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

[REPORTABLE]

Case No's: 2688/2019 & 5500/2019

In the matter between –

RECYCLING AND ECONOMIC DEVELOPMENT INITIATIVE OF SOUTH AFRICA NPC	Applicant / Respondent

And

SIVALUTCHMEE MOODLIAR	First Respondent / Applicant
TREVOR PHILIP GLAUM	Second Respondent / Applicant
KEITUMETSE TAUNYANE	Third respondent / Applicant
BOWMAN GILFILLAN INC	Fourth respondent
THE MASTER OF THE HIGH COURT, WESTERN CAPE DIVISION, CAPE TOWN	Fifth Respondent
THE MINISTER OF ENVIRONMENTAL AFFAIRS	Sixth Respondent

And

Case No: 2687/2019 & 5499/2019

In the matter between –

KUSAGA TAKA CONSULTING (PTY) LTD	Applicant / Respondent
And	
STEPHEN MALCOLM GORE	First Respondent / Applicant
TREVOR PHILIP GLAUM	Second Respondent / Applicant
FRANCIS TJALE	Third Respondent / Applicant
BOWMAN GILFILLAN INC	Fourth Respondent
THE MASTER OF THE HIGH COURT, WESTERN CAPE DIVISION, CAPE TOWN	Fifth Respondent
THE MINISTER OF ENVIRONMENTAL AFFAIRS	Sixth Respondent

Judgment Delivered: 26 June 2019

Introduction:

[1] In these matters I have prepared one judgment. The matters are interrelated raising the same factual material and the same question of law. The Applicants in the two main applications, Recycling and Economic Development Initiative of South Africa NPC ("Redisa") and Kusaga Taka Consulting (Pty) Ltd ("KT") are companies that were placed under provisional final winding-up orders in June 2017 and in final liquidation in September 2017. The Fifth Respondent ("the Master") appointed the respective First, Second and Third Respondents as the provisional liquidators of Redissa and KT. For ease of reference I will refer to Redissa and Kusaga as the Companies and the provisional liquidators as the Liquidators.

[2] The Liquidators, in the counter application, seek to join the Sixth Respondent ("the Minister") as a party to the proceedings ("the joinder application"). The liquidators also applied for certain consequential amendments to their notices of motion in the joinder application. The companies have also launched an application to strike out certain matter from the Liquidators' affidavits on the grounds that it is irrelevant, scandalous, vexatious and that it raised new matter in reply ("the strike out application").

[3] The Fourth Respondent, a firm of attorneys, holds certain funds in its trust account which is the subject matter of the main dispute between the Companies and the Liquidators.

[4] The Fourth and Fifth Respondent abides by the decision of the Court. The Minister and the Companies opposed the Liquidators relief sought in the joinder application.

Background facts:

[5] The factual matrix underpinning all these matters are largely common cause. Briefly stated they are the following: Redisa was responsible for the implementation of a waste tyre recycling scheme under the Redisa Plan, which was promulgated in late 2012 by the Minister in terms of the National Environment Management: Waste Act 59 of 2008. Redisa engaged KT to provide administrative and management services in respect of the scheme. The Redisa Plan operates indefinitely, subject to a review conducted every five years. The first was in November 2017. The Redisa Plan was apparently approved by the Minister but on 1 June 2017, the Minister on an urgent basis sought and obtained a provisional order, first against Redisa and then on the same basis a week later against KT.

[6] The Minister's broad contentions that it was 'just and equitable' to wind-up the Companies were premised on the grounds that firstly, certain of Redisa's directors had not disclosed their relationship with or significant shareholding in KT and that this had enabled them to misappropriate public funds by using KT as their vehicle to unlawfully channel funds collected by Redisa under the Plan for their

personal benefit. The second ground for winding up Redisa, which was that Redisa's business plan on 23 May 2017 had acknowledged that it would have to begin to 'wind down' from 1 June 2017, if the Minister's Department had to allocate insufficient funds to meet its operational requirements. Upon learning of the provisional orders the companies applied for the provisional orders to be discharged. On 15 September 2017, judgment was granted, finally winding-up both Companies, on 'just and equitable' grounds.

[7] Both Redisa and KT were solvent companies when they were placed under orders of winding-up. Redisa's cash reserves exceeded R170 million and KT's exceeded R9 million. The Master appointed the respective Liquidators. Upon their appointment, the Liquidators took control of the assets of the companies including their funds and were obliged to manage them in accordance with their duties as liquidators.

[8] Redisa and KT appealed against the windings-up and the appeals were set down for hearing in the Supreme Court of Appeal ("SCA") on 1 and 2 November 2018.

[9] A week before the hearings in the SCA, on 24 October 2018, the Redisa liquidators transferred R20 million from the current account which they operated in Redisa's name into the Fourth Respondent's trust account and the KT liquidators transferred R2 million from the current account operated in KT's name, also into the Fourth Respondent's trust account.

[10] On 24 January 2019, the SCA handed down its judgment. Both appeals were successful. The majority judgment of the SCA ruled that the orders of provisional liquidation in respect of both companies had been improperly obtained. It set aside the final winding-up orders granted on 15 September 2017 and replaced them with orders discharging the provisional winding-up orders.

