IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

Case No: 4182/2015

In the matter between:

CHAVONNES BADENHORST ST CLAIR COOPER N O	First Applicant
JOHANN DEMETRIUS APPIES N O	Second Applicant
SADECK ZHAUM AHMED N O	Third Applicant

(In their capacities as the liquidators of the Dividend Investment Scheme)

and

MICROMATICA 324 (PTY) LTD AND 135 OTHERS	Respondents
CITY CAPITAL S A PROPERTY HOLDING LIMITED	First Intervening Party
M JANSE VAN RENSBURG	Second Intervening Party
W S SMITH	Third Intervening Party
THE TRUSTEES FOR THE TIME BEING OF THE O'NEILLE FAMILY TRUST	Fourth Intervening Party
V T FERNHOUT	Fifth Intervening Party

JUDGMENT DELIVERED ON 10 OCTOBER 2016

VAN ROOYEN AJ

[1] By agreement between the parties, only the counter-application ("*the counter-application")* of the first intervening party, City Capital SA Property Holding Limited ("*City Capital"),* needs to be adjudicated in this matter. City Capital contends that this court, on 8 July 2014, appointed the applicants as liquidators of *Dividend Investment Scheme,* a company in liquidation, and that their appointment was a nullity because only the master of this court ("*the master")* has the right to appoint

liquidators. City Capital therefore seeks the setting aside of that order and, as a consequence, a further order granted on 3 December 2014.

Procedural background

[2] On 27 February 2013 this court ordered the winding-up of Div-Prop 11 (Pty) Ltd ("*Div-Prop 11")* and Div-Prop 12 (Pty) Ltd ("*Div-Prop 12")*. First meetings of creditors of both companies were held and the master appointed liquidators. The first and second applicants were appointed for Div-Prop 11. The first and third applicants were appointed for Div-Prop 12. Collectively, the Div-Prop 11 and Div-Prop 12 liquidators will be referred to as "*the Div-Prop liquidators"* herein.

[3] Div-Hold 11 Ltd is the holding company of Div-Prop 11. Div-Hold Income 12 Ltd and Blue Beacon Investments 52 (Pty) Ltd are the holding companies of Div-Prop 12. Collectively, those holding companies will be referred to as "*the three holding companies"* herein.

[4] During March 2013 the boards of directors of the three holding companies resolved to voluntarily commence business rescue proceedings and the same person was appointed as business rescue practitioner ("*the business rescue practitioner")* for each of the three holding companies.

[5] During June 2014 the business rescue practitioner launched applications in this court for the winding-up of the three holding companies. At the same time, he and the Div-Prop liquidators launched an application for an order declaring that: (a) Div-Prop 11, Div-Prop 12 and the three holding companies are a single entity; (b) those five entities shall henceforth be known as the "Dividend Investment Scheme";

(c) the Div-Prop liquidators are also the appointed liquidators of the Dividend Investment Scheme.

[6] On 8 July 2014 this court ordered that the three holding companies be wound up. On the same day this court ordered ("*the 8 July 2014 order")* as follows:

> "*1. Simultaneously with the liquidation orders pertaining to the first to third respondents …, the first to third respondents, Div-Prop 11 (Pty) Ltd and Div-Prop 12 (Pty) Ltd is [sic] declared a single entity as envisaged by Sections 20(9), 22, 141(2)(c) and 141(3) of the Companies Act 2008;*
>
> *2. The five entities referred to in paragraph 1 above shall henceforth be known as the 'Dividend Investment Scheme' to be administered as a company in continuance of the liquidation proceedings of the 4th to 7th Applicants;*
>
> *3. It is declared that the appointed liquidators in the estates of the 4th to 7th Applicants to [sic] be the appointed liquidators of the combined company (the 'Dividend Investment Scheme');*
>
> *…*"

The reference to the "*first to third respondents"* is a reference to the three holding companies and the reference to the "*4th to 7th Applicants"* is a reference to the Div-Prop liquidators.

