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

Reportable

CASE NO: 4372/2020

In the matter between:

CHRISTIAN FINDLAY BESTER N.O	First Applicant
CHAVONNES BADENHORST SINCLAIR COOPER N.O	Second Appellant
IMRAN DINATH N.O	Third Respondent
ELITE FIBRE (PTY) LTD (IN LIQUIDATION)	Fourth Respondent

and

CTS TRAILERS (PTY) LTD	First Respondent
AFRIT (PTY) LTD	Second Respondent

Judgment: 16 November 2020

DAVIS J

[1] This case provides a luminous illustration of the difficulties that confront a court in dealing with a hotly contested application launched by the first to third applicants ('liquidators') of a company for payment, in this case of R 4 583 942.28, which the liquidators claim are due to the liquidated company by two respondent companies. A range of factual disputes are apparent when the various affidavits are read together and, with one significant claim, the court is confronted with three

different versions. The limitations of litigation based on affidavits looms large in this case.

The background

[2] Notwithstanding the range of disputed facts, it is common cause that between July 2017 and January 2018 first respondent incurred a series of debts towards fourth applicant for goods served and delivered and services rendered by the latter to the former, the total of which amounted to R 4 583 942.28, which is the total sum claimed by the applicants in the present application.

[3] Between March 2017 and January 2018 fourth applicant incurred a series of debts towards first respondent, the net amount of which amounted to R 1 941 696. 80 as at January 2018. On 31 January 2018 first respondent paid to second respondent an amount of R 2.7 million. It is common cause that fourth applicant owed second respondent immediately prior to the 31 January 2018 an amount of R 3 897 660. In this judgment I shall refer to this transaction as the CTS – Afrit payment.

[4] The disputes which exist, insofar as the amounts owing by fourth applicant to first respondent and from the latter to the former are concerned, can be summarised thus: According to the liquidators, set off was prohibited by agreement between the parties and never occurred. Thus immediately prior to the 31 January 2018 first respondent owed fourth applicant R 4.6 million and the latter owed the former R 1.9 million. By contrast, the version put by first respondent is that set off occurred between the parties during 2017, which thus involved the discharge of a debt of R 1.9 million.

[5] Even if set off had occurred, first respondent would still have owed fourth applicant R 2.7 million. But in terms of the CTS – Afrit payment, first respondent contends that it paid an amount of R 2.7 million to second respondent. As such this amount of first respondent's debt to fourth applicant had been discharged *in toto*. By contrast, the fourth applicant disputes that first respondent was legally entitled to discharge any of its debts owing by it to second respondent by paying an amount to second respondent. It thus contends that this payment could not affect first respondent's indebtedness to fourth respondent.

[6] Fourth applicant was provisionally wound up on 26 April 2018 and a final order was granted on 29 May 2018. As a result, the liquidators have launched the present application. I turn therefore to deal with the main claim.

Applicants' main claim

[7] The liquidators claimed payment of R 4.6 million from first respondent which they contend is the full amount of first respondents' indebtedness to fourth applicant. The liquidators claim is based on the argument that set off was always prohibited by way of an agreement between the parties. As was stated in *Blakes Maphanga Inc. v Outsurance Insurance Ltd* 2010 (4) SA 232 (SCA) at para 15: 'Although set off operates *ipso iure* its operation may be excluded by agreement.' The liquidators contend that fourth applicant had never agreed that first respondent could reduce its debt to it by making payment to second respondent.

[8] Mr van der Merwe, who appeared together with Mr Olivier on behalf of the applicants, contended that there was no basis by which Mr Watters, the director of fourth applicant, would have agreed to any such set off. In the alternative, Mr van der Merwe claimed that the main claim must succeed, even if the court was not satisfied that set off had occurred, because s 46 of the Insolvency Act 74 of 1936 (the Act) is applicable to the present dispute.

[9] Section 46 provides as follows:

> 'If two persons have entered into a transaction the result whereof is a set off wholly or in part, of debt which they owe one another and the estate of one of them is sequestrated within a period of six months after the taking place of the set off …; then the trustee of the sequestrated estate may … abide by the set off or he may, if the set off was not effected in the ordinary course of business, with the approval of the Master disregard it and call upon the person concerned to pay to the estate the debt which he would owe it but for the set off, and thereupon that person shall be obliged to pay that debt and may prove his claim against the estate as if no set–off had taken place.'