[11] On 29 January 2019, a meeting was held, between directors of the Companies the Liquidators, and the parties' legal representatives generally regarding the return of control of the Companies to its respective directors. At the meeting, the liquidators advised that they had taken the decision to retain an amount of R20 million as cover for their fees in respect of Redisa and R2 million in respect of KT and that such sums have transferred into the trust account of Fourth Respondent.

[12] The transfer of the abovementioned funds to the Fourth Respondent has, after the SCA judgement, sparked a litany of correspondence between the Companies' and the Liquidators' legal representatives. It needs to be mentioned that shortly before the launch of these proceedings, the Liquidators instructed the Fourth Respondent to pay portions of the funds to the Companies, which they did. The current position is that approximately R16.8 million of the Companies funds are being held in Fourth Respondent's trust account.

[13] The Companies are adamant the transfer of the funds by the Liquidators to the Fourth Respondent, contravened s 394(1) of the Companies Act, 61 of 1973 and it should be returned. On the other hand, the Liquidators holds the firm view the

Companies and or the Minister are liable to pay their reasonable remuneration as taxed or agreed and that the Fourth Respondent should retain the funds pending taxation and or agreement, to pay the disputed funds to whomsoever would be entitled to it.

Counsel:

[14] Advocates J Dickerson, SC assisted by Ms K Reynolds appeared for the Companies in the main application. Advocate L Kelly appeared for the Companies in the joinder application. Advocates B Manca, SC assisted by Ms C Morgan appeared for the Liquidators. For the Minister was the State Attorney and Counsel.

Argument:

[15] The principal contentions advanced by Mr. Dickerson were, that; - the disputed funds are assets of the companies; the liquidators were upon the discharge of the companies from liquidation, required to immediately return all of the companies' assets to the companies; the Liquidators' fees are only payable when the Master has determined the quantum of the fees by taxation; the Master has in this instance not done so in respect of the fees claimed by the respective Liquidators, and accordingly no fees are due and payable.

[16] It was further contended that the Liquidators do not hold a lien or other form of security over Companies assets as security for their fees, pending the Master's determination or for that matter any other basis. Moreover, it was argued that no agreement exists between the Fourth Respondent, Liquidators and the Companies

that permits and or obliges the Fourth Respondent to hold the funds in the capacity of a stakeholder. It was also contended the Liquidators further failed to plead the requirements of a stake-holding arrangement and in the present instance, on the facts, no such arrangement was intended by the Liquidators or the Fourth Respondent when the funds were transferred. Lastly, it was argued that the transfers of the funds to the Fourth Respondent is in contravention of s 394(1) of the Companies Act.

[17] The main contentions advanced by Mr. Mance were, that: -the Liquidators have accounted to the Companies in intromissions accounts; these accounts have in the interim been lodged with the Master to be taxed; the Liquidators believe these amounts are payable to them and the funds are currently held in the Fourth Respondent's trust account. The balance of the Companies' funds has been remitted to them; the Fourth Respondent holds the funds as a stakeholder; and must pay to whomsoever may be entitled thereto on taxation or agreement; the liquidators reasonably apprehended that the Companies would dispute their remuneration; as a matter of law, they were entitled to retain the disputed funds (for the latter proposition reliance was placed on Van Eck v Meyer,[1] and the cases cited therein, In re Insolvent Estate Paruk[2] and Rose v Kemp[3] to which I will return); the liquidators do not seek to gain a preference but simply exercised the rights to which they are entitled and chose to place the funds in the hands of a third party in order to display their *bona fides*.

[1] Van Eck v Meyer 1964 (4) SA 609 (GW).
[2] In re Insolvent Estate Paruk 1913 NPD 424.
[3] Rose v Kemp 1914 WLD 14.

The Liquidators' remuneration and entitlement to withhold funds:

[18] In order to deal and resolve the abovementioned issue(s), it is perhaps necessary to briefly highlight the status of the Liquidators and their obligations flowing therefrom. In terms of the definition in s 1 of the Companies Act, "liquidator" includes "provisional liquidators". Ordinarily, it is the duty of a liquidator to recover and reduce into possession the assets of the company, then to realise them and apply the proceeds in satisfaction of the costs of winding - up and the claims of creditors and, if there is a residue to distribute it among the persons entitled thereto. This is the effect of s 391 of the Companies Act. The duty to recover and reduce into possession the assets applies equally to the provisional liquidator. In many instances, for a variety of reasons, it may be necessary for the liquidator or provisional liquidator to continue the business operations of the company and to keep it intact as a going concern.

[19] It is however, trite that liquidators stand in a fiduciary relationship to the company and to the body of creditors as a whole and the body of members as a whole[4].