[7] A dispute arose between the Div-Prop liquidators and the master as to whether a first meeting of creditors had to be held for the Dividend Investment Scheme. By then, first and second meetings of creditors had already been held for Div-Prop 11 and Div-Prop 12. The Div-Prop liquidators were of the view that it was not necessary to have a first meeting of creditors for Dividend Investment Scheme. The Div-Prop liquidators therefore brought an application in this court to have the

matter resolved and on 3 December 2014 an order ("*the 3 December 2014 order")* was granted, the effect of which was that no first meeting of creditors for Dividend Investment Scheme needed to be held.

[8] On 10 December 2014 the master certified that the Div-Prop liquidators were appointed liquidators of "*the Company known as 'Dividend Investments Scheme' which has been placed under liquidation … on 8 July 2014."*

[9] During March 2015 the Div-Prop liquidators launched an application in this court ("*the main application")* seeking relief in terms of s 20(9) of the Companies Act, 71 of 2008, ("*the 2008 Act")* in respect of companies other than those referred to above. City Capital intervened and launched the counter-application. The main application was dismissed by agreement and the counter-application was set down for hearing on 18 April 2016. However, on 18 April 2016 the matter was not allocated to a judge. It was postponed (which may be relevant to a costs order) to 15 August 2016 and on that day I heard oral argument in the counter-application.

Striking out

[10] City Capital applied for the striking out of certain parts of the Div-Prop liquidators' answering affidavit in the counter-application on the basis that those parts related to settlement negotiations that were privileged. However, those settlement negotiations resulted in an agreement that the main application be dismissed and the reason for privilege fell away [1]. Consequently, the application for striking out is without merit.

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[1] *Gcabashe v Nene* 1975 (3) SA 912 (D) at 914H

Factual background

[11] The facts relied on by the business rescue practitioner in the application that led to the 8 July 2014 order will be summarised below.

[12] Div-Prop 11, Div-Prop 12 and the three holding companies were part of a property syndication scheme known as the *Dividend Investment Scheme*. Typically, the investment in a single property would be divided into two parts namely a holding company (such as the three holding companies) and a property company (such as Div-Prop 11 and Div-Prop 12). The property company would purchase the immovable property directly from the seller. The promoter company inflated the value presented to investors. The promoter company received the substantial difference between the investment value and the asset value. Investors immediately lost millions of Rand upon investing in a scheme as a result of the difference between the value of the assets that the investors believed they invested in and the true value. In addition, the promoter company took 15% shareholding in the property company.

[13] Zambezi Retail Park ("*Zambezi")* is a single shopping centre in Pretoria. When the three holding companies were funded by investors, they purchased Zambezi in different parts, at different times, through Div-Prop 11 and Div-Prop 12 so that the three holding companies had substantial loan accounts in Div-Prop 11 and Div-Prop 12. In total, investors invested more than R160 million in the three holding companies but the value of Zambezi is only approximately R45 million. This means that investors have lost more than R100 million already.

[14] It is impossible to determine the value of each of the two parts of Zambezi invested in by different investors. To date only one offer in the sum of approximately R45 million has been received for Zambezi as a whole.

[15] A further problem identified by the business rescue practitioner, is the flow of funds. There was no real separation of the five entities which are the subject of this application. Funds flowed to and from the various companies as investors needed to be paid the dividends that they were promised. It will be impossible to untangle all these transactions.

[16] The failure to keep the financial affairs of the five companies apart is further illustrated by the fact that there is a single electricity meter for Zambezi and an adjacent property called *Zambezi Mall*. Zambezi is currently in a dispute with the City of Tshwane regarding an electricity bill of some R14 million. It is impossible to determine which part of the debt is to be attributed to each of the five companies.

[17] In these circumstances, the business rescue practitioner stated that the purpose of the application (which led to the 8 July 2014 order) was to pierce/lift the corporate veil existing between Div-Prop 11, Div-Prop 12 and the three holding companies and to declare them a single entity for the benefit of investors. It was proposed that the combined entity be named *Dividend Investment Scheme* and that it be treated as a single scheme as it is impossible to separate the transactions relating to these companies.

