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

**REPORTABLE**

**CASE NO: 17150/2016**

In the matter between:

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| **GARY WALTER VAN DER MERWE** | First Applicant |
| **GARY WALTER VAN DER MERWE N.O.** (on behalf of the Eagles Trust) | Second Applicant |
| **FERN JEAN CAMERON N.O.** (on behalf of the Eagles Trust) | Third Applicant |
| **CANDICE VAN DER MERWE N.O.** (on behalf of the Eagles Trust) | Fourth Applicant |
| and | |
| **ZONNEKUS MANSION (PTY) LTD (IN LIQUIDATION)** | First Respondent |
| **THE EMPLOYEES OF ZONNEKUS MANSION (PTY) LTD** | Second Respondent |
| **THE COMMISSIONER FOR THE SOUTH AFRICAN REVENUE SERVICE** | First Intervening Party |
| **THE STANDARD BANK OF SOUTH AFRICA LIMITED** | Second Intervening Party |

## JUDGMENT DELIVERED ON MONDAY 19 DECEMBER 2016

**GAMBLE, J:**

INTRODUCTION

[1] On Saturday 10 September 2016 the first applicant, Mr Gary Walter van der Merwe ("van der Merwe"), as a matter of urgency, lodged an application in this court for the following orders –

> *"1. Placing Zonnekus Mansion Pty Ltd (in liquidation)*[hereinafter 'ZKM'] *under supervision and for it to commence business rescue proceedings in terms of the provisions of Section 131 (1), read with section 131 (4) (a) of the Companies Act No 71 of 2008 ("the Act");*
>
> *2. Confirming the appointment of Gary Walter van der Merwe as a director of the Respondent in Business Rescue and ratifying the decisions taken by him from 13 April 2015 to date regarding the implementation of the business rescue plan of the Respondent as contemplated in the first, second and third business rescue applications and in terms of section 137 of the Companies Act 71 of 2008;*
>
> *3. That the purported claim by by SARS against the Respondent be adjudicated on in the pending Action ordered by Rogers J under case number*

*8569/2014 and that the matter involving the alleged claim be joined to that case which involves inter alia the same parties and claims.*

*4. Appointing* ***NEILL MICHAEL HOBBS*** *as the interim practitioner, as contemplated in section 131 (i) of the Act.*

*5. Directing that the costs of this application shall be borne by [ZKM]* ***(in business rescue)*** *unless the application is opposed, in which case a costs order shall be sought against those parties who oppose the application, and if the liquidators should oppose, against them de bonis propriis.*

*6. Granting such further and/or alternative relief as the Honourable Court may be disposed to granting."*

[2] The notice of motion cited the second to fourth applicants in their respective capacities as trustees of the Eagles Trust (IT 3019/95) as co-applicants in the matter. They are van der Merwe himself, his 75 year old mother ("Ms Cameron") and 23 year old daughter ("Candice"). Further, the notice of motion cited ZKM as the first respondent and its employees as the second respondent. Notwithstanding the obvious interest of the first intervening party (*"SARS")* in the relief sought in prayer 3 of the notice of motion, it was not cited as a respondent. Nor was the second intervening party ("*SBSA"* or "*the bank"*), which to the knowledge of van der Merwe and the attorney for the Trust and the employees, Mr. Dunn, had a material interest in the matter, cited as a respondent in the notice of motion.

[3] The notice of motion was drawn in the long form directing that the matter be heard on 17 October 2016 in the event of non-opposition. It was signed by van der Merwe personally and on behalf of the Trust and was marked for service on ZKM at 1A Chandos Close, Woodbridge Island, Milnerton, Cape Town and on the second respondent at C/O TJC Dunn Attorneys, Suite 3, 1A Chandos Close, Woodbridge Island, Milnerton, Cape Town. Receipt of the papers on behalf of those respondents was acknowledged by van der Merwe and TJC Dunn Attorneys. The notice of motion was also marked for service on the Trust at the same address and further on the Companies and Intellectual Property Commission, SARS, SBSA, ABSA Bank Limited and the liquidators of ZKM all at their respective email addresses. It bears mention at this juncture that the office of the Registrar of this court is not open for business on a Saturday but, by special arrangement, a standby registrar is available to attend to the issuing of urgent applications, properly so-called, i.e. applications which are to be moved before the Duty Judge as a matter of urgency. I shall revert to this issue later.

[4] After receipt of the papers SARS and SBSA brought applications to intervene in BR4, which applications were opposed by the applicants and the second respondent. The intervening parties also sought certain incidental relief to which I shall refer later and further requested the court to fix a timetable for the hearing of the application on an expedited basis on the semi-urgent roll. After an exchange of almost 600 pages, leave to intervene was granted to both parties by Weinkove AJ on 30 September 2016, while the incidental relief was held over for determination by this court. The court also directed that the matter be set down for hearing on 7 and 8 December 2016. When the matter did not conclude before this court on the second

day it continued the following day (Friday 9 December 2016) with the court sitting until 18h30, whereafter judgment was reserved.

[5] At the hearing van der Merwe appeared in person, the Trust was represented by Adv P. Tredoux instructed by TJC Dunn Attorneys, the second respondent by Mr. Dunn himself, SARS by Advs H.G.A.Snyman SC, C. Naude and Z. Cornelissen and SBSA by Adv.G.W.Woodland SC. The court is indebted to counsel and van der Merwe for the sterling effort put into their respective heads of argument and bundles of authorities, to the attorneys for the meticulous preparation of the papers and to the parties and their legal representatives generally for their co-operation and indulgence in sitting long hours to bring the matter to finality.

[6] During argument van der Merwe abandoned the relief sought in prayer 2 and I shall therefore only comment thereon briefly. However, as that prayer reflects, this was the fourth in a series of business rescue applications brought in respect of ZKM and was referred to by the parties during argument as "*BR 4*". The previous three applications were referred to as BR1, 2 and 3 respectively. I shall deal with those proceedings shortly but for present purposes it bears mention that BR1 and 3 were dismissed by this court while BR2 was purportedly withdrawn by the applicants in that matter. However, as the matter had already been set down for hearing and the consent of the respondents therein had not been obtained prior to the withdrawal, the withdrawal was opposed and, after further argument, the application was formally dismissed by Weinkove AJ. But, before dealing with those applications some corporate background is necessary.

CORPORATE HISTORY

[7] ZKM was registered as a private company on 3 November 1999. Its first directors were van der Merwe, and one Leno de Villiers, who both resigned on 14 December 2004. They were replaced by Ms Cameron, who until recently remained the the sole director of the company. Initially van der Merwe was the sole shareholder in ZKM but since 2004 the entire shareholding has vested in the Trust. Notwithstanding the fact that van der Merwe is neither a shareholder nor a director of ZKM, he has for many years, as he positively asserts, been the guiding mind and corporate controller of the company.

[8] ZKM owns 5 immovable properties –

- A partially developed residential property on the Dennegeur Estate in Somerset West which is intended for re-sale once completed;
- 3 adjacent residential properties in Burmeister Circle , Milnerton which are utilized for rental income;
- Zonnekus Mansion.

[9] Zonnekus Mansion is the jewel in the crown. It is an estate of some 8000 sq.m located on the beach at Woodbridge Island close to the mouth of the Milnerton lagoon. The stately residence on the property, which commands endless views of Table Bay, was designed by Sir Herbert Baker and built in 1926 by Sir David Graaff, an entrepreneur, land owner and politician affectionately known as "*The*

*Octopus*" because he had interests in so many Cape businesses[1]. The value of the property is estimated to be between R30 and 50 million. Van der Merwe told the court during argument that he has lived in the property for more than 20 years and it is clearly his most treasured possession: a castle which he will defend to the bitter end with every sinew of war available to him.

[10] Van der Merwe claims that ZKM also owns 2 Bell "Huey" helicopters and a Mitsubishi fixed wing aircraft. Although there is reference to certain unidentified aircraft in the 2012 financial statements of ZKM, SARS and the bank believe that ownership thereof vests in other entities. Judging from certain promotional brouchures placed before the court, the Mansion is lavishly furnished with every modern appliance and appurtenance which the discerning occupant would desire. In addition there is a large fleet of motor vehicles under attachment by SARS, ownership whereof may ultimately vest in van der Merwe.

LEGAL PROCEEDINGS INVOLVING ZKM

[11] In 2011 the Homeowners' Association of Dennegeur Estate commenced liquidation proceedings against ZKM arising out of the non-payment of levies alleged to be due to it in respect of the Somerset West property. After protracted litigation the application was dismissed by Pillay AJ on 8 May 2014.

[12] In June 2013 SARS commenced an investigation into the tax affairs of *inter alia* ZKM, Gary, Candice and other taxpayers directly or indirectly linked to ZKM. As part of that investigation SARS approached this court on 30 August 2013 for a

[1] Wikipaedia Online Encyclopaedia *sv* "Sir David Graaff, 1st Baronet"

provisional order under s 163(4)(a) of the Tax Administration Act, 28 of 2011("the TAA") preserving a variety of assets belonging to the various entities under investigation. Rogers J granted such an order returnable on Monday, 7 October 2013.

[13] Candice anticipated the return day of that order before Savage AJ, in litigation which eventually found its way to the Supreme Court of Appeal.[2] On 11 December 2013 Davis J granted an order in terms of section 50 of the TAA for an enquiry into the affairs of van der Merwe and, inter alia. ZKM. That enquiry was subsequently held before retired Judge M.M.Joffe and a number of witnesses, including Gary, were questioned in the process.

[14] On 19 March 2014 Rogers J made the preservation order final as against, inter alia, Gary and ZKM in an order taken by agreement. Thereafter, and within the 2 month period directed by Rogers J,[3] SARS instituted action against van der Merwe, Candice and ZKM in this court under case number 8569/2014 claiming a globular sum of R42m. All of the above-mentioned immovable assets of ZKM are presently subject to attachment under the Rogers order, as are the helicopters, the fixed wing aircraft and more than a dozen motor vehicles. It is common cause that none of these assets may be disposed of without the sanction of this court.