[20] There is also an obligation upon Liquidators, as fiduciaries, to act at all times openly and in good faith. They must exercise their powers for the benefit of the companies and the creditors as a whole, and not for their own benefit or a third party's benefit or for any other collateral purpose. They may also not act in matters

[4] E.g. Cronje NO and others v Hillcrest Village (Pty) Ltd and another 2009 (6) SA 12 (SCA) at [25].

in which they have a personal interest which conflicts, or which might possibly conflict, with their duties as liquidators of the company.[5]

[21] When a company is under an order of winding-up, as in this instance, a provisional liquidator conducts and controls the affairs of the company as if he/she is an officer of the company.[6] The lawful exercise of most powers by liquidators depend on their having such powers as envisaged by s 386 of the Companies Act of 1973, liquidators' powers are limited in a way that a board of directors' powers are not. In respect of certain of their functions, liquidators do not stand in the place of the company; they have duties – for example to creditors or to the Master – which the board of directors would not have had before the company was wound-up.[7]

[22] Upon discharge of a company from liquidation, there is ordinarily a '*complete reversal* of the position under liquidation, where the liquidators effectively stood in for the board. On discharge, from liquidation, the court held in AMS Marketing[8] that: -

> '*The liquidator is immediately divested of his powers and the directors are restored to their former position. Nothing in the Act gives the liquidator power to extend his activities beyond the moment when the discharge takes place … There are no grounds upon which he may retain any of the assets of*

[5] See generally Blackman Commentary on the Companies Act volume 3 14-380 to 14-381.

[6] *Howat Motors (Pty) Ltd v Waterson* 1963 (3) SA 669 (TPD) at 673B-C; AMS Marketing Co v Holzman and another 1983 (3) 263 (WLD) at 268 to 269.

[7] Barclays Zimbabwe Nominees (Pvt) Ltd v Black 1990 (4) SA 720 (AD) at 726B-C.

[8] Ft 3, *supra* at 270A-C.

the company and any books, records and documents which came into existence must remain with the company when he vacates his office.'

[23] In Howzat Motors[9], it was further held that: -

> '*[A] company continues to exist until it is wound up and struck off the register of companies. If, during the period that it is under provisional liquidation, it continues to trade, then all its activities during that time are the acts and deeds of the company. A provisional liquidator who controls and conducts those activities is for all practical purposes an officer of the company while he is so controlling and conducting. Any books or entries therein, any documents or vouchers relating to the affairs of the company, be they the old books or a new set of books which come into existence or are written up in the period during which the provisional liquidator conducts and controls the affairs of the company, are in law the property of the company; they are held or possessed by the liquidator as it were as an officer of the company as and for the company. The liquidator, therefore, has no right to retain any of those books or documents or vouchers when the provisional order is discharged. The assets, including all the books and documents, must be returned to the persons who control the affairs of the company – usually the directors.'*

[9] Ft 3 at 672G to 673B. See also Van Eck v Meyer 1964 (4) SA 609 (GWPA).

[24] From the abovementioned, the principles that; - (i) liquidators must immediately on the discharge of a company from liquidation deliver to the company or its directors all its assets,- (ii) liquidators' appointment end simultaneously with the discharge and they retain no powers in respect of the company or its assets and;- (iii) liquidators have no lien or other form of security over company assets as security for their fees, have firmly been established in our law.

[25] Turning to the question of the liquidators' fees. In terms of the provisions of s 384(1) of the Companies Act of 1973, 'no liquidator shall be entitled either by himself or his partner to receive out of the assets of the company any remuneration for his services except the remuneration to which he is entitled to under this Act.' In terms of s 384(2) of the Companies Act of 1973, the Master may reduce or increase such remuneration if in his or her opinion there is good cause for doing so, and may disallow such remuneration, either entirely or in part, on account of any failure or delay by the liquidator in the discharge of his or her duties.

[26] In terms of Winding-up Regulation 24[10] read with Form CM104 thereto, where an appointment is provisional and the application is withdrawn or dismissed (or a final order is made but the provisional liquidator does not continue as a final liquidator), the liquidator is entitled to "*a fee to be taxed by the Master with due regard to the special circumstances of the case*".

[27] The amount of fees that may be paid to a provisional trustee (or liquidator) is stipulated in Tariff B in the Second Schedule to the Insolvency Act, which provides that a provisional trustee (or liquidator) is entitled to "*reasonable remuneration*" to

[10] Published under GN R2490 in Government Gazette 4128 of 28 December 1973.

be determined by the Master and not exceeding the rate of remuneration of a (final) trustee (or liquidator) under the tariff. In other words, a provisional liquidator is entitled to his or her reasonable remuneration, taxed by the Master.

[28] It is evident on a reading of the regulations that on the discharge of a company from liquidation, the liquidators (be they provisional or final) are obliged to account to the controllers of the company (usually the directors) for their stewardship of the company's affairs and to include in such, an account for their reasonable remuneration, which fee is to be taxed by the Master with due regard to the special circumstances of the case.

[29] In casu, the Liquidators did set out and advise the Companies of the basis of their reasonable numeration. The Liquidators hold the view they could not have the Master taxed their fees prior to the companies' discharge from liquidation**.** Moreover, the fact that the remuneration has not been taxed or agreed does not detract from their entitlement to retain sufficient funds to cover that which they consider to be their reasonable remuneration. It was contended that a liquidator's remuneration and costs is different to the position pertaining to the other assets of a company formerly in liquidation. As authority for such proposition reliance was placed on Van Eck v Meyer, In re Insolvent Estate Paruk and Rose v Kemp[11].

[30] In my view, the Liquidators' contention on the latter point is not supported under the Companies Act of 1973, the winding-up regulations, the relevant case-law and by the legal commentators on insolvency.