[10] On 20 November 2019, first respondent, through its attorneys, wrote to the Master of the High Court in anticipation of the liquidators making a s 46 application to her, setting out the grounds on which it opposed to set off being disregarded in terms of s 46. On 27 November 2019, the liquidators, through their attorneys, wrote to the Master, applying, by way of a detailed motivation, for an approval to disregard the set off.

[11] On 18 December 2019 first respondent's attorneys responded to these submissions and a day later the liquidators' replied thereto. It is clear from the liquidators letter of 27 November 2019 that what was being requested of the Master was a disregarding of the set off of the full amount of R 1.9 million being the debt owed by fourth applicant to first respondent and which was the subject matter of the purported set off. The relevant portion of this letter reads thus:

> 'The set off in this matter was simply unilaterally effected by CTS Trailers without the approval of Elite Fibre, and contrary to the well-established business agreement between the parties. The only object of the purported sett-off was to escape the consequences of the *concursus creditorum*, in circumstances where CTS Trailers were well aware of the imminent liquidation of Elite Fibre.
>
> The set off (and the subsequent payment by CTS to Afrit) was effected as a 'once-off and unique arrangement' in the business relationship between the parties. It was a 'special course of dealing' and not 'the usual and ordinary course of trade of business between Elite Fibre and CTS.' The purpose was to obtain payment in preference above other creditors of Elite Fibre, and simultaneously pay a debt that was legally owed to Elite Fibre to its sister company, Afrit. This fact adds to the strange transaction and gives rise to a further reason why the set off should be disregarded.
>
> In the premises, the Master is requested to approve the liquidators' application to disregard of the set off and to enable them to recover this debt from CTS Trailers. This approval is a prerequisite for the institution of the action to obtain the payment from CTS Trailers, and accordingly the Master is requested to urgently make her decision in this regard to enable the liquidators to take the appropriate steps in the best interest of all creditors.'

[12] By contrast, the first respondent contends, through the answering affidavit deposed to by Mr Prinsloo on its behalf that the liquidators had elected to accept the

set off. In support of this contention, Mr Melunsky who appeared on behalf of first respondent referred to the following: Firstly, the liquidation has been aware of the set off, in his view, shortly after their appointment in July 2018. Secondly, Mr Watters had informed the liquidator's representative, Mr Shaw, in July 2018 that set off had occurred. Thirdly, in August 2018 the liquidators had prepared a report which first respondent received in which the liquidators indicated that certain trailers were regarded as assets of first respondent and were to be sold all of evidence which Mr Melunsky contended that the liquidators had relied on set off.

[13] The underlying transaction, according to first respondent, which permitted set off can be summarised thus: There had been the purchase of four trailers by fourth applicant from first respondent. The payment had been by way of set off of an equivalent amount owed by first respondent to fourth applicant prior to its winding up. According to first respondent, these were the kind of transactions which gave rise to reciprocal debts of a kind which the parties had regularly concluded during the ordinary course of business transactions. It is precisely for this reason, according to first respondent, that in October 2018 Mr Shaw, who had been assisting the liquidators, emailed Mr Prinsloo in which he enquired as to how he could 'get the documentation all in place in order that we may dispose of them'; which is the trailers.

[14] Pursuant thereto requests were made that registration documents be provided to the liquidators, the last being in April 2019. In short, the first respondent contended that the only time that the liquidators had disputed the set off was long after first respondent had assisted them and this occurred in a letter of demand in

September 2019, which was the first time that questions were raised with regard to the set off.

[15] While the first respondent accepted that a payment agreement had once existed between the parties in terms of which set off was prohibited, this practice has ceased to exist when the set off occurred because there had been a termination of the 'no set off' agreement, once Nedbank, the bank to both parties, no longer regarded fourth applicant as a bankable debtor on 25 August 2015. From that moment on, a prohibition of set off no longer applied between the parties.

[16] Mr van der Merwe contended that this was a totally unsubstantiated and implausible argument. The claim that no set off fell away because Nedbank had ceased to regard fourth applicant as a bankable debtor was implausible. In his view, had this occurred, Nedbank would have called up fourth applicant's overdraft facility which had not happened nor was any evidence provided by first respondent by way of documents which would have substantiated its claim with regard to Nedbank's alleged decision.