[15] On 20 June 2014 SBSA applied to this court for a provisional order of winding up in respect of ZKM. That application was enrolled for hearing in the motion court on 1 July 2014 (during the court recess). A notice of opposition was filed on 25 June 2014 and when the matter came before the court on 1 July it was postponed by

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[2] CSARS v Van der Merwe 2016(1) SA 599 (SCA) hereafter referred to as "*Candice's application"*

[3] The precise date does not appear from the papers but it was said to be not later than 15 May 2014.

agreement for hearing in the Fourth Division on 11 September 2014. An agreed timetable was incorporated in the court order. The application served before Traverso DJP on 11 September 2014, when a further postponement was sought by van der Merwe to enable an answering affidavit to be filed. Her Ladyship was not prepared to grant the relief sought, suggesting that dilatory tactics were being employed and granted a provisional order returnable on 28 October 2014. All opposition disappeared and on that day a final order of liquidation was granted. For the sake of completeness I point out that the application was based on a mortgaged loan by SBSA to ZKM totaling R5,3m and in respect whereof ZKM had been in default since October 2013.

[16] On 1 October 2014 the Master appointed provisional liquidators for ZKM and on 14 December 2014 a final appointment was made. On 2 December 2014 the first meetings of creditors and members were convened. At that meeting 4 claims totalling R13 443 174.08 were submitted and accepted as proved, including three secured claims on behalf of SBSA. On 15 December 2014 the liquidators successfully applied to this court for an extension of their powers in terms of section 386 (5) of the Companies Act, 61 of 1973 (“the old Companies Act”). On the same day the liquidators wrote to ZKM’s erstwhile attorney, Mr. Perold, informing him of their appointment and requesting a meeting in January 2015 with van der Merwe. A dispute thereafter arose in relation to ownership of the helicopters and on 2 March 2015 the liquidators informed Mr.Perold of their intention to hold an enquiry in terms of section 417 of the old Companies Act in relation thereto. An order to this effect was granted by this court on application by the liquidators on 25 March 2015.The enquiry was convened before retired Judge Joffee to commence on 20 April 2015.

[17] However, before the enquiry could proceed van der Merwe, Candice, the Trust and two other corporate entities launched BR1 on 13 April 2015. In that application, *inter alia*, the liquidators, SBSA, SARS, and ABSA Bank were cited as respondents. As a consequence of the launching of BR1 the section 417 enquiry was postponed.

[18] In response to BR1, SARS and SBSA applied to this court for a declaratory order that business rescue was not competent in respect of a company which was in final liquidation. The preliminary point was argued on 28 May 2015 before Ferreira AJ and was ultimately resolved in favour of van der Merwe on 10 June 2015 in light of the judgment of the Supreme Court of Appeal in *Richter*[4] delivered on 1 June 2015. Ferreira AJ then postponed BR1 for hearing on the semi-urgent roll on the earliest date upon which the parties were able to agree.

[19] On the assumption that there had been agreement in that regard, the matter was enrolled to be argued before Binns-Ward J on 1 December 2015. On that day van der Merwe successfully took the point that the matter had been set down improperly in that there had not been agreement on the date and the application was accordingly postponed for hearing on the semi-urgent roll on 4 February 2016.

[20] When the matter came before Koen AJ on that day the court refused an application by van der Merwe for condonation of the late filing of a replying affidavit. In so refusing, Koen AJ fortuitously relied upon the decision by the Supreme Court of

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[4] Richter v ABSA Bank Limited 2015 (5) SA 57 (SCA)

Appeal ("the SCA") in Candice's application where there had been a delay in filing certain documents before that court. An application for condonation in that regard was refused with the relevant principles in relation thereto being restated by the court. In the result the matter proceeded before Koen AJ in the absence of a replying affidavit from van der Merwe.

[21] On 18 February 2016 Koen AJ dismissed the application in BR1 and on 18 March 2016 refused an application for leave to appeal. A petition for special leave to appeal to the SCA was refused by that court on 4 July 2016.

BUSINESS RESCUE 2, CASE NO 10504/2016

[22] Even before the SCA had delivered its judgment on the petition before it, BR 2 was launched. This time it was brought by the alleged employees of ZKM at the behest of van der Merwe on 22 June 2016 under case number 10504/16. On 1 August 2016 Weinkove AJ gave directions and fixed a timetable for a hearing of the matter of semi-urgent roll on Monday, 5 September 2016. However, on Friday 2 September 2016 the applicants in that matter filed a notice of withdrawal of BR2 which was of no force and effect given that they failed, in terms of Rule 41(1)(a) to secure the consent of their opponents or the leave of the court to such withdrawal, the matter already having been enrolled for hearing.

[23] In the circumstances, the matter proceeded on the Monday before Weinkove AJ, who found that BR2 constituted an abuse of process of court and had been brought in bad faith. On 11 November 2016 Weinkove AJ dismissed an application for leave to appeal his findings in BR2. The court was informed by van der

Merwe from the Bar in this matter that a further application for special leave to the SCA was in the process of being filed. He pointed out that such leave related, not to the merits of BR2, but to certain of the ancillary relief granted by Weinkove AJ. Accordingly, the parties were in agreement that a positive outcome of such petition would not affect the merits of BR4.

BUSINESS RESCUE 3, CASE NO 15861/2016

[24] On Friday 2 September 2016 van der Merwe was at it again. BR3 was launched on that day, apparently in the mistaken belief that BR 2 had been validly withdrawn. Weinkove AJ dealt with BR 3 on Friday 9 September 2016 and dismissed the application on the turn as being a nullity, reasoning that it had been launched while BR2 was still a live application. On that day Weinkove AJ also dismissed an application for his recusal and made a costs order against Mr. Dunn *de bonis propriis.* This court was also informed by van der Merwe that an application for leave to appeal had been lodged in BR3 against the ancillary relief granted, which application is yet to be heard by Weinkove AJ.

PROCEDURAL ISSUES IN RELATION TO BR4

[25] It is against this background that the current application, BR 4, was hastily launched on Saturday, 10 September 2016, immediately after the dismissal of BR 3 the previous day. The application is procedurally defective in a number of respects. In the first place, the notice of motion is signed by van der Merwe personally and on behalf of the Trust. Yet, there is no resolution from the Trust authorizing either the institution of the application or van der Merwe to represent it. Then there is the

fact that the employees cited collectively as the second respondent are not identified in any manner whatsoever in either the notice of motion in the founding affidavit. It goes without saying that no confirmatory affidavits by the alleged employees were filed. Further, there is no entry of appearance by TJC Dunn Attorneys on behalf of either the Trust or the employees. In the circumstances, the source of Mr Tredoux's instructions and the entitlement of Mr Dunn to represent the Trust and the employees remains a mystery; this notwithstanding that he is the "in-house attorney" (in the fullest sense of the word) for van der Merwe and the interests he effectively controls (hereinafter "*the van der Merwe interests").*

[26] Finally there is the question of non-joinder of SBSA and SARS. The latter point was remedied to an extent by the fact that these parties were given notice electronically, albeit not in terms of the Rules, and were able to apply to intervene. But the point is that they should never have been put to the trouble, expense and resultant delay of such an application in the first place. All of this is a matter of concern to the court since, as van der Merwe stated during his address, Mr Dunn accompanied him to the Registrar's office on the Saturday morning to facilitate the issuing of the papers. Notwithstanding these procedural defects, SBSA and SARS asked the court to determine the application finally on its merits so as to avoid the possibility of a further application on papers duly remedied. It seems to me that it is in the interests of justice to adopt such a pragmatic approach.

[27] Before dealing with the merits of BR4, I shall set out the principles applicable to business rescue proceedings brought under Chapter 6 of the Companies Act, 71 of 2008 ("the Act"). I do so fairly briefly given the relative urgency

in delivering this judgment and because the parties were essentially *ad idem* in relation to the mandated approach.

THE GENERAL APPROACH TO BUSINESS RESCUE APPLICATIONS

[28] In the first place it must be observed that Chapter 6 contains its own internal definitions in s 128 of the Act. Accordingly, a business rescue application is to be brought by an *"affected person"* in circumstances where the intention is "*to facilitate the rehabilitation of a company that is financially distressed* ". There is no dispute that ZKM, as a company that has been finally wound up, is *"financially distressed."* Nor is there any dispute that the Trust, as the shareholder of ZKM, is an "*affected person"* as defined. All parties are in agreement that the Trust has the necessary *locus standi* before this court. Similarly, it is not in dispute that SBSA has *locus standi* to oppose the current business rescue application, given that it is a proven creditor in liquidation.

[29] What is in issue is whether -

- Van der Merwe has *locus standi* to bring the application personally;
- ZKM conducts a business;
- ZKM has any employees;
- SARS is a creditor of ZKM, thus giving it *locus standi* to oppose business rescue;

- A suitable business plan has been put up in compliance with the criteria set out in Chapter 6 and the applicable case law.

[30] In the founding affidavit in this application van der Merwe refers only briefly to the judgment of Koen AJ in BR 1. It is as if the judgment is coincidental and of no consequence, since no copy thereof is attached to the founding papers. Van der Merwe puts it thus –

> "*[18] …. It is submitted that due to a change in circumstances relating to the Respondent, the refusal of BR 1 has no effect on this current application and with respect ought not to be considered at all."*

[31] The judgment of Koen AJ in BR 1 is fortunately attached to the answering affidavit filed on behalf of SARS.[5] I am in agreement with the approach adopted by Loen AJ in his judgment based as it is on the decision of the SCA in *Oakdene Square*[6] .