[11] See supra

[31] On a reading of the s 384 (3) of the Companies Act of 1973, it is evident that in a case of a provisional liquidator, as in this instance, his remuneration is to be taxed by the Master in accordance with the prescribed tariff and with due regard to the special circumstances of the winding- up. In addition, in terms of subsection (2) the Master may reduce or increase such remuneration if in his or her opinion there is good cause for doing so, and may disallow such remuneration, either wholly or in part, on account of any failure or delay by the liquidator in the discharge of his or her duties.

[32] Furthermore, Annexure CM104.I provides that, where the appointment is provisional and the application is withdrawn or dismissed (or a final order is made but the provisional liquidator does not continue as a final liquidator), the liquidator is entitled to '*a fee to be taxed by the Master with due regard to the special circumstances of the case*'. Annexure CM101.5 also stipulates that a liquidation and distribution account may '*provisionally*' reflect the amount claimed in respect of liquidators' remuneration, but '*no such remuneration or part thereof shall, except by permission of the Master … or the Court, be drawn until the account in which it appears has been confirmed*'.

[33] In the present instance the Liquidators remuneration has not been confirmed and as stated earlier, the Master may still increase or decrease the liquidators' remuneration if in his or her opinion there is good cause for doing so.

[34] In Van Eck v Meyer[12], an order of provisional sequestration had been set aside and the former provisional trustee (the plaintiff) handed all assets back to the defendant. The plaintiff then sued the defendant for his reasonable remuneration as erstwhile provisional trustee. The court held (in exception proceedings relating to the particulars of claim) that the plaintiff had a claim for reasonable remuneration and that he had not lost that claim by returning the defendant's assets to him (at 612C). The court at 612 A held that "..Indien sekere bates reeds te gelde gemaak was voor opheffing van die voorlopige bevel of die voorlopige kurator sekere gelde ten behoewe van die insolvent boedel ingesamel het sal hy na my mening geregtig wees om in sy rekening die uitgawes wat hy gehad het en sy vergoeding in verband met die gedeeltelike bereddering as a debiet te toon en die bedrag aan hom verskuldig in verrekening te bring-'. The Court went on and said at 612 C-D that '*Inderdaad het hy by opheffing van die bevel na my mening geen ander uitweg gehad as om die bates waarvan die eiendomsreg by opheffing van die bevel weer in die gewese insolvent gevestig het terug te gee nie*'.

[35] On a proper reading of Van Eck, I can find no authority for the proposition that the liquidators are entitled to retain sufficient funds to cover their remuneration. What was indeed said was that the liquidators are obliged to account to the controllers of the company (usually the directors) for their stewardship of the company and are entitled to include into such an account their remuneration. Moreover, upon discharge of the winding-up order all the assets, including books and documents must be returned to the persons who control the affairs of the company- usually the directors.

[12] See ft 9

[36] In Re Insolvent Estate Paruk[13], a provisional trustee was appointed in an estate which was provisionally sequestrated. The petitioner with leave of the court then withdrew the summons. During the provisional sequestration period the trustee collected certain rent monies. There were no other assets other than the rent monies available for the administration of the estate. The trustee deducted the administration expenses from the rent monies and allocated the balance to the insolvent. The firm of E M Paruk to whom the former insolvent had ceded all monies in his estate, objected thereto. The Court held that:

> "*There were no assets in this Estate other than the rents in the Trustee's hands available for the costs of the administration of the estate and we think therefore that such expenses must be charged against the rents which were the only moneys in the trustee's hands. … There will be an order that the balance in the Trustee's hands arising from the rents in question is to be allocated to E M Paruk as part of his security*."

[37] In Commentary on the Companies Act[14], the following passage appears with a reference in a footnote to Paruk:

> '*Where after the appointment of a provisional liquidator the liquidation proceedings are withdrawn, the provisional liquidator is entitled to deduct his expenses and remuneration.*'

[13] Ft 2
[14] Blackman et al, Vol 2, 14 -324 [Revision Service 8, 2011]

[38] In my view Paruk, is not authority for the proposition that, where the law requires that trustees' or liquidators' fees be taxed before they become payable, the trustees or liquidators may withhold and retain a self-determined fee from company assets. Paruk's is however clear authority for the proposition that, where a sequestration application is withdrawn, the erstwhile provisional trustee may in his or her account reflect a claim for his or her remuneration as trustee against the former insolvent, and may do so up to an amount equivalent to the total value of the former insolvent's assets. Under the common law, a trustee was and is not permitted to draw his or her remuneration until the account in the estate showing the amount claimed has been confirmed[15].

[39] In Rose v Kemp[16] an insolvent, under a provisional order of sequestration, agreed with the plaintiff (a preferent creditor), his concurrent creditors and with the defendant, his provisional trustee, that for certain considerations the provisional order should be discharged. The insolvent would thereon transfer to plaintiff his business and assets to which the plaintiff would be entitled to. The plaintiff would pay the costs of the sequestration, of the discharge thereof and the remuneration of the trustee. The Defendant signed the agreement "merely as consenting thereto in his capacity as provisional trustee", and all the parties bound themselves for the due performance of the agreement. The provisional order was discharged, and the unrealized assets (the whole of which were movables) were handed over to plaintiff by defendant, with the exception of a sum of £227 which defendant, in his administration account, claimed to retain as remuneration, being five per cent of the

[15] In this regard see Strydom v The Master of the High Court *supra* at [27].