City Capital's submissions

[18] Initially, broader relief was sought in the counter-application but, during oral argument, I was informed that it was limited to an order setting aside the afore-

quoted paragraph 3 of the 8 July 2014 order and the 3 December 2014 order. City Capital's stance is that the master, and not the court, had to appoint liquidators for the Dividend Investment Scheme and that, as a result, paragraph 3 of the 8 July 2014 order is a nullity. Consequently, the 3 December 2014 order too should be set aside because the Div-Prop liquidators had no standing to launch that application.

[19] It is submitted by City Capital that only the master has the power to appoint a liquidator for purposes of conducting the winding-up of a company and if a court does so, such appointment has no legal consequences [2].

[20] City Capital argues that the Div-Prop liquidators' reliance on *Ex Parte Gore & Others NNO* 2013 (3) 382 (WCC) for their argument that a court has the power to appoint liquidators in terms of s 20(9) of the 2008 Act, is misplaced for the reasons set out below.

[21] According to City Capital, the matter of *Gore* dealt exclusively with relief sought by the existing liquidators of forty-one companies in a group in terms of s 20(9). It had nothing to do with the winding-up of those companies or the appointment of liquidators. Section 20(9) has nothing to do with liquidations and makes no provision for the winding-up of companies, let alone the appointment of liquidators. Section 367 of the Companies Act, 61 of 1973, ("*the 1973 Act")* is part of chapter 14 (retained by the legislature [3]) which deals with winding-up of companies. Section 367 provides that the master shall appoint liquidators. No mention is made of a court or anyone else.

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[2] *The Master of the High Court (North Gauteng High Court, Pretoria) v Motala NO & Others* 2012 (3) SA 325 (SCA) para [14]

[3] Schedule 5, item 9(1), which reads as follows:
"*Despite the repeal of the previous Act, until the date determined in terms of sub-item (4), Chapter 14 of that Act continues to apply with respect to the winding-up and liquidation of companies under this Act, as if that Act had not been repealed subject to sub-items (2) and (3).*"

[22] It is submitted by City Capital that s 367 does not provide that the power of the master to appoint a liquidator must yield to the powers of a court to make an appropriate order in terms of s 20(9)(b) when piercing the corporate veil of a company in terms of s 20(9)(a). If that was the legislature's intention, the legislature, in promulgating the 2008 Act, would have amended s 367 of the 1973 Act.

[23] The reasons why it is the master and not the court who is vested with the power to appoint liquidators, were discussed comprehensively in *Ex Parte the Master of the High Court South Africa (North Gauteng)* 2011 (5) SA 311 (GNP) paras [25] – [33].

[24] It is further argued by City Capital that the powers of a liquidator relate to "*the company*" [4] for which he is appointed and not any other company.

Div-Prop liquidators' submissions

[25] The Div-Prop liquidators point out that the business rescue practitioner, under s141(2)(a)(ii) of the 2008 Act, applied for the liquidation of the three holding companies when he concluded that there had been misfeasance and irregularity in the administration of those companies.

[26] The business rescue practitioner proposed that the court should, in terms of s 141(3), alternatively s 20(9), consolidate the rights and obligations of the three holding companies, Div-Prop 11 and Div-Prop 12. The three holding companies possess nothing other than their interest in Div-Prop 11 and Div-Prop 12. It would

[4] See the wording of several provisions of chapter 14 of the 1973 Act, such as ss 391, 402 and 404-406

save costs and be an acknowledgement of the reality of the estates if all five companies were to be administered together.

[27] The 2008 Act created, in the words of the memorandum which accompanied its consideration in Parliament, a company system based on simplification, flexibility, corporate efficiency, transparency and predictability. That memorandum also made it clear that, as far as insolvency was concerned, the 2008 Act would provide for a transitional arrangement that would retain the current regime set out in chapter 14 of the 1973 Act "*on an interim basis until such time as any new uniform insolvency law may be enacted*".