[32] Brand JA observes in *Oakdene Square* that a court of first instance exercises a general and wide discretion when deciding whether to grant business rescue under s131 (4) of the Act. That section reads as follows -

> *"(4) After considering an application in terms of subsection (1), the court may-*

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[5] See also Van der Merwe and Others v Zonnekus Mansions (Pty) Ltd and Others [2016] ZAWCHC 11 (18 February 2016)

[6] Oakdene Square Properties (Pty) Ltd and Others v Farm Bothasfontein (Kyalami) (Pty) Ltd 2013 (4) SA 539 (SCA)

*(a) make an order placing the company under supervision and commencing business rescue proceedings if the court is satisfied that-*

*(i) the company is financially distressed;*

*(ii) the company has failed to pay over any amount in terms of an obligation under or in terms of a public regulation, or contract, with respect to employment-related matters; or*

*(iii) it is otherwise just and equitable to do so for financial reasons, and there is a reasonable prospect for rescuing the company; or*

*(b) dismissing the application, together with any further necessary and appropriate order, including an order placing the company under liquidation.*

[33] Each case will be determined on its merits, at all times having regard to the definition of business rescue in s128 (1)(b) of the Act which sets out the goals for consideration under s131(4):

*"'**business rescue'** means proceedings to facilitate the rehabilitation of a company that is financially distressed by providing for-*

*(i) the temporary supervision of the company, and the management of its affairs, business and property;*

*(ii) a temporary moratorium on the rights of claimants against the company or in respect of property in its possession; and*

*(iii) the development and implementation, if approved, of a plan to rescue the company by restructuring its affairs, business, property, debt and other liabilities, and equity in a manner that maximises the likelihood of the company continuing in existence on a solvent basis or, if it is not possible for the company to so continue in existence, results in a better return for the company's creditors or shareholders than would result from the immediate patient of the company."*

[34] Brand JA observes that that definition must be read in conjunction with the definition contained in s 128(1)(h) that-

"'***rescuing the company'*** *means achieving the goals set out in the definition of "business rescue" in paragraph (b);"*

Accordingly, said Brand JA, an applicant for business rescue must establish grounds for the reasonable prospect of achieving one of the two goals set in s128(1) (b) -

> "[31] ….*(E)ither to restore the company to a solvent going concern, or at least to facilitate a better deal for creditors and shareholders than they would secure from a liquidation process."*

[35] In circumstances where a business rescue practitioner, as opposed to the liquidator, is likely to have to sell property belonging to the embattled company, Brand JA points out that the purpose of business rescue is not intended to serve as a less expensive form of winding up.

> *"[33] My problem with the proposal that the business rescue practitioner, rather than the liquidator should sell the property as a whole, is that it offers no more than an alternative, informal kind of winding-up of the company, outside the liquidation provisions of the 1973 Companies Act which had, incidentally, been preserved, for the time being, by item 9 of schedule 5 of the 2008 Act. I do not believe, however, that this could have been the intention of creating business rescue as an institution. For instance, the mere savings on the cost of the winding-up process in accordance with the existing liquidation provisions could hardly justify the separate institution of business rescue. A fortiori, I do not believe that business rescue was intended to achieve a winding up of the company to avoid the consequences of liquidation proceedings, which is what the appellant's apparently seek to achieve."*

[36] Further, Brand JA refers to the important investigative powers of a liquidator acting under the old Companies Act in circumstances where there have been, for example, questionable transactions on the part of the company or its

directors or employees, and which warrant further investigation by way of interrogation.

> *"[35] …On the respondents' version the company has been stripped of all its income and virtually all its assets while under the management [of one of the company's directors]. These allegations are, of course, denied by the appellants. But, as I see it, that is not the point. The point is that these are the very circumstances at which the investigative powers of the liquidator - under s417 and 418 of the 1973 Companies Act - and the machinery for the setting aside of the improper dispositions of the company's assets - provided for in the Insolvency Act 24 of 1936 - are aimed. In this light I believe there is a very real possibility that liquidation will in fact be more advantageous to creditors and shareholders - excluding, perhaps, the appellants - than the proposed informal winding up of the company through business rescue proceedings."*

[37] Finally, Brand JA points out that where the majority of creditors are against the proposed business rescue scheme, that is an important consideration for the court to have regard to –

> *"[38] …As I see it, the applicant for business rescue is bound to establish reasonable grounds for the prospect of rescuing the company. If the majority creditors declare that they will oppose any business rescue scheme based on those grounds, I see no reason why that proclaimed opposition should be ignored. Unless, of course, that attitude can be said to be unreasonable or mala fide. By virtue of s132 (2) (c) (i) read with s152 of the Act, rejection of the proposed plan by the majority of creditors will normally sound the death knell of*

*the proceedings. It is true that such rejection can be revisited by the court in terms of s153. That, of course, will take time and attract further costs. Moreover, the court is unlikely to interfere with the creditors' decision unless their attitude was unreasonable. In the circumstances I do not believe that the court can be criticised for having regard the declared intent of the major creditors to oppose any business rescue plan along the lines suggested by the appellants."*

[38] An applicant for business rescue is not required to set out a detailed business rescue plan. However, the applicant must establish grounds for the reasonable prospect of achieving one of the two goals mentioned in section 128 (1)(b) of the Act (ie a return to solvency or a better deal for creditors and shareholders than through liquidation). A reasonable prospect means a possibility that rests on objectively reasonable grounds.[7]

[39] In *Propspec* [8] van der Merwe J observed that –

"*There can be no doubt that, in order to succeed in an application for business rescue, the applicant must place before the court a factual foundation for the existence of a reasonable prospect that the desired object can be achieved."*

Expanding thereon, the court noted [9] that-

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[7] Propspec Investments (Pty) Ltd v Pacific Coast Investments 97 Ltd 2013(1) SA 542 (FB) at [12]

[8] [31]

*"..(A) reasonable prospect in this context means an expectation. An expectation may come true or it may not. It therefore signifies a possibility. A possibility is reasonable if it rests on the ground that it is objectively reasonable.… [a] reasonable prospect means no more than a possibility that rests on an objectively reasonable ground or grounds."*

[40] In *Wedgewood Village* [10] Binns-Ward J held the view that an applicant for business rescue must be able to place before the court a cogent evidential foundation to support the existence of a reasonable prospect that the desired object could be achieved.

[41] Lastly, by way of background, it is generally accepted that business rescue is intended to be a short-term measure. In *Gormley* [11] Traverso DJP made the following observation:

"….*The Act envisages a short-term approach to the financial position of the company. This is so for self-evident reasons. There must be a measure of certainty in the commercial world. Creditors cannot be left in a state of flux for an indefinite period. The provisions of the Act make it clear that the concept of business rescue only applies to companies which are financially distressed as defined in the Act. If a company is not so financially distressed, the provisions of Chapter 6 of the Act will not*

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[9] [12]

[10] Koen and Another v Wedgewood Village Golf and Country Estate (Pty) Ltd and Others 2012(2) SA 378 (WCC) at [17]

[11] Gormley v West City Precinct Properties (Pty) and Another [2012] ZAWCHC 33 (18 April 2012) at [11]

> *apply. It must either be likely that the debts can be repaid within 6 months or that there is the likelihood that the company will go insolvent in the ensuing 6 months."*

Traverso DJP went on to find that because the company in question was at the time insolvent and that it required a moratorium to pay its debts, the company was not financially distressed within the meaning of section 128(1)(f) of the Act.

[42] In light of these authorities I turn to consider whether the applicants have made out a case for the primary relief sought in these proceedings. I do so in the context of the issues referred to in paragraph 29 above.

DOES VAN DER MERWE HAVE *LOCUS STANDI* ?

[43] Given that it is not in dispute that the Trust as shareholder is an "*affected person",* and given that van der Merwe is a trustee who holds a general power of attorney from Ms Cameron, and assuming that the Trust is van der Merwe's *alter ego*[12]*,* it does not affect the continuation of the application whether he has the necessary standing in law. The application can proceed in the name of the Trust alone and without his participation. However to the extent that this point was argued, and for reasons which will become apparent later, I think it is appropriate to make a finding in this regard.

[44] Van der Merwe relied on three alleged facts which he claimed rendered him an "*affected person"*-

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[12] Jordaan v Jordaan 2001(3) SA 288 (C) at [33]

- He holds a single share in the company along with the Trust;
- He is a creditor of ZKM; and
- He is an employee of ZKM.

[45] As to the first alleged fact, van der Merwe maintained that before the institution of BR1 the Trust transferred a single share to him. When asked to do so van der Merwe was, however, unable to refer the court to any documentation in the papers which reflected a decision taken by the Trust pursuant to a duly adopted resolution to support this allegation. He first referred the court to a resolution at p 66 of the papers signed by the 3 trustees on 20 February 2015 in which he was authorized to take various steps on behalf of the Trust including launching and defending legal proceedings and submitting claims on behalf of the Trust. When the court pointed out to van der Merwe that this document did not sustain a transfer of shares he then took the court to a similar resolution passed by the Trust just over a month ago on 12 November 2016 (at p1338 of the papers). This resolution too makes no mention of a decision to transfer any shares to van der Merwe. It is simply untrue to suggest that he is a shareholder in ZKM.

[46] But, in any event, the transfer of shareholding post liquidation is proscribed thus by s 341(1) of the old Companies Act –

*"(1) Every transfer of shares of a company being wound up or alteration in the status of its members effected after the commencement of the winding-up without the sanction of the liquidator, shall be void."*

There is no suggestion of any such sanction by the liquidators in this matter. The first inconvenient truth therefore is that van der Merwe is not a shareholder in ZKM.

[47] As proof of his alleged status as a creditor of the company, van der Merwe firstly referred the court to the cession to him of debts owed by ZKM to a company he controls ("Bank on Assets Global (Pty) Ltd – BOAG"). The cession itself is signed by van der Merwe both as cessionary and cedent. The circumstances of such a cession would perhaps be suspect. But since it occurred on 30 August 2016, it is of no force and effect given that the cession now relied upon took place after the liquidation of the company and in the midst of a succession of business rescue applications. The second inconvenient truth is that van der Merwe is not a creditor of ZKM.