[16] Ft 3

total value of the assets. The Master had not taxed the account on the ground that, by the supersession of the provisional order he was *functus officio*.

[40] The Plaintiff claimed the defendant was not entitled the more then £ 27, being 5% of the assets actually realised by the defendant and sued for the balance. The court held at page 20 that;-

> *"If the order for provisional sequestration is superseded in the ordinary way without further agreement it becomes his duty ipso jure to account to the insolvent, and the property of the insolvent which was vested in him during the insolvency becomes ipso jure vested in the late insolvent. The sum of £ 200 for which the present claim is, does not become vested in the insolvent, but there arises a right in the insolvent to claim an account and the amount due. This would be the effect of the supersession of an order of insolvency in the ordinary course without any agreement between the parties. But in this case there is an agreement…. One of the terms of the agreement is the plaintiff shall be entitled that position of the business as it immediately after the discharge of the provisional order. He was therefore entitled upon the discharge to take possession of all the assets including, a right to claim an account from the trustee of his dealing and the balance shown."*
>
> At page 21, the court further held that :- " *The law allows the provisional trustee reasonable remuneration to be fixed by the Master, whose decision is subject to appeal to the court.'*

[42] The Liquidators' reliance on the dictum of Rose v Kemp that the disputed amount of the trustee's remuneration (i.e. the sum of £200) did not become vested in the former insolvent on discharge, but that "*there arises a right in the insolvent to claim an account and the amount due*, to support the contention that their remuneration and costs is different to the position pertaining to the other assets of the companies formerly in liquidation and that they are entitled to retain the disputed funds, is unsound, not supported by the Companies Act of 1973 and the Winding -Up Regulations and later case-law[17].

[43] It is clear that under the Companies Act of 1973 and the Winding-up Regulations, liquidators may not simply retain funds for themselves, out of the assets of the company, what they propose as their fees. In terms of the laws which apply to these proceedings, liquidators' proposed fees must first be taxed by the Master and the quantum accordingly determined. As mentioned previously, Annexure CM101.5 further provides that a liquidation and distribution account may '*provisionally*' reflect the amount claimed in respect of liquidators' remuneration, but '*no such remuneration or part thereof shall, except by permission of the Master … or the Court, be drawn until the account in which it appears has been confirmed*'.This as much has also been decided in Rose v Kemp, even-though the Master had not taxed the account on the ground that, by the supersession of the provisional order, he was *functus officio* and the Court had to deal with the issue.

The Liquidators' reasonable apprehension they would not be paid:

[17] See: AMS Marketing and Howzat Motors, supra.

[44] The liquidators have advanced a number of reasons why they reasonably apprehended that the companies have no intention of paying their remuneration and accordingly decided it was necessary for the Fourth Respondent to retain the disputed funds in its trust account. Chief among the concerns raised by the Liquidators are the alleged irregular and corrupt transactions they have uncovered in the conduct of the Companies' businesses before the discharge from liquidation, events after the discharge and the open hostility by the Company towards the Liquidators.

[45] To this end, the Liquidators relied on an e-mail by one of the Directors of Redisa that wrote on behalf of the Companies that they (the Liquidators) would not be entitled to charge a fee where the companies were discharged from liquidation. Regarding the irregular transactions, the Liquidators aver that there is no basis for a company with KT's business to be sponsoring the Ruling Party (the ANC), by paying for old travel debts of the ANC's members dating back to 2011 and sponsoring T-shirts in an election year. Reference was also made to the fact that the current spokesperson for the ANC was a full-time employee of KT until he was elected to Parliament in May 2014. According to the Liquidators there were certain SMS messages exchanged between the spokesperson and the CEO of Redisa, between 20 July 2014 and 6 August 2014, a few months after the ANC's fundraising efforts for its gala dinner in January 2014. The Liquidators further aver that KT overcharged Redisa, a non -profit company, for the services it rendered Redisa – and thus that Redisa overpaid for the services. The Liquidators also alleged that Redisa has unfairly expressed some unhappiness with the performance of the Liquidators.

[46] According to the Liquidators the ineluctable inference to be drawn from these facts is that the transactions were *prima facie* irregular and is evidence of corrupt activities. The Liquidators further alleged that these transactions were of great concern to them as they demonstrate the manner in which the businesses of the companies were operated and may well operate in future.

[47] All of these allegations, according to the Liquidators, contributed to the reasonable apprehension that the Companies had no intention of paying their reasonable remuneration. Furthermore, the uncovering of the alleged irregular transactions contributed to the hostile relationship between the directors of the Companies and themselves which exacerbated their apprehension that they would not be paid.

[48] The Companies' took serious exception to the allegations of corruption levelled against them and applied that the allegations be struck-out as it is scandalous, vexatious and irrelevant to the issues of dispute in the main and counter-applications. According to the Companies, the Liquidators do not rely on the alleged conduct prior to the Liquidation to justify their retention of the disputed funds in the main applications and counter-applications.

