies Act through the provision of sufficient security, the lodging of the papers with the Master of the Honourable Court and service of the founding papers in the prescribed manner.

[51] In the circumstances I am satisfied that Questek has satisfied its onus of prima facie establishing on a balance of probabilities that Lumen is indeed unable to pay its debts, that Lumen has failed to rebut the prima facie inference that it is unable to pay its debts and also that it is also just and equitable that Lumen be wound up.

[52] In the result an order for the provisional winding up of the respondent must follow.

[53] This leaves the question of Questek's application for costs order *de bonis propriis*.

[54] Questek initially sought the dismissal of Lumen's application for a postponement on the scale of attorney and own client, *de bonis propriis*. That application became moot, however, although certain wasted costs were caused thereby. Nonetheless, Questek's counsel argued vigorously for such a punitive costs order, as I understood him, in respect of the applications for rescission and the counter-application in terms of the Arbitration Act.

[55] In support of these costs orders Questek relied on the general background to these three applications with, what it contended, was their overall history of delay, obfuscation, reneging on agreements and the *mala fide* taking of spurious points, all in an effort to avoid the day when Lumen had to meet its obligations in terms of court orders or arbitration awards. Questek also relied on the conduct of Lumen's attorney in failing to disclose the debt owing by Lumen to Trapeze Switzerland GMBH.

[56] Lumen's attorney explained in an affidavit that the point relating to the arbitration award being a nullity only came to his attention shortly prior to the date on which the liquidation application was again set down for hearing following Lumen's failures to make payments in accordance with the order of Dlodlo J. There is nothing to contradicts the attorney on this point and indeed it would seem that Questek itself was not alive to this point before it was raised. It was undoubtedly Lumen's attorney who conveyed this point to his client but ultimately, when the point was taken, I can only presume this was done on the instructions of the client. In these circumstances, although the bringing of the application for rescission was a vain and expedient attempt to stop the inevitable, and without any merit at all, I am reluctant to categorise the attorney's conduct as deserving of a costs order *de bonis propriis*.

[57] As far as the incident involving Trapeze Switzerland GMBH, it reflects very poorly upon Mr Erleigh whose explanation for the omission I regard as somewhat disingenuous. Be that as it may, on balance I do not consider that such conduct alone, or in combination with the other conduct complained of by Questek, justifies a costs order *de bonis propriis*. However, I do consider that a special, punitive costs order should be made in all but the main application

not least because the applications for rescission and postponement constitutes litigation designed only to improperly frustrate and delay court orders and awards which were either agreed to or which followed upon the conclusion of an exhaustive process of arbitration and litigation in which the parties exhausted their rights of review and appeal.

[58] In the circumstances the costs of the rescission application, the wasted costs of the postponement application as well as the costs of the application for the extension of the period within which the arbitration award had validity will all be awarded but on the costs on the scale of attorney and client.

[59] For these reasons the following orders are made:

1. *The time period contemplated in section 23(a) of the Arbitration Act, 42 of 1965 is extended to the later of the two dates upon which the arbitration awards of retired Judge Erasmus were made, being 16 November 2013;*
2. *Lumen Technologies cc's rescission application is dismissed;*
3. *The costs of the rescission application and conditional counter-application for extension of the time period referred in para [1] is to be paid by Lumen Technologies cc on the scale as between attorney and client;*
4. *These costs are to include the costs of two counsel and the costs occasioned by the postponement of the matters on 29 April 2014, 9 May 2014, 12 May 2014, 15 May 2014 and 20 May 2014;*

   PROVISIONAL LIQUIDATION
5. *Lumen Technologies cc is placed under provisional liquidation in the hands of the Master of this Honourable Court;*
6. *A rule nisi is issued calling upon Lumen Technologies cc and all interested parties to show cause, if any, on* ***8 July 2014*** *why the following order should not be made:*

6.1 That Lumen Technologies cc be placed under final liquidation;

6.2 That the costs of this application be costs in the liquidation

7. A copy of this Order is to be served in the following manner:

7.1 On Lumen Technologies cc at its registered address;

7.2 By publication in one each of the 'Cape Times' and 'Die Burger' newspapers

7.3 On the South African Revenue Service;

7.4 On the employees of Lumen Technologies cc;

7.5 On the trade union(s) representing the employees of Lumen Technologies cc, if any.

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L J BOZALEK

JUDGE OF THE HIGH COURT