[28] One of the significant new elements of the 2008 Act is the introduction of a business rescue regime. Whilst the 2008 Act generally deals only with the liquidation of solvent companies, s 141 provides that, if a business rescue practitioner concludes that a company cannot be rescued he must apply for its liquidation. According to the Div-Prop liquidators, this constitutes a new and separate ground for the winding-up of a company which stands apart from the provisions of s 344 of the 1973 Act. In terms of s 141(3) the court has a wide discretion regarding the relief to be granted in such an application. These provisions go beyond chapter 14 of the 1973 Act.

[29] A further new feature of the 2008 Act is the introduction of s 20(9) which provides for the piercing of the corporate veil.

[30] It is argued by the Div-Prop liquidators that regard must be had to the new legislation and its objectives in interpreting the 8 July 2014 order and the statutory basis on which it was made (see the specific reference to certain provisions of the

2008 Act in paragraph 1 of the order). To the extent that there may be a conflict between the 2008 Act and the 1973 Act, the former should take precedence.

[31] The Div-Prop liquidators contend that, strictly speaking, there was not an appointment of liquidators in the 8 July 2014 order. There was arrangement of rights and obligations which would now vest in Div-Prop 11 and Div-Prop 12 and would be administered by the Div-Prop liquidators. This is in accordance with what was done in the *Gore* matter.

Interpretation of the Companies Act

[32] In *Ex Parte the Master of the High Court South Africa (North Gauteng), supra,* the court found that the master is the only official authorised to appoint liquidators of companies in liquidation and that a court has no authority or jurisdiction to effect such appointments. The application in that matter was necessitated by a practice that had developed to include in applications for liquidation a prayer for the appointment of a specific individual as liquidator. Such relief was granted in several matters.

[33] Section 367 of the 1973 Act (which provides that the master shall appoint a liquidator) should not be read in isolation but with the other provisions of Chapter 14 of the 1973 Act [5]. Those provisions contemplate the appointment of a liquidator by the master in circumstances where no liquidator has been appointed yet and when vacancies that occur after the appointment of liquidators have to be filled. This is the scenario that was considered by the court in *Ex Parte the Master of the High*

[5] See the approach to interpretation explained in *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) at para [18]

Court South Africa (North Gauteng). The court did not have to consider whether s 20(9)(b) and 141(3) of the 2008 Act empower a court to appoint a liquidator.

[34] The interaction between chapter 14 of the 1973 Act and ss 20(9)(b) and 141(3) of the 2008 Act will be considered hereinafter and this analysis will be guided by the following approach adopted in *Panamo Properties (Pty) Ltd v Nel and Another NNO* 2015 (5) SA 63 (SCA) para [27]:

> "*When a problem such as the present one arises the court must consider whether there is a sensible interpretation that can be given to the relevant provisions that will avoid anomalies. In doing so certain well-established principles of construction apply. The first is that the court will endeavour to give a meaning to every word and every section in the statute and not lightly construe any provision as having no practical effect. The second and most relevant for present purposes is that if the provisions of the statute that appear to conflict with one another are capable of being reconciled then they should be reconciled."*

[35] Chapter 14 of the 1973 Act and the provisions of the 2008 Act referred to in paragraph 1 of the 8 July 2014 order are all part of the same statutory scheme and ought to be interpreted as such, instead of approaching them as two competing statutes or in a hierarchical fashion, unless specific provision is made for the contrary. Such a specific hierarchical provision is to be found in items 9(2) and (3) of schedule 5 to the 2008 Act, in the following terms:

> "*(2) … sections 343, 344, 346 and 348 to 353 do not apply to the winding-up of a solvent company, except to the extent necessary to give full effect to the provisions of Part G of Chapter 2.*
> *(3) If there is a conflict between a provision of the previous Act that continues to apply in terms of sub-item (1), and a provision of Part G of Chapter 2 of this Act with respect to a solvent company, the provision of this Act prevails."*

[36] Neither the provisions of the 1973 Act referred to in item 9(2), nor the provisions of part G of chapter 2 of the 2008 Act referred to in items 9(2) and (3),

deal with the appointment of liquidators. Consequently, the provisions of chapter 14 of the 1973 Act which deal with the appointment of liquidators are not subject to hierarchical interpretation.