[49] On the papers filed of record, I agree with the Companies' contention that the Liquidators cannot in the circumstances of this case rely on the alleged misconduct, prior to liquidation of the Companies, which is disputed on paper, to justify their withholding of the disputed funds from the Companies. The fact that a party may in law be entitled to reasonable remuneration as taxed by the Master, does not infer a

right to such a party to also debit their fees from the Companies' funds and to hold those funds as security.

The Stakeholder:

[50] The Liquidators are of the firm view that the Fourth Respondent holds the disputed funds as a stakeholder. The Companies dispute this claim and are of the view that there is no lawful basis for the Fourth Respondent's position. According to the Companies, the stakeholder contention is not supported and or borne out by the facts on the papers. Furthermore, the earlier explanations that were given by the Liquidators and the Fourth Respondent regarding the transfer of the disputed funds are inconsistent with a stakeholder's agreement.

[51] In Baker v Probert[18] the Appellate Division (as it then was) examined the contract between the parties and scrutinised the law as to whether an estate agency who sold a property and had accepted the purchase price from the buyer on behalf of the seller in terms of a contract of sale had done so in terms of a contract which was a "*species of* depositum sequestrarium" i.e. whether the estate agency "*was in the position of a* sequester *or stakeholder*".[19]

[52] The Appellate Division at 441 B-E held the following:

> *"the concept of the stakeholder is best known in our law in the context of the person all holds a res litigiosa – where property is the subject*

[18] Baker v Probert 1985 (3) SA 429 (A).
[19] Baker supra at 440J.

matter of litigation- between two rival claimants,…[I]t is known also in the context of a person who holds money which is the subject of a wager, to paid over to the party would turns out to be the winner of the bet…[I]n both instances it is of the essence of the stakeholding that at its inception it is uncertain which of the two parties involved will ultimately become entitled to receive what the stakeholder is holding. The identity of the creditor will only be established on the happening of an uncertain future event- the outcome of the litigation or of the wager. That being so, it can be said in these instances, that the stakeholder holds the money or the thing on behalf of that one of the two parties involved who will eventually become entitled to it, but it cannot be said that the stake holder, when he receives the money or the thing, or while he is holding it pending the happening of the future event, is acting as the agent of specifically the one or the other of the two parties.'

[53] The Liquidators rely heavily on the dictum in Aero-duct Installations CC v Degaturn (Pty) Ltd t/a as Profour Projects & Another[20] , that a tripartite agreement exists between the Fourth Respondent, as stakeholder, the respective companies entered into by its then representatives, the Liquidators, in October 2018 before transfer of the funds to the trust account and the Liquidators in their personal capacities, as the party entitled to their reasonable remuneration in each company.

[54] In Aero-duct, the appellant concluded a contract with the first respondent to

[20] [2006] JOL 17631 (KZN)

supply and install air conditioning equipment at premises where the first respondent was the main contractor. A completion certificate was issued in respect of the work but most of what the first respondent owed to the appellant went unpaid, despite demand.[21] The appellant applied for the first respondent's liquidation. Thereupon, the first respondent arranged that the amount demanded by the appellant be placed in the trust account of the second respondent, its attorney ("the attorney"), to stave off the liquidation application and pending resolution of the dispute which had arisen between the appellant and the first respondent as to the terms upon which the work had been done and the quality thereof.

[55] The attorney wrote the appellant a letter setting out the basis on which he (the attorney) held the funds pending the resolution of the dispute between the parties. The letter recorded inter alia that: - '*My client has attended to place the relevant funds into my trust account, not as an admission of the averments set out in your clients application, but solely as a means of addressing the dispute between our respective clients in accordance with the terms and conditions of the Sub-contract.*'

[56] It was this letter which the Court examined as "*the touchstone (i.e as the contract between them) by which the rights and obligations of the parties involved is to be measured*". The Court found that it was apparent from the letter that the attorney had received an irrevocable mandate i.e. that the attorney would not pay out the funds if, for example, his client (the first respondent) tried to cancel the arrangement entered into between the three parties the attorney, the first

[21] Aero-duct supra at 1.

respondent and the appellant, who had accepted the terms of the letter.

[57] The Court made these findings in the context of a further liquidation application that was brought against the first respondent by another creditor – at that point, the first respondent went into liquidation and it was the liquidator who demanded and sued for the return of the funds in the attorney's trust account. The liquidator considered that the funds in the trust account would be a realisation in the liquidation made for the benefit of all the first respondent's creditors and not just the appellant. The Court found that this would have been the case had the attorney held the funds on an ordinary mandate between an attorney and its client (i.e. in terms of a mandate of agency which would have terminated on the client's (the first respondent's) liquidation. On the facts, however, the Court found that the attorney held the funds as a stakeholder for the specific purpose of satisfying the terms of the subsequent resolution of the dispute whereupon the first respondent would be entitled to the residue. The Court held that; -

> *"The first respondent agreed and undertook not only to pay the sum of money over to its attorney for the specific purpose of satisfying the terms of any subsequent agreement, arbitration or judgement, but to divest itself of the ordinary right which a client has vis a vis his attorney, to revoke or alter the mandate. The result, in my view, was that, when the money was paid into the trust account, the first respondent divested itself of any right to recall the money other than a right to receive payment of the residue on fulfilment of the resolutive condition under which it was held by [the attorney]. In my view it is clear that [the attorney] was constituted as a stakeholder in regard to the*

money paid to him by the first respondent." [22]

[58] The contention by the Liquidators in the present instance that the Fourth Respondent's letter of 5 March 2019, that it is a stakeholder holding the funds pending agreement and or taxation is an irrevocable mandate in the context of the facts, is misguided.