[48] Then, van der Merwe attempted to persuade the court that he had a claim against ZKM for services rendered to the company after it was placed in liquidation and later in business rescue. This allegation goes hand-in-hand with his claim that he is an employee of ZKM. Once again the answer to this assertion is to be found in the legislation. In terms of subsections 38(1) and (9) of the Insolvency Act, 24 of 1936 (which are applicable to the winding-up provisions under the old Companies Act), the contracts of service of employees whose employer has been liquidated are suspended with effect from the date of the granting of the order of winding-up. Unless the liquidator thereafter agrees to the continued employment of such an employee within 45 days of the suspension of the contract of service under s38(1), such an employee's employment terminates at the end of the 45 day period. The third inconvenient truth is that van der Merwe is not an employee of ZKM.

[49] In consequence of the aforegoing, van der Merwe is not an "*affected person*" as contemplated in s128(1)(a) of the Act and he has no *locus standi* to move an application for business rescue.

DOES ZONNEKUS MANSION (PTY) LTD (IN LIQUIDATION) CONDUCT BUSINESS?

[50] In BR1 Koen AJ found that ZKM was a property owning company which owned 5 immovable properties and allegedly also owned unidentified movables, including certain aircraft. In [27] of the judgment Koen AJ formed the following view regarding ZKM –

> "*It has no employees and conducts no business in the accepted sense of the word, at least not a business which can be said to be on-going. I am mindful of the fact that it was submitted on behalf of the applicants that Zonnekus held the immovable properties it owned with a view to later developing them, and that this was its business. However, it is only in respect of the Somerset West property that there is any evidence of the business of property development being conducted by Zonnekus, and that this development ground to a halt sometime ago as a result of inadequate funding."*

I have not read the papers in BR1, nor have I read the arguments advanced in that application. While the assessment of Koen AJ makes eminent sense, I prefer to conduct my own enquiry, based on the facts deposed to in this application, into the alleged business status of ZKM.

[51] Van der Merwe argued that "*business rescue*" as contemplated in chapter 6 actually meant "*company rescue*". In such circumstances, he said, a more flexible interpretation should be given to the rescue of ZKM in light of the fact that the express purposes of the Act as set out in s7 thereof are, inter alia, to –

> *"(d) reaffirm the concept of the company as a means of achieving economic and social benefits;*
>
> *(e) continue to provide for the creation and use of companies, in a manner that enhances the economic welfare of South Africa as a partner within the global economy;*
>
> *(f) promote the development of companies within all sectors of the economy, and encourage active participation in economic organisation, management and productivity….*
>
> *(k) provide for the efficient rescue and recovery of financially distressed companies, in a manner that balances the rights and interests of all relevant stakeholders…"*

[52] In addition, there is s5 which deals with the general interpretation to be applied to the Act, and in particular s5(1) which provides that the Act *"must be interpreted and applied in a manner that gives effect to the purposes set out in section 7."*

[53] Van der Merwe argued that the aircraft allegedly owned by ZKM are chartered out for use by other entities and pointed to the financial statements of the

company for the tax year ending 29 February 2012 in which charter fees totaling R1 262 000 constitute the bulk of the company's revenue for that year. Such revenue totals R1,4m, with rent received in the amount of R138 000 making up the balance. When one looks at the *"Statement of Financial Performance*" for that period in which the company's alleged operating expenses of R1,95m are set out, one sees that the principal component thereof (R1,36m) relates to "*depreciation, amortisation and impairments*". The remainder of the operating expenses seem, on the face of it, to be very much like the sort of expenses associated with the running of a large domestic household (rates and taxes, cleaning, levies, repairs and maintenance, telephone and fax, electricity and water). Significantly *"Employee costs"* for that tax year are reflected as nil.

[54] Van der Merwe informed the court during argument that ZKM invoices a company called FFA Aviation (Pty) Ltd (which evidently operates support services in the fire-fighting industry) for the so-called "*hire and fly"* of its aircraft. In the same breath he conceded that at least one of those aircraft was registered to an American company and he was unable to refer to any documentation reflecting ownership of the aircraft in ZKM.

[55] As far as the immovable properties are concerned, van der Merwe argued that the Somerset West property is half built and will ultimately be sold in the hope that it will return a profit. The three properties in Burmeister Circle were apparently purchased for development in 2008 and have been let out for residential rental in the meanwhile. Then, it was said that Zonnekus Mansion itself is available for occasional rental for social occasions such as weddings and lavish parties. Its

website[13] advertises that it is a *"Premier Conference and Events Venue*" capable of accommodating up to 150 guests. The Mansion is also available for rental for 16 guests on the Airbnb international website[14] at a staggering R96 604/day.

[56] I have some serious reservations regarding the claim that ZKM was running a business as a going-concern, but I am nevertheless prepared to accept for present purposes that in the past the company may have been used for commercial purposes and, given the mandated interpretation in the Act, that it might have been an appropriate entity to be considered for business rescue under Chapter 6 had it presently been in business. However, the papers demonstrate that such commercial activities as might have been conducted behind that corporate veil in the past ended in mid 2014 when the liquidation application commenced. Significantly, van der Merwe did not consider business rescue as an option for saving ZKM either before or after issue of the liquidation papers, notwithstanding his knowledge that SBSA was contemplating foreclosure. Nor did he take any such steps while the company was in provisional liquidation or immediately after it was put into final winding-up. Rather, he allowed the liquidators to take control of the company and waited several months before launching BR1 for an ulterior purpose, as I shall demonstrate later.

[57] Simply put, the company has been in liquidation for more than 2 years: final liquidators have been appointed, at least two meetings of creditors have been convened, a s 417 enquiry has been authorized by this court and any employees who may once have been in the service of ZKM have long since ceased to render services

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[13] www.zonnekus.co.za

[14] www.airbnb.com/rooms/10409278

to the company. Moreover, not only have such employees not been identified in these papers other than in their collective nomination as the second respondent, but the provisions of s38 of the Insolvency Act referred to above are applicable and they are in any event unable to discharge any duties towards the company.

[58] In the circumstances I am of the view that the company in liquidation does not conduct any business. ZKM is presently no more than a property holding entity in final liquidation. Whatever business it might have conducted for profit is moribund and incapable of resuscitation through the provisions of Chapter 6. Such a finding renders consideration of the proposed business rescue plan redundant. However, in the event that I am wrong in regard to the absence of ZKM's business activities, I shall deal with the proposed plan more fully hereunder. Before doing so it is necessary to give consideration to the status of SARS as a creditor of the company in liquidation since it plays a major role in consideration of the proposed business rescue plan.

THE SARS CLAIMS - VAN DER MERWE'S 'BLIND SPOT'

[59] As already pointed out, secured claims in excess of R5,3m have been proved by SBSA in liquidation, the company having been unable to settle its indebtedness to the bank since at least March 2014. Van der Merwe does not dispute the company's liability to the bank but suggests that it is lower than the amount proved. He has it in his mind that the account is still alive, that mortgage bond payments can be made to SBSA and that when the time comes he will be in a position to sit down and debate the extent of the company's liability with the bank. He says the following by way of example in the founding affidavit –

"*[35]……(SBSA) is a fully secured creditor who (sic) can and will be paid in full. In this regard I can state that the three… mortgage bonds are paid way in advance, active and have never been cancelled, the respondent continues to keep them up to date and…(the bank) keep(s) accepting such payments…..*

*[49]….[The attached spreadsheet].. reflects payments of R2 965 000 over the past 12 months, of which R2 005 000 went to [SBSA], who accepted the payments without hesitation. I pause to mention that the balances on the bond accounts needs (sic) to be audited as [the bank] continues to charge unauthorised amounts such as legal costs of R1 458 837 on one bond account alone and then levy additional interest on this. That said, if one has regard to the proven [SBSA] claim of R5 366 502, less the payments made… over the past 12 months of R2 005 000, there should be a balance of no more than R3 361 502, plus some interest and less any unauthorised payments allocated to the bond accounts, this (sic) is a minor claim compared to the huge asset base of the respondent."*

[60] Van der Merwe points out that ABSA Bank is also a secured creditor with a claim which he says totals the "*relatively minor amount of some R1 703 000."* He makes similar allegations suggesting that this bank's mortgages have also been regularly serviced since liquidation. The rationale behind this curious reasoning on the part of van der Merwe lies in the fact that he believes that the general moratorium on legal proceedings against the company introduced in s133 of the Act has the effect of

depriving the company of its status as having been finally wound up, suspending the liquidators' statutory powers and permitting him to carry on running ZKM as his personal fiefdom on the basis that it is no longer in final liquidation. In conjunction with this contention is his assumption that the company is already in business by virtue of the provisions of s132(1)(b) of the Act.[15] This approach completely ignores the express wording of s131(1)(c) which is applicable *in casu.*[16]

[61] In the founding affidavit van der Merwe asserts that SARS is not a creditor in liquidation in that its claim of R46 026.36 against ZKM has been settled by BOAG. It bears mention that this entity is the current corporate vehicle being utilised by van der Merwe to conduct his business interests. He flatly refuses to recognise SARS' assertion that it is a creditor of ZKM for an amount in excess of R82m.

[62] The basis of the SARS claims is two-fold. Firstly, it says that it raised an assessment on 27 November 2015 against ZKM for unpaid taxes going back to 2005 in the aggregate amount of R41 618 767.24. Secondly, it says, on the assumption of success in the action instituted in case no 8569/2014 it has a further contingent claim against ZKM of R 42m. Van der Merwe argues that both of these claims arose post liquidation and that they are not enforceable in the current *concursus creditorum.*

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[15] "*S132(1) Business rescue proceedings begin when-*

*(a)…..*

*(b) an affected person applies to court for an order placing the company under supervision in terms of section 131(1)….."*

*"(c) a court makes an order placing a company under supervision during the course of liquidation proceedings*

[63] It is not necessary for the purposes of this enquiry to go into any great detail regarding the enforceability or prospects of success of the SARS claims. In the event that SARS persists with these claims, and if they are contested by the liquidators, litigation will assuredly follow in different *fora:* the claim in case number 8569/2014 will proceed in the High Court, while any challenge to the assessed taxes must be taken on appeal to the Income Tax Court. Suffice it to say that SARS contends in these proceedings that there is substance in both legs which make up the claims.