[17] In response, Mr Melunsky referred to a passage in Mr Prinsloo's affidavit:

> 'Because Elite failed to pay the two invoices of 24 April 2017 on 25 August 2017 Nedbank cancelled the discount facility in respect of Elite, produced CTS's facility by R 1 779 854 and refused to advance any further refunds in respect of invoices issued to Elite. From Nedbank's perspective Elite was no longer a bankable debtor. On 25 August 2017 Nedbank issued CTS with a special margin report which had generated in such circumstances.'

[18] As a counter to this, Mr van der Merwe referred to an email generated by Mr Prinsloo on 19 January 2018 stated:

> 'Mark (Watters then the sole director of Elite) and Leon (van der Wetering a director of Afrit) have met and I have also spoken telephonically to Mark Watters and we are to play the different accounts off against one another and CTS will pay Afrit the balance.'

[19] The point which Mr van der Merwe sought to make was that, if set off had begun from 25 August 2017, then Mr Prinsloo would not have written to the other parties on 19 January 2018, stating that an agreement had been reached that set off would occur. At the inquiry convened before the Master of the High Court in terms of s 415 read together with ss 414 and 416 of the Companies Act 61 of 1973, Mr Prinsloo was questioned about this email and confirmed that it had supposedly been agreed in January 2018 that 'CTS and Elite will firstly apply a set off regarding the indebtedness and vice versa.' In Mr van der Merwe's view, this testimony was totally inconsistent with the proposition that set off had begun to operate on an *ad hoc* basis as from 25 August 2017.

[20] On its own, the vigorous contestation as to whether set off was permissible would have raised significant problems for applicant which had chosen to approach this court on motion. I shall return to this problem presently. Suffice it to say with regard to the argument about set off, that the issue stands to be dealt with on another basis, namely that on 17 February 2020 the Master approved the liquidator's application under s 46 of the Act to disregard the pre liquidation set off which

occurred between “Elite Fibre and CTS Trailers (Pty) Ltd”. It is to the significance of this decision that I must now turn.

The Master’s certificate

[21] First respondent does not dispute the fact that the Master granted approval to the liquidators to disregard the set off. Accordingly, Mr van der Merwe submitted that s 46 of the Act comes into play, namely that the liquidators acquired the power to ‘disregard (the set off) and call upon the person concerned to pay the estate the debt which he would owe it but for the set off and thereupon that person shall be obliged to pay that debt and may prove his claim against the estate as if no set off had taken place.’ According to Mr van der Merwe, the liquidators had done so with the result that first respondent was required to pay fourth respondent the debt it would have owed but for the set off; in other words the amount R 1.9 million which it purported to set off and further that first respondent may prove the R 1.9 million claim it has against fourth applicant in the ordinary course, as if no set off had taken place.

[22] By contrast, Mr Melunsky contended that it was not relevant that the first respondent chose not to take the Master’s decision on review, in that this decision was not binding on either first respondent nor on this Court but was simply part of the liquidator’s cause of action. Mr Melunsky submitted further that the Master’s decision should be seen as no more than part of the liquidator’s cause of action. In this connection he cited as support for this proposition from the judgment in *Estate Engelbrecht v Engelbrecht* 1957 (3) SA 83 (N) at 86 C-D:

> 'A strict reading of the section (s 46) means that the approval of the Master to the disregard by the trustee of the set off and the right in the trustee to call upon the person concerned to pay the estate his indebtedness must be obtained before the trustee can disregard it and call upon the debtor (in this case the defendant) to pay his indebtedness to the estate.'

[23] This *dictum* asserts the uncontroversial proposition that permission from the Master is required before the liquidators can proceed to ignore a set off, hardly authority for the submission that the decision of the Master does not have a legal effect which requires some act on behalf of the party relying on set off to set this decision aside.

[24] There are however clear legal consequences to the decision by a Master acting in terms of s 46 of the Act. This is reflected in *Bekker NO v BMW Financial Services SA (Pty) Ltd* [2006] JOL 17634 (T):

> ''Waar die toestemming van die Meester eers die reg verleen om 'n skulvergelyking te verontagsaam, kan ek nie sien hoe die versuim om dit te bekom as 'n formele gebrek beskou kan word nie. Die toestemming is nie 'n blote formaliteit nie. Dit het ingrypende gevolge. As dit verleen is, kan 'n skuldvergelyking negeer word. Klaarblyklik sal die Meester hom daarvan moet vergewis dat die skuldvergelyking nie in the gewone loop van besigheid plaasgevind het nie voor hy sy toestemming kan verleen. As toestemming verleen, of nie verleen