[59] The context underpinning the attorney's letter in Aero-duct differs significantly from the present instance and is distinguishable. The letter by the Fourth Respondent on 5 March 2019 was in fact preceded by certain correspondence between the attorneys of the Companies, the Liquidators and the Fourth Respondent.

[60] In casu, of significance was the following: The Liquidators first informed the Companies about the transfer of the disputed funds at the meeting of 29 January 2019. They advised that they had decided to '*ringfence*' R20 million and R2 million as cover for their fees. The Liquidators and or the Fourth Respondent did not mention that the funds had been transferred to and were being held by Fourth Respondent as a stakeholder. They also did not suggest that there were competing claims to the disputed funds.

[61] On 8 February 2019, the Fourth Respondent wrote to the attorneys of the Companies advising that it was holding the funds in trust on the basis that '*our clients are in law … entitled to payment of their remuneration by the companies and*

[22] Aero-duct supra at 13.

are entitled to debit their fees when accounting to the companies …'. The Fourth Respondent did not contend that it held the funds in view of competing claims to the disputed funds. The Fourth Respondent however stated that it held the funds because its clients were entitled to deduct their fees when accounting to the companies.

[62] Fourth Respondent on 14 February 2019, sent the Companies' attorneys another letter which is incompatible with the existence of a stakeholder arrangement in several respects: The letter firstly advised that Fourth Respondent's clients '*are entitled to debit their remuneration against the already realized assets … They have, instead, retained their remuneration in an interest-bearing account pending any resolution of any queries that your clients may have in regard thereto.'*

The letter continued and recorded that: *'We have been instructed to arrange for the transfer of all amounts held in Trust, over and above the amount reflected in the account as our clients' remuneration…'* On the common cause facts an amount of R22 million was transferred on 24 August 2018 into the trust account of Fourth Respondent and shortly before the launch of these proceedings, the Liquidators instructed the Fourth Respondent to pay portions of the funds to the Companies, which they did. Currently an approximate amount of R16.8 million of the disputed funds are being held in Fourth Respondent's trust account. The fact that the liquidators gave an unilateral instruction, which the Fourth Respondent carried out, is at odds with the dictum in Aero-duct where it was held that '*when the money was paid into the trust account, the first respondent divested itself of any right to recall the money other than a right to receive payment of the residue on fulfilment of the*

resolutive condition under which it was held by [the attorney]. If the Fourth Respondent indeed held the funds as a stakeholder, amounts could only have been transferred from the disputed funds with the agreement of both competing claimants, which in this instance did not happen.

[63] Furthermore, on 1 March 2019, the Fourth Respondent replied to Redisa's attorneys' requests, regarding the identity of the account-holder where the disputed funds were being held, as follows: '*To respond to your question as to the identity of the account-holder of the funds held in trust by Bowmans, we confirm that the funds are invested in the name of REDISA NPC.'* The fact that the funds are held in the companies' names is in itself incompatible with the Fourth Respondent having received the funds in the capacity of a neutral stakeholder in view of two competing claims to the funds.

[64] In my view having regard to the requirements as set out in *Baker v Probert*, and in Aero-duct, and in considering the background facts and context of the letter of 5 March 2019, the Fourth Respondent in my view was not constituted as a stakeholder in regard to the disputed funds.

Transfer of funds in contravention of s 394(1) of the Companies Act of 1973:

[65] The complaint by the Companies is that an attorneys' trust account is not a form of banking account or investment contemplated in ss 394(1)(b) or (c), and the Liquidators' transfer of funds from the current accounts which they operated in the companies' names (which constitute accounts contemplated in s 394(1)(a)) to

Fourth Respondent's trust account contravened the provisions of s 394(1). In my view this complaint can be dealt with swiftly, as it is without merit.

[66] The relevant provision is section 394(1) of the 1973 Companies Act. Section 394(1) provides that liquidators: - must open a current account in the name of the company in liquidation to hold the company's funds (section 394(1)(a));may open a savings account and/or an interest-bearing account in the name of the company, and may transfer funds from the current account to the savings and/or interest-bearing account, provided that such funds are not immediately required for the payment of claims against the company (section 394(1)(b) and (c)); may not withdraw funds from the savings and/or interest-bearing account except by way of a transfer to the current account (section 394(1)(d)).

[67] The primary object of s 394(1)-(6) is to regulate the manner in which the company in liquidation' funds are held and expended in a manner that facilitates the keeping of a vouched record that can be easily checked by the Master and any other interested person. By placing the disputed funds in the Fourth Respondent's trust account (where the funds are invested in an interest-bearing savings account in terms of section 78(2A) of the Attorneys Act 53 of 1979) the liquidators have complied with the provisions of section 394(1)(b) and did not thwart the objects of s 394.