[64] The claim in respect of assessed taxes is based on two documents issued during 2015. On 11 May 2015 SARS issued a *"Letter of Audit Findings"* in which it advised ZKM –

> *"(T)hat it intended to raise assessments which would result in additional normal tax liability in an amount of R12 342 725.70, excluding interest on underpayment of provisional tax, understatement penalties and other administrative non-compliance penalties."*

It invited the ZKM (through its erstwhile attorney Mr Perold) to engage with it in relation to its findings. Various extensions of time were sought by the company which ultimately requested that SARS await the appointment of a business rescue practitioner, given that BR1 was still before the court at that stage. Ultimately SARS refused any further extensions and on 27 November 2015 proceeded to raise the relevant assessments, substantiated in a document entitled "*Finalisation of Audit Letter*". Individual assessments were drawn up by SARS in respect of each of the tax

year is in question over the period 2005-2012, the aggregate whereof is said to exceed R41m.

[65] ZKM sought to attack these assessments by first requesting reasons as it is entitled to do under the TAA. Various items of correspondence ensued between SARS and Mr Perold all of which served to confuse rather than elucidate the situation. The position taken by van der Merwe is that no taxes are payable to SARS under the assessments until ZKM has been furnished with reasons in relation thereto. Such reasons are said to be a pre-condition to any objection by ZKM being raised to the assessments.

[66] Mr Snyman SC pointed out in argument that van der Merwe's argument on this aspect is fundamentally flawed. Applying the maxim "*Pay Now, Argue Later"*, SARS relies on ss100 and 164 of the TAA and points out that now, more than a year after the assessments were made, no valid objections have been lodged. In *"Metcash"*[17] , which was decided before the TAA was passed, the Constitutional Court approved of the "Pay Now, Argue Later" principle. And, s164 of the TAA now expressly directs that payment of a tax obligation must proceed pending any objection thereto "*unless a senior SARS official otherwise directs."* It is common cause that there has been no such direction in relation to ZKM's tax obligation arising from the November 2015 assessments. As a matter of fact, therefore, ZKM is presently indebted to SARS in the amounts contained in the assessments and if it wishes to

[17] Metcash Trading Ltd v Commissioner, South African Revenue Service and Another 2001 (1) SA 1109 (CC) at [61]

challenge them it must pay before it is entitled to invoke the dispute resolution mechanism contained in chapter 9 of the TAA.

[67] A second issue which arose in relation to the claim for assessed tax turned on van der Merwe's argument that the assessments were out of time and beyond the three year prescription period contemplated under s 99 of the TAA. During argument it appeared that all of the parties were in possession of the "*Letter of Audit Findings*" of 11 May 2015 but that no copy thereof had been included in the papers before the court. SARS contended that such a letter contained allegations which served to remedy the prescription argument relied upon by van der Merwe. At the conclusion of argument the court requested SARS to place the letter before it in an affidavit.

[68] On 12 December 2016 the attorney acting on behalf of SARS, Mr Kotze, filed an affidavit to which the letter was attached. The issue of prescription is dealt with pertinently in Section G of the letter as follows:

> *"111. SARS is of the view that the amounts mentioned in this letter have not been previously assessed to tax or the expenses and/or input tax claims were allowed, due to the non-disclosure and/or misrepresentations of material facts by the taxpayer in the various returns submitted.*
>
> *112. Therefore, SARS is of the view that in terms of section 99 (2) of the Tax Administration Act, SARS may re-open any one or more of the*

> *assessments raised in respect of any assessment period within the period of investigation."*

Thereafter details are furnished of the alleged non-disclosures and/or misrepresentations of material facts. In the circumstances, I am of the view that there is no substance in the argument advanced by van der Merwe that the tax claims have prescribed.

[69] The last argument advanced in respect of the revenue claims relates to the action instituted under case no. 8569/2014. It was suggested by Mr. Tredoux on behalf of the Trust that the claims had lapsed in that SARS had not given the statutory notice required under s359(2)(a) of the old Companies Act of its intention to continue with the proceedings. However, the court was referred by Mr Snyman SC to a report of the liquidators for submission to the second meeting of creditors held on 24 February 2015 where, under the heading "*LEGAL PROCEEDINGS",* the following is recorded –

> "*We received notice from the attorneys acting for the South African Revenue Services ("SARS") in terms of section 359(2) of the 1973 Companies Act for the continuation of proceedings commenced prior to the liquidation of the Company.*
>
> *The proceedings relate to an action instituted against 10 defendants, including the Company as the 7th defendant under case number 8569/2014……*

*The liquidators are taking advice as to the merits of the claim which forms the basis of the SARS action and will be guided accordingly."*

There is accordingly no merit in this argument and the claim brought on the half of SARS is currently properly before this court.

CANDICE'S APPLICATION

[70] As appears from the judgment of Ponnan JA in Candice's application, she is an attractive and vivacious woman who, prior to 2013, earned a modest living from a modelling career. Her career as such required her, so she said, to visit a private resort on the Indian Ocean island of the Seychelles known as "*The Plantation Club*" where she was employed "*to lend a sense of glamour and exclusivity to the… [lavish parties and events held at that club]… and by definition the resort .*

[71] A fantastical tale of serendipitous wealth is described in detail by Ponnan JA and I shall not prolong this judgment unnecessarily with the finer detail described in that judgment. Suffice to say that Candice describes meeting a wealthy businessman from the Middle East at the club during one of her visits and the subsequent unsolicited deposit of US$15,3m (then worth almost R143m) into her bank account held in South Africa. This deposit attracted the attention of the revenue authorities who were alerted thereto by the Financial Intelligence Centre.

[72] Candice lost little time in satisfying her heart's desire by acquiring 2 expensive motor vehicles (an Audi R8 Spyder and a Range Rover Evoque collectively valued at more than R2,5m) as also a luxury home in the Cape Town suburb of

Fresnaye allegedly worth R110m). The authorities suspected that the hand of van der Merwe may have been involved in the deposit into Candice's bank account and asked that these assets of Candice also be preserved in the provisional order granted by Rogers J in August 2013.

[73] Candice anticipated the return day of the Rogers J order before Savage AJ in February 2014. She was unsuccessful in securing the release of the assets, an order which was confirmed by the SCA. It appears that Candice thereafter came to an agreement with SARS in terms whereof the action instituted against her (as the 2nd defendant) in case number 8569/2014 was withdrawn.

[74] Van der Merwe's affidavit in these proceedings informs us that Candice paid an amount in excess of R12m to SARS in settlement of the claim against her. His affidavit before the the SCA in relation to the condonation application in Candice's application demonstrates manifestly that he was the driving force behind that litigation. In paragraph [25] of his judgment Ponnan JA further found that van der Merwe –

- *"has a strong presence in [Candice's] affairs";*
- *"asserts a mandate to conduct the litigation on her behalf, but has chosen not to disclose the full details of the mandate";*
- *"appears to… control…Zonnekus Mansions… as he sees fit";*
- *" also appears to control the affairs of his daughter";*

- *"has signing powers in respect of the account into which the R140 million was deposited";*

- *"[has the] facility to control or influence the transfer of funds between accounts for which he holds signing powers"*

[75] Ponnan's JA's concluding remarks in Candice's application are intended to have far-reaching consequences –

> *[26] Mr van der Merwe's evident involvement of family members and his obviously close relationship with the applicant, coupled with the extraordinary wealth which she suddenly acquired (allegedly as a gift), require investigation. It thus seems imperative that a curator investigate how and on what basis those funds were effectively placed at the disposal of Mr van der Merwe and whether and how he has disposed of the funds. It follows that Sars' application for the appointment of a curator bonis should have succeeded before Savage AJ and that its appeal in that regard must succeed."*

[76] The remarks of the learned Judge of Appeal, the facts revealed in Candice's application and the allegations made in the affidavits filed in that application must be considered when the business plan put up by van der Merwe in this application are considered.

THE PROPOSED BUSINESS PLAN

[77] I agree with counsel for SBSA and SARS that the business plan suggested by van der Merwe in these proceedings is significantly short on detail.

What he proposes is that funding will be injected into ZKM from BOAG, which he controls. And, it appears as if Candice's immense wealth was relatively short lived as BOAG is now said to be flush with money, or at the very least will have access to loans from Candice. Van der Merwe goes on to point out that the money to be injected into ZKM will not be by way of a loan but rather an investment of capital and a participation in the shareholding of the company in liquidation. As I say, the business rescue plan is short on detail and no indication is given as to what sort of shareholding will be given to BOAG in return for its investment. The court is not told what class of shares will be allocated to BOAG, what rights will attach to such shares nor is consideration given to the mechanism for disturbing the share capital of a company which is in final liquidation

[78] Mr Woodland SC euphemistically described van der Merwe's attitude towards the revenue claims as "*the elephant in the room*", while Mr Snyman described the SARS claims as van der Merwe's "*blind spot*". As I see it, it is all very well to come along claiming that a business plan which contemplates an investment of some R5 – 7m in ZKM is a fair investment for the return at hand. But when that business plan consistently ignores the existence of the SARS claims it runs into interminable trouble. The SARS claims presently exist and cannot simply be thought away. And so, one only has to ask oneself what prudent investor would contribute a significant sum of money (probably running into tens of millions of Rands) in exchange for equity in a company that has potential liabilities close to R90m, to realise that the business plan has little prospect of success at all.

[79] But there are other issues of equal importance which militate against the granting of business rescue in this matter. As in *Oakdene Square,* the backers of this company are liable to be interrogated in terms of s is 417 of the old Companies Act. In such circumstances, said Brand JA, business rescue is not an appropriate vehicle. In addition one has the cautionary remarks of Ponnan JA referred to earlier. There are yet many questions to be asked and many answers to be furnished under the windingup provisions of the old Companies Act before the sun finally sets on Zonnekus Mansion.