Section 20(9):

[37] Section 20(9) of the 2008 Act does not deal with the winding-up of companies. It provides a statutory basis for piercing the corporate veil of companies [6] and empowers the court to grant consequential relief for purposes of "*fixing the right, obligation or liability in issue of the company somewhere else"* [7]. That does not translate into a power to appoint a liquidator in the circumstances contemplated in chapter 14 of the 1973 Act. Chapter 14 provides a structured framework for the appointment of liquidators and the rationale for that structure, with the emphasis on the master's power to appoint liquidators, was explained in detail in *Ex Parte Master of the High Court South Africa (North Gauteng).* It could not have been the legislature's intention to hide in a statutory provision for piercing the corporate veil, a power for the court to appoint a liquidator in circumstances contemplated in chapter 14 whilst express provision is made for such appointments to be made by the master within the structure provided for in chapter 14. If it were the intention of the legislature to empower the court to appoint liquidators in circumstances contemplated in chapter 14, express provision would have been made for it.

Section 141:

[38] Section 141(2)(a) of the 2008 Act provides that:

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[6] *Gore, supra,* para [30]
[7] *Gore, supra,* para [34]

> "*If, at any time during business rescue proceedings, the practitioner concludes that-*
> *(a) there is no reasonable prospect for the company to be rescued, the practitioner must-*
> *(i) so inform the court, the company, and all affected persons in the prescribed manner; and*
> *(ii) apply to the court for an order discontinuing the business rescue proceedings and placing the company into liquidation"*

[39] In terms of s 141(3), a court to which an application has been made in terms of s 141(2)(a)(ii), may "*make the order applied for, or any other order that the court considers appropriate in the circumstances"*.

[40] It is argued on behalf of the Div-Prop liquidators that s 141 in effect constitutes a new and separate ground for the winding-up of a company which stands apart from the provisions of s 344 of the 1973 Act and that the court, on receiving such an application, is endowed with a wide discretion provided for in s 141(3). According to the Div-Prop liquidators, that discretion includes the power to appoint liquidators.

[41] It has been illustrated earlier herein how, in terms of item 9(2) of schedule 5, certain provisions of chapter 14 of the 1973 Act are not applicable to the winding-up of solvent companies but that the provisions dealing with the appointment of liquidators remain applicable. The 2008 Act does not provide for the exclusion of chapter 14 when a winding-up order is granted in terms of s 141 of the 2008 Act. If the intention was to exclude the provisions of chapter 14, the legislature would have made express provision for it in the same way certain provisions of chapter 14 were excluded in item 9(2) of schedule 5.

[42] The discretion provided for in s 141(3) relates to an order in the alternative to an order "*discontinuing the business rescue proceedings and placing the*

company into liquidation" contemplated in s 141(2)(a)(ii). It does not relate to the consequences (such as the appointment of a liquidator) of a winding-up order. That appears from the fact that the words "*or any other order"* in s 141(3) follow the reference to an order applied for in terms of s 141(2)(a)(ii).

[43] The cogent reasons why the master should appoint a liquidator when a company is wound up in the circumstances considered in *Ex Parte Master of the High Court South Africa (North Gauteng),* equally apply to the winding-up of a company in terms of s 141. There is no conceivable reason why the legislature would have intended to create a different dispensation in the event of a winding-up contemplated in s 141.

Analysis of the 8 July 2014 order

[44] The 8 July 2014 order must be construed in accordance with the principles of construction that apply to the interpretation of documents [8]. Paragraph 3 of the 8 July 2014 order must not be read in isolation but in the context of the order "*as a whole and the circumstances attendant upon its coming into existence*" [9]. Paragraph 3 of the order must be considered, in particular, in conjunction with paragraphs 1 and 2 which are not under attack. Considered objectively and preferring a "*sensible meaning"* [10], the effect of paragraphs 1 and 2 is the following:

[44.1] Div-Prop 11, Div-Prop 12 and the three holding companies are considered to be a single entity ("*the single entity")*.

[44.2] The single entity shall be known as *Dividend Investment Scheme*.

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[8] *Finishing Touch 163 (Pty) Ltd v BHP Billiton Energy Coal South Africa Ltd and Others* 2013 (2) SA 204 (SCA) para [13]

[9] *Natal Joint Municipal Pension Fund, supra*

[10] *Natal Joint Municipal Pension Fund*, *supra*

[44.3] The single entity shall be administered "*as a company*". That can only mean that it shall be administered as if the five companies are one company. The court did not (and could not) create a new company.

[44.4] The administration of the single entity shall be conducted in continuation of the liquidation proceedings relating to Div-Prop 11 and Div-Prop 12 which means that:

[a] the Div-Prop liquidators are to continue with the liquidation process as if Div-Prop11 and Div-Prop 12 are one entity.

[b] the three holding companies are to be dealt with as if they are part of Div-Prop 11 and Div-Prop 12.

[c] the pending liquidation proceedings (in respect of Div-Prop 11 and Div-Prop 12) have to continue from where they were immediately prior to the 8 July 2014 order and do not have to start afresh.

How else are the liquidation proceedings to continue, as ordered in paragraph 2 (which is not under attack) of the 8 July 2014 order, if these conclusions were not correct?

[45] The order in paragraph 3 is a necessary consequence of the effect of paragraphs 1 and 2 dealt with above.

[46] There are distinctions between this matter and *Gore* but, in effect, the 8 July 2014 order, like the order in *Gore,* engineered the fixing of rights and obligations elsewhere. The rights and obligations of the three holding companies were transferred to Div-Prop 11 and Div-Prop 12 who in turn are to be treated as one

entity. This structure was necessitated by the fact that, unlike the group of companies dealt with in *Gore*, the property syndication scheme in this matter does not involve a single overall holding company. Each property is owned by a different company and each property owning company is owned by a different holding company.

[47] Read contextually, this was not an appointment of liquidators contemplated in chapter 14 of the 1973 Act, i e the appointment of liquidators in circumstances where no liquidator has been appointed yet or the filling of a vacancy that occurred after a liquidator had been appointed.

[48] The master appointed the Div-Prop liquidators for Div-Prop 11 and Div-Prop 12. The three holding companies whose separate legal personalities have to be disregarded, courtesy of paragraph 1 of the 8 July 2014 order, are to be administered as if they are a part of Div-Prop 11 and Div-Prop 12. As a result of paragraph 1 of the order, there is no remaining company for which a liquidator can be appointed. Consequently, the Div-Prop liquidators are to continue to administer the two companies for which they were appointed but as a result of paragraph 1 of the order, they have to act jointly because those two companies are considered to be one entity and the three holding companies too are considered to be part of that entity.

[49] The court therefore did not act in contravention of the 2008 Act, read with the provisions of chapter 14 of the 1973 Act, when it included paragraph 3 in the 8 July 2014 order and, as a result, the 3 December 2014 order too is not impugnable.

Costs

[50] As far as costs are concerned, I am not convinced by the argument of the Div-Prop liquidators that the counter-application is vexatious and that a punitive costs order is justified. The interpretation of the 8 July 2014 order and the relevant provisions of the 1973 Act and the 2008 Act is not straightforward. It cannot be said that City Capital did not have an arguable case. The Div-Prop liquidators further contend that the wasted costs resulting from the postponement on 18 April 2016 ought to be paid by City Capital on a punitive scale. The circumstances that led to that postponement do not justify the application of a punitive scale.

Order

[51] It is ordered that:

1. the application of the first intervening party (City Capital SA Property Holdings Ltd) for the striking out of certain parts of the applicants' answering affidavit in the counter-application, is dismissed with costs, including the costs of two counsel.

2. the counter-application of the first intervening party for the relief in paragraphs 3.1 and 3.2 of the notice of counter-application, is dismissed with costs, including the costs of two counsel.

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VAN ROOYEN, AJ

Heard: 15 August 2016
Delivered: 10 October 2016

Counsel for applicants: S du Toit SC and T Prinsloo
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