Counter- and Joinder Application(s):

[68] In the counter – and related applications as amended, the following declaratory relief are sought, namely: -(1) the Companies be liable to pay the

Liquidators their reasonable remuneration (inclusive of their disbursements), as taxed or agreed; (2) The Fourth Respondent be directed to retain the disputed funds in its trust account pending taxation or agreement on the Liquidators' remuneration; (3) on taxation or agreement, to pay the disputed funds to whomsoever of the Companies and or the Liquidators are entitled thereto; (4) the status quo be preserved pending the determination of the application and counter application; (5) in the alternative the Minister be liable to pay the Liquidators their reasonable remuneration (inclusive of their disbursements), as taxed or agreed and (6) in the alternative, upon the Minister be declared to pay the Liquidators their reasonable remuneration (inclusive of their disbursements), as taxed or agreed, the Fourth Respondent be directed to pay the disputed funds to Redisa.

[69] For the reasons stated in the main- application the only remaining issues to consider in the counter applications as amended, are whether the Minister should be joined to these proceedings and prayers 1 and 5.

[70] In respect of the Joinder applications, they were launched on the basis that the founding affidavits in the main applications do not contain an unequivocal acknowledgement by the Companies that they are liable to pay their respective liquidators' remuneration; nor do they contain an unequivocal undertaking that they will do so.

[71] The replying affidavits in the main applications record that the Companies will *"pay the liquidators what is lawfully owed*." The answering affidavit in the counter-applications recorded that the companies had *"not yet formed a view"* on their liability for the Liquidators' fees. This conceivable doubt as regards to who is actually responsible for payment of the Liquidators' remuneration compelled the Liquidators to launch the joinder application.

[72] The doubt as to who is ultimately responsible for the Liquidators' fees was finally put to rest in the Companies' answering affidavit in the joinder applications where the following was pleaded:

> *"I confirm that Redisa and KT accept that they are liable (not the Minister) for the liquidators' reasonable fees and disbursements as taxed by the Master."*

[73] In their replying affidavit the Liquidators have seemingly accepted that there is no dispute about who is liable for their fees, but have adopted the position that the joinder applications would not be necessary should the companies consent to the relief sought in prayer 1 of the counter-applications. According to the Liquidators it would be desirable that the legal controversy as to the liability of the Liquidators remuneration be decided in a single hearing.

[74] It is now well-established in our law that declaratory relief is a discretionary remedy.[23] It is also well-established that Courts will not grant declaratory relief in cases where abstract, hypothetical or academic issues are raised, or where there is no dispute between the parties. In JT Publishing[24] the Constitutional Court held as follows:[25]

> *'I interpose that enquiry because a declaratory order is a discretionary remedy, in the sense that the claim lodged by an interested party for such an order does not in itself oblige the Court handling the matter to respond to the question which it poses, even when that looks like being capable of a ready*

[23] JT Publishing (Pty) Ltd v Minister of Safety & Security 1997 (3) SA 514 (CC) at para 15.

[24] JT Publishing (was referred to more recently with approval in Director-General Department of Home Affairs v Mukhamadiva 2014 (3) BCLR 306 (CC)).

[25] At para 15.

answer. A corollary is the judicial policy governing the discretion thus vested in the Courts, a well-established and uniformly observed policy which directs them not to exercise it in favour of deciding points that are merely abstract, academic or hypothetical ones. I see no reason why this new Court of ours should not adhere in turn to a rule that sounds so sensible. Its provenance lies in the intrinsic character and object of the remedy, after all, rather than some jurisdictional concept peculiar to the work of the Supreme Court or otherwise foreign to that performed here.'

[75] On the papers, there can currently be no dispute as to who in law is liable for the Liquidators fees. The Companies' in their answering has accepted that they and not the Minister are liable for the liquidators' reasonable fees and disbursements as taxed by the Master. For these reasons the Joinder Application falls to be dismissed.

[76] In view of the abovementioned, the fact that there is no dispute in law who is liable for the Liquidators' fees and disbursements, prayers 1 and 5 in the counter applications have become moot, unnecessary to consider and falls to be dismissed.

Striking-out applications:

[77] The Liquidators sought to strike out firstly, matter which they perceive to have been scandalous, vexatious and irrelevant and secondly, matter which was raised for the first time in reply. As a result of the view I have taken, it would be unnecessary to deal with the new matter that was raised in reply by the Liquidators.

[78] The main offending matters complained about are the allegations of corruption by Redisa and that KT overcharged Redisa, a non-profit company, for services it rendered Redisa. The allegations of corruption by the Liquidators involve also the ANC and its spokesperson who are not a party to these proceedings. These allegations are serious in nature but were irrelevant in determining the core disputes between the parties.

[79] There can be no doubt that if these allegations are permitted to stand in the affidavits, which are public record it could be damaging to the Companies and their representatives and to those mentioned that were not party to these proceedings to defend themselves. It is therefore only proper that the offending matter complained of be struck out.

Conclusion:

[80] In conclusion, for all the reasons stated, it follows that the relief sought in prayer 3 of the respective Notices of Motions in the Main Applications must succeed with costs. The Counter Applications as Amended, including the Joinder Applications, falls to be dismissed with costs.

[81] In the result the following order is made:

> The relief sought by both Redisa and KT in prayer 3 of their Notices of Motion respectively, is granted with costs. The Counter Applications and Joinder Applications are dismissed with costs. Such costs to include the costs attendant upon two counsel.

LE GRANGE, J