[80] Furthermore, it is beyond any doubt that SBSA and SARS will oppose any business rescue model being put up by van der Merwe. This,too, is an important consideration in deciding whether or not to grant business rescue.

[81] Considering the *dictum* in *Gormley*, that business rescue is a relatively speedy and sharp intervention intended to return a company to solvency, it must be said that the litigation which must follow in relation to both the SARS and SBSA claims will indubitably protract proceedings in relation to the winding-up of this company: a company which is hopelessly insolvent and whose affairs need urgently to be taken under control and investigated. Such steps are preferably conducted in the winding-up process by the liquidators rather than via the limited avenues which are open to a business rescue practitioner.

[82] In *Normandie Restaurants*[18] the SCA delivered its most recent pronouncement on business rescue. The principles remain the same and *Oakdene Square* is still the touchstone. As Tshiqi JA reminds us that in regard to business rescue, as in any other application brought on notice of motion,

> "*[16] An applicant must establish reasonable grounds in accordance with the ordinary rules of the pleadings in motion proceedings, i.e. in the founding affidavit.… Motion proceedings such as these are aimed at the resolution of the legal issues based on common cause facts. They are not geared towards deciding factual disputes. To the extent that disputes of fact exist in the affidavits filed by the parties, the matter must be decided on the [respondent] Bank's version unless it is so far-fetched, or clearly untenable that it can justifiably be rejected merely on the papers.… What is more, it makes no difference to this approach that, as in this case, motion proceedings have been dictated by the legislature. Neither does it make any difference where the legal or evidential onus lies."*

[83] In BR4 van der Merwe's "*blind spot"* serves to create factual disputes between the parties. And, the persistent failure of the applicants to realistically address the SARS claims means that they are unable to discharge the onus which they bear in BR4. As the court further highlighted in *Normandie Restaurants* –

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[18] Firstrand Bank Limited v Normandie Retaurants Investments and Another {2016] ZASCA 178 (25 November 2016)

*[19] Section 128 (1) (b) envisages that measures to be taken in order to facilitate the rehabilitation of the company should provide for temporary supervision, and for a temporary moratorium on the rights of claimants against the company. They are not meant to provide companies with a mechanism with which to delay payments to creditors with no feasible plan of ever paying its debts, or a means of restructuring its debts over lengthy periods of time.*

*[20] The temporary measures envisaged by the Act are aimed at maximising the likelihood of the company continuing in existence on a solvent basis and at creating a better return for the creditors and shareholders… The measures proposed in the business rescue plan will, in my view, not provide for a temporary solution as envisaged in s128 (1) (b). They do no more than plan a long-term debt management process."*

To those remarks I imagine that the creditors would probably add, "*and so say all of us".*

PRAYER 2 – CONFIRMATION OF DIRECTORSHIP

[84] During argument van der Merwe was asked by the court to identify any documentation confirming his appointment as a director of ZKM. He was unable to do so. In the founding affidavit van der Merwe deals with his purported appointment as director as follows:

"*…. I was also appointed the (sic) director of the Respondent post liquidation and since business rescue preceding (sic) began."*

In argument van der Merwe expanded on this allegation by stating that Ms Cameron had "*appointed"* him to such office.

[85] The election of directors of profit companies (of which ZKM is one) is governed by s68 of the Act. When it was pointed out to van der Merwe that this required a decision and resolution by the Trust as the sole shareholder in the company, he accepted that they had been no such appointment and indicated to the court that he no longer persisted in the relief sought in prayer 2.

PRAYER 3 – CONSOLIDATION OF ACTIONS

[86] The relief sought in prayer 3 is aimed at a consolidated hearing in relation to SARS' on-going litigation with the van der Merwe interests. As demonstrated above the litigation in case number 8569/2014 has been commenced by SARS in the High Court and will serve before a single judge of this Division. There is currently no litigation pending before this court in relation to the tax assessments arising from the "*Finalisation of Audit Letter"* of 27 November 2015.

[87] Should the liquidators of ZKM elect to exercise the taxpayer's rights under the TAA and object against that assessment they may ultimately appeal against such finding to the Tax Court. That Court is a creature of statute established under the TAA and, in terms of s118, consists of a judge of the High Court, an accountant selected from a panel of members appointed by the President in terms of s120, and a representative of the commercial community also selected from that panel. In the circumstances, consolidation of the tax proceedings contemplated in this matter is a legal impossibility. Accordingly the relief sought in prayer 3 cannot succeed.

THE INCIDENTAL RELIEF SOUGHT BY SARS

[88] As already indicated, by virtue of the failure of the applicants to join, inter alia, SARS as a party in these proceedings, it was obliged to bring a substantive application for intervention. In so doing it asked the court to grant the following additional relief:

> *3. That pending the finalisation of Zonnekus BR4, including but not limited to the finalisation of any interlocutory or ancillary applications and any applications for leave to appeal or subsequent appeals:*
>
> > *3.1 the liquidation proceedings of Zonnekus not be suspended as envisaged in section 153(1)(b) of the Companies Act; and*
> >
> > *3.2 the liquidators in the winding up of Zonnekus be authorised to take control of Zonnekus' assets in accordance with the provisions of the Companies Act, read with the provisions of the Insolvency Act, Act 24 of 1936 (" the Insolvency Act");*
>
> *4. That the applicants, both in their personal and representative capacities as trustees of the the Eagles Trust, are hereby interdicted from launching any further applications to place Zonnekus under supervision and business rescue proceedings to be commenced as envisaged in terms of section 131 of the Companies Act, without the prior written leave from this Honourable Court."*

The basis for the relief was motivated in the affidavit filed on behalf of SARS in support of the application to intervene.

[89] In granting SARS leave to intervene Weinkove AJ ordered that the relief sought in prayers 3 and 4 should be determined by the court hearing the business rescue application. At the conclusion of argument before this court counsel for the intervening creditors handed up a draft order which contained relief jointly sought. Besides asking the court to dismiss the application and to make appropriate costs orders, the creditors sought the following further relief in slightly more refined terms:

> *"2. Pending the finalisation of any application for leave to appeal or subsequent appeals against the dismissal of the application:-*
>
> *2.1 The liquidation proceedings of Zonnekus Mansion (Pty) Ltd(in liquidation)("Zonnekus") are not suspended; and*
>
> *2.2 the liquidators in the winding-up of Zonnekus are directed to take control of Zonnekus' assets, in accordance with the provisions of the Companies Act, Act 61 of 1973 ("the Companies Act 1973"), read with the provisions of the Insolvency Act, Act 24 of 1936.*
>
> *3. Gary Walter van der Merwe ("Mr van der Merwe"), Candice-Jean van der Merwe ("Ms C van der Merwe") and Fern Jean Cameron ("Mrs Cameron") in their personal and representative capacities as trustees of the Eagles Trust, or any other affected party, as defined in section 128 (1) (a) of the Companies Act 2008, are interdicted from launching further*

*applications to place Zonnekus under supervision and business rescue proceedings to commence, as envisaged in section 131 of the Companies Act 2008, without the prior written authorisation of the Senior Duty Judge."*

[90] The relief so sought by the intervening parties is undoubtedly far-reaching and unusual. It seeks to interfere with the ordinary operation of the suspension of orders pending appeal and further seeks to place a limitation on a party's constitutional right to approach a court under section 34 of the Constitution of the Republic of South Africa, 1996. The creditors argue for such relief because they say that the van der Merwe interests have persistently abused the processes of this court. So, it is argued, the time has come for this court to take back control of its processes and to make appropriate orders to ensure that these are not abused to advance sectional interests.

ABUSE OF PROCESS ?

[91] SBSA and SARS relied upon, inter alia, my judgment in *Harris*[19] for the principles applicable to an assessment as to whether litigation constitutes an abuse of process of the court or not. I believe that the judgment indeed captures those principles succinctly and it is therefore not necessary to traverse them in any great detail now. Suffice it to say that the judgment of Southwood AJA in *National Potato*

[19] Ex Parte Harris [2016] 1 All SA 764 (WCC)

*Co-Operative*[20], provides a useful summary of the approach in the constitutional setting:

> *"[54] In general, legal process is used properly when it is invoked for the vindication of rights or the enforcement of just claims and it is abused when it is diverted from its true course so as to serve extortion or oppression; or to exert pressure so as to achieve an improper end. The mere application of a particular court procedure for a purpose other than that for which it was primarily intended is typical, but not complete proof, of mala fides. In order to prove mala fides a further inference that an improper result was intended is required. Such an application of a court procedure (for a purpose other than that for which it was primarily intended) is therefore a characteristic rather than a definition, of mala fides. Purpose or motive, even a mischievous or malicious motive, is not in general a criterion for unlawfulness or invalidity. An improper motive may, however, be a factor where the abuse of the court process is in issue. (Brummer v Gorfil Brothers Investments (Pty) Ltd en Andere 1999 (3) SA 389 (SCA) at 412I-J; 414I-J and 416B). Accordingly, a plaintiff who has no bona fide claim but intends to use litigation to cause the defendant financial (or other) prejudice will be abusing the process (see Beinash and Another v Ernst & Young and Others 1999 (2) SA 116 (CC).. para [13]). Nevertheless it is important to bear in mind that courts of law are open to all and it is only in exceptional cases that a court would close its doors to anyone who wishes to prosecute an action… The importance of the right of access to courts*

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[20] PriceWaterHouseCoopers Inc and Others v National Potato Co-Operative Ltd 2004(6) SA 66 (SCA) at [50]

*enshrined by s 34 of the Constitution has already been referred to. However, where a litigant abuses the process this right will be restricted to protect and secure the right of access for those with bona fide disputes…"*

[92] To fully appreciate the conduct of the applicants in this matter a little more background is necessary. At the commencement of proceedings on Wednesday 7 December 2016, van der Merwe moved an interlocutory application permitting a film crew to record the entirety of the proceedings. His reason for this was said to be an autobiographical documentary which he is in the process of compiling to highlight his alleged persecution by SARS over the years. Van der Merwe informed the court of his expertise in the production of documentary films and hoped that his life story might one day make commercial success in the film world. The application was refused with short reasons given at the time but the seeds of the present litigation are to be found in certain of the facts mentioned by van der Merwe in his address to this court.

[93] Van der Merwe informed the court from the Bar of two criminal matters in which he claimed he had been wrongly pursued by SARS - one in the regional court and another before this court. He later said that he had recently been convicted by le Grange J in this Division on a single count of fraud to which he was sentenced to 7 years imprisonment conditionally suspended for five years. Apparently an application for leave to appeal in that matter is currently pending.

[94] Be that as it may, van der Merwe said that SARS was the complainant in that case. He referred to other litigation in which he had been involved over the years and after the adjournment of the proceedings this court requested a list of all reported cases in which the name Gary Walter van der Merwe appears to be

compiled by one of the High Court researchers. The list, which excludes reference to either of the criminal trials referred to by van der Merwe, is annexure A to this judgment. It must immediately be said that van der Merwe's experience in the courts over the past 10 years or so has made him into a very competent litigator. In this matter, he prepared detailed heads of argument and thereafter addressed the court with the utmost decorum, candour and respect. Indeed many an aspirant to junior advocate could take a leaf out of van der Merwe's book. The point here is that this court is not dealing with any ordinary lay litigant: van der Merwe is an experienced litigator on a mission to discredit SARS and he aspires to be "Mission Control".

[95] In dealing with the post-liquidation developments, van der Merwe complained bitterly about the conduct of the liquidators, in particular of the fact that they immediately approached this court for increased powers under section 386 of the old Companies Act and thereafter applied for a s417 enquiry to be conducted into the affairs of ZKM. He described the exercise of these powers as "*Draconian*" and attributed an improper motive to the liquidators. Such complaints are, of course, unfounded given that both applications were brought in terms of the old Companies Act and would have been considered on their merits by judges of this Division.

[96] When asked by the court during argument to explain why there had been a delay of at least 9 months in bringing BR1, van der Merwe frankly informed the court that he was obliged to do so because the liquidators were *"up to their shenanigans again".* That explanation established beyond doubt that BR1 was launched, not for the purposes of rescuing a financially distressed company, but to frustrate the liquidators from discharging their obligations under the winding-up

provisions of the old Companies Act. And, thereafter the conduct of van der Merwe and the people he controls, be they alleged employees, the Trust or attorneys, has effectively precluded the liquidators from taking any steps in relation to the company for more than two years.

[97] Immediately upon the launching of BR1 the creditors challenged the validity of the proceedings in light of the final order of liquidation. Once that issue had been determined by the SCA one would have expected that the application for business rescue would have preceded with the necessary alacrity. However, quite the contrary is occurred. It appears as if no serious effort was made at agreeing a date for hearing and when the matter came before Binns-Ward J it was van der Merwe who called in the assistance of senior counsel and obtained a last-minute postponement in December 2015 for a hearing in February 2016.

[98] Next, one sees the dismissal of BR1 by Koen AJ, an application for leave to appeal, the prompt dismissal thereof and an immediate petition to the SCA. But even before that court had delivered its ruling, BR2 was issued. That suggests that van der Merwe realised that the pending application was not likely to succeed and that fresh steps had to be taken to kibosh the liquidators.

[99] After BR2 was issued it was necessary for a timetable to be fixed to advance the matter on the roll only for that application to flounder on the court day preceding the hearing when an invalid notice of withdrawal was filed. Then, when BR3 served before this court it was established that it had been issued prematurely while BR 2 was still pending. And, when BR3 was dismissed on Friday 9 September, this application was launched over a weekend in unusual circumstances. Van der Merwe

explained to this court during argument that his current attorney was actually in attendance when the papers were issued; yet there is no palpable explanation for the fact that the application was brought by van der Merwe in his personal capacity and not through duly appointed attorneys.

[100] A further anomaly is that the papers issued in BR 4 did not envisage an expedited hearing: rather van der Merwe elected to follow the long form contemplated in Form 2(a) to the First Schedule to the Uniform Rules when issuing the notice of motion. And, as I have already pointed out, there was a non-joinder of two parties who shared a material interest in BR4. All of these tactical decisions only served to protract the matter further as parties sought leave to intervene, such applications were opposed and timetables were required to be fixed to ensure a speedy hearing. Manifestly, procrastination and foot dragging was the preferred approach of the van der Merwe interests.

[101] There can be little doubt, therefore, that as the one obstacle set up to hinder the liquidators in the exercise of their statutory came down, the next was shrewdly put in place. All the while, claiming that he was entitled to do so by virtue of the provisions of the general moratorium provided for in s133 of the Act, and a misinterpretation of s132(1)(b), van der Merwe has side-lined the liquidators and asserted control of the company for almost 2 years now . Claiming that the powers of the liquidators had been suspended under s131(6) of the Act, ignoring the provisions of s132(1)(c) and exploiting the absence of a duly appointed business rescue practitioner, van der Merwe has done with ZKM just what he pleases, notwithstanding

the absence of any legal relationship with the company whether as shareholder, director or employee.

[102] In the result, the collective conduct of the van der Merwe interests has precluded the liquidators from discharging their court-appointed functions and served only to entrench his position at Zonnekus Mansion. But it goes further than that. Not only have the liquidators been unable to gain physical access to that property, van der Merwe has taken active steps to interfere with the integrity and use of the Burmeister Circle properties. When he suspected that a tenant in one of the houses (a woman living on her own) may have been so bold as to offer assistance to the liquidators he immediately stepped in. He allowed a group of Angolan to occupy a property adjacent to hers and boundary walls were taken down. All the while van der Merwe personally collected the rental from these properties.

[103] Ultimately, however, the proof of the pudding has been in the eating. A worthless, revamped business plan has been put up in BR4 in respect of a company which does not conduct business. In the process, valuable court time and resources have had to be taken up to deal with the allegations made, not only by van der Merwe personally but by his in-house attorney on behalf of unidentified employees and by counsel on behalf of the shareholders of the company in liquidation. Choosing to attack on three fronts meant that a matter which was set down for 2 court days lasted long into a third day which, but for the endurance of the legal representatives, might well have run into a fourth day. One shudders to consider what further tricks the van der Merwe interests might have up their collective sleeves.

[104] In the result I am satisfied that since their inception these business rescue proceedings have not been intended to restore the liquidated company to solvency but rather to preclude the liquidators from discharging their statutory functions as directed to do by this court. Simply put, business rescue has been utilised by being "*diverted from its true course so as to serve extortion or oppression; or to exert pressure so as to achieve an improper end."* A clearer example of an abuse of process, as contemplated by Southwood AJA, could not be found to exist.

APPROPRIATE RELIEF

[105] What then should be done to address these tactics? Mr Tredoux suggested somewhat optimistically that van der Merwe's conduct had always been *bona fide* and that the doors of the court should not be shut in his face, nor of those who shared his interests. While I am satisfied that van der Merwe has failed to establish that any of the applications for business rescue were *bona fide,* I am of considered view that the order proposed by SBSA and SARS does not completely shut the door to a *bona fide* litigant. Rather, it seeks to put in place a suitable gate-keeping measure to ensure that this court's resources and time are not taken up needlessly, and that other parties affected by this litigation are not put to the unnecessary trouble of filing yet another set of opposing papers.

[106] In the passage referred to above in *National Potato Co-Operative* the SCA sanctioned a restriction of the section 34 right in appropriate exceptional circumstances. I am satisfied that such circumstances exist in the instant case, and that the procedure proposed is a fair limitation of the right to approach the court on behalf of the liquidated company. Given that there can be no pressing need in the

prevailing circumstances for an urgent order for the commencement of business rescue, any delay which might be occasioned by requiring a genuinely affected party to approach this court on proper notice to all other interested parties will not operate unduly harshly in the circumstances.

[107] As far as the relief sought in paragraph 2 of the creditors' draft order is concerned, it is a matter of great concern that for almost 2 years the liquidators have been stopped dead in their tracks notwithstanding the provisions of s132(1)(c). There is much work yet to be done in bringing the winding-up of ZKM to finality and the sooner that is done the better for all concerned. At the conclusion of argument the court anticipated a delay in the delivery of this judgment and asked the parties come to an agreement to permit the liquidators limited access to the property for the purposes of compiling an inventory. Mr Tredoux indicated that he supported such an approach and undertook to liase further with Mr Woodland SC to that end.

[108] During the afternoon of Wednesday, 14 December 2016 this court's registrar was copied into a string of emails between the parties relating to a discussion of the court's proposal. All of that was brought to a halt on the morning of Thursday, 15 December 2016 when van der Merwe flatly refused to co-operate:

> "*Dear All*
>
> *Please note that I am not in agreement that the Hon Court expressed the view or need for an interim order to be made, it merely asked the parties if they could reach an agreement as an interim measure pending judgment, (sic) your order clearly goes way beyond this and in facts (sic)*

*provides for the liquidation to continue notwithstanding the fact that liquidation proceedings have been suspended until the Hon Court rules on the business rescue application, (sic) as stated in my earlier email the status quo should remain as it has been for more than two years and 18 years before that, (sic) I can see no reason why the liquidators should be permitted the inconvenience (sic) the numerous families that reside in the houses (and during the festive season) and how they would have the locus standi to proceed with the liquidation as you would have it,(sic) the liquidators have stated under oath that they have no Locus Standi during business rescue proceedings and have accepted this.*

*Furthermore the liquidators stated under oath in the replying papers that they have absolutely no funds available and that they would not even be in a position to pay the insurance premiums on one of the properties let alone all 5, (sic) please provide an explanation as to how they would be in a position to undertake any function and pay for the substantial monthly running costs, (sic) who is currently covering the legal expenses and other costs? and (sic) kindly provide an interim liquidation and distribution account of the liquidators (sic) position to date in order that same may be evaluated.*

*Regards*

*Gary van der Merwe."*

[109] As I understand SARS' position, paragraph 2 of the draft contemplates the prospect of an application for leave to appeal being brought by one or more of the applicants, and, in the context of the history of this matter, and generally having regard to van der Merwe's propensity to litigate, as demonstrated in *inter alia* Annexure A, I consider that assumption to be reasonably held. SARS' obvious concern then is how to reign in van der Merwe and permit the liquidators to procede with their designated funtions.

[110] The erstwhile provisions of Rule 49 (11), which dealt with the suspension of the operation of orders pending the decision of an application for leave to appeal, have been replaced by s18 of the Superior Courts Act, 10 of 2013 which prescribes a fairly complex and regulated procedure to be considered by a court requested to implement the operation of its order immediately. The relief sought in paragraph 2 of the draft order, however, has nothing to do with s18 of the Superior Courts Act but is based on s131(4)(b) of the Act which is the following effect-

> "*(4) After considering an application [for the commencement of business rescue] in terms of subsection (1), the court may-*
>
> *(a)……..*
>
> *(b) dismiss the application, together with any further necessary and appropriate order, including an order placing the company under liquidation."*

[111] In *Richter* the SCA based its finding that business rescue was possible even after a final order of liquidation on the notion that winding-up is an ongoing procedure which only terminates when the company is finally dissolved –

> *"[9] … Generally, in law and in business, liquidation is the exhaustive process by which a company is brought to an end, and the assets thereof, if any, are redistributed. The authors of Cilliers and Benade; Corporate Law (3rd ed, 2000,at 494) describe liquidation as follows:*
>
> > *'(27.01)…. The process of dealing with or administering a company's affairs prior to its dissolution by ascertaining and realising its assets and applying them firstly in the payment of creditors of the company according to the order of preference and then by distributing the residue, if any, among the shareholders of the company in accordance with their rights, is known as the winding-up or liquidation of the company'.*
>
> *[10] ...The correct position is that upon the final order of liquidation being granted the company continues to exist, but control of its affairs is transferred from the directors to the liquidator who exercises his or her authority on behalf of the company. As to when liquidation commences, in terms of s348 of [the old Companies Act] liquidation of a company by the court is deemed to commence on presentation to the court of the application for the winding up and continues until the affairs of the company have been finally wound up and the Master's certificate to that effect is published in the Government Gazette, thus dissolving the company…."*

[112] The decision in ***Richter*** is consonant with the position contemplated by the Legislature in s132(1)(c): if a company is already in liquidation, business rescue only commences when a court places the company under supervision of the business rescue practitioner. However, in terms of s131(6)(a), the mere launching of the application for business rescue has the effect of suspending the liquidation proceedings. This does not mean that the liqudators are depived of their staturoy powers, just that they are precluded from exercising them. As the facts of this case demonstrate, this can result in an undesirable state of affairs should an unscrupulous individual seek to exploit the legal *lacuna* which the Act occasions in relation to day-to-day control of the liquidated company.

[113] The refusal of BR4 will have the effect that the general moratorium provided for in s133 of the Act is lifted and the suspension of the liquidators powers under s131(6)(a) is terminated. Control of the company will therefore be exercised by the liquidators again. Should an application for leave to appeal be lodged, the likely effect is that it will be contended the moratorium has once again been reinstated. But, in such circumstances there is nobody available to manage the company. A business rescue practitioner has not been appointed, nor does the company have any directors given that Ms Cameron has apparently resigned as a director. Added to that is the fact that van der Merwe has shamelessly assumed control of the company as if he were a director, shareholder, employee and creditor where he is manifestly none of those and has no claim to control of the company. And, as his email of 15 December 2016 illustrates, he is assuredly not going hand over control of ZKM to the liquidators.

[114] In such circumstances the company will be what Kgomo J termed "*a rudderless ship or a ship without captain"*[21], or as Mr Snyman SC so colourfully and aptly suggested, "*a ship captained by a pirate".* In my view it is imperative that ZKM be returned immediately to the control of the "*nightwatchman looking after the assets and affairs of the insolvent company".*[22] Accordingly I consider that an order in terms of prayer 2 of the draft is correctly grounded in the legislative provisions of s131(4)(b) of the Act and in accordance with precisely the staus which the legislature had in mind in the event of a business rescue application not succeeding – the company to continue to be subject to the process of winding-up and the resumption of control of court-appointed liquidators.

COSTS

[115] In the draft order, the creditors ask that the costs of this business rescue application as well as the interlocutory proceedings brought to sanction their intervention in the matter be borne by van der Merwe in his personal as well as is representative capacity and Candice and Ms Cameron in their representative capacities on behalf of the Trust. SARS asks that those costs include the costs of two counsel and that they be awarded on the punitive scale. SBSA adopts a more benign approach, asking for costs on the ordinary scale, notwithstanding its entitlement to attorney and client costs in terms of its loan agreements with ZKM.

[116] There is no reason why costs should not follow the result as is customary in litigation of this nature. Having found that van der Merwe and his fellow

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[21] Jansen van Rensburg NO v Cardio-Fitness Properties (Pty) Ltd 2014 JDR 0406 (GSJ) [56];[58]

[22] Ibid [49]

applicants perpetrated serial abuse of this court's processes, it is appropriate that the court should express its displeasure at such conduct by ordering costs on the scale as between attorney and client.

**ORDER OF COURT:**

IN THE CIRCUMSTANCES THE FOLLOWING ORDER IS MADE:

1. The application is dismissed.

2. Pending the finalisation of any application for leave to appeal or subsequent appeals against the dismissal of the application:

    2.1 the liquidation proceedings of Zonnekus Mansion (Pty) Ltd (in liquidation) ("*Zonnekus")* are not suspended; and

    2.2 the liquidators in the winding-up of Zonnekus are directed to take control of Zonnekus' assets, in accordance with the provisions of the Companies Act, 61 of 1973 ("*the Companies Act 1973*"), read with the provisions of the Insolvency Act, Act 24 of 1936.

3. Gary Walter van der Merwe("*Mr van der Merwe"),* in his personal `capacity and representative capacity as a trustee of the Eagles Trust and Candice-Jean van der Merwe *("Ms C van der Merwe")* and

Fern Jean Cameron ("*Mrs Cameron")* in their representative capacities as trustees of the Eagles Trust, or any other affected party as defined in section 128 (1) (a) of the Companies 2008, are interdicted from launching further applications to place Zonnekus under supervision and business rescue proceedings to commence, as envisaged in section 131 of the Companies Act 2008, without the prior written authorisation of the Senior Duty Judge of this Division.

4. Mr van der Merwe, in his personal capacity and representative capacity, and Ms C van der Merwe NO and Mrs Cameron NO in their representative capacities as aforesaid are ordered to pay the Commissioner for the South African Revenue Service's ("SARS") costs of this application on the attorney and client scale, including the costs occasioned by the appointment of two counsel, as well as the costs occasioned by the interlocutory application brought by SARS, on 30 September 2016, such costs also to be taxed on the attorney and client scale.

5. Mr van der Merwe, in his personal capacity and representative capacity and Ms C van der Merwe NO and Mrs Cameron NO, in their representative capacities, are ordered to pay the Standard Bank of South Africa Limited's ("*Standard Bank")* costs of this application, as well as the costs occasioned by the interlocutory application brought by Standard Bank on 30 September 2016, all such costs to be on the party and party scale.

6. All such costs payable are to be paid jointly and severally by the respective parties, the one party paying, the others to be absolved.

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**GAMBLE J**

Annexure A

Reported cases involving Gary Walter van der Merwe

1. Wellness International Network Ltd V MV *Navigator* And Another 2004 (5) SA 10 (C)

2. MV *Navigator* And Another v Wellness International Network Ltd 2004 (5) SA 29 (C)

3. V & A Waterfront (Pty) Ltd and another v Helicopter & Marine Services (Pty) Ltd and others 2004 JDR 0073 (C)

4. V & A Waterfront (Pty) Ltd and another v Helicopter & Marine Services (Pty) Ltd and others 2005 JDR 1061 (SCA)

5. Helicopter & Marine Services (Pty) Ltd And Another v V & A Waterfront Properties (Pty) Ltd And Others 2005 JDR 1400 (CC)

6. Huey Extreme Club v McDonald t/a Sport Helicopters 2005 (1) SA 485 (C)

7. V & A Waterfront (Pty) Ltd and another v Helicopter & Marine Services (Pty) Ltd and others 2006 (1) SA 252 (SCA)

8. Van der Merwe & another v Nel & others 2006 (2) SACR 487 (C).

9. Van der Merwe & another v Taylor N O & others 2008 (1) SA 1 (CC).

10. McDonald t/a Sport Helicopters v Huey Extreme Club 2008 (4) SA 20 (C)

11. Gary Walter Van Der Merwe v The National Director Of Public Prosecutions And Others, CASE NO 8845/08, UNREPORTED, Judgment delivered 8 April 2009

12. Van der Merwe And Others v Additional Magistrate, Cape Town And Others 2010 (1) SACR 470 (C)
13. Legal Aid South Africa v Van der Merwe and Others (A409/2010) [2010] ZAWCHC 525 (4 November 2010)

14. Van der Merwe v NDPP (373/09) [2010] ZASCA 129 (30 September 2010)

15. Van der Merwe v National Director Of Public Prosecutions And Others 2011 (1) SACR 94 (SCA)

16. Minister Of Safety And Security And Another v Van der Merwe And Others 2011 (1) SACR 211 (SCA)

17. Minister Of Safety And Security v Van der Merwe And Others 2011 (2) SACR 301 (CC)

18. Minister Of Safety And Security v Van der Merwe And Others 2011 (5) SA 61 (CC)

19. Van Der Merwe and Others v Zonnekus Mansion (Pty) Ltd and Others (4653/2015B) [2016] ZAWCHC 11 (18 February 2016)

20. Commissioner, South African Revenue Service v Van Der Merwe 2016 (1) SA 599 (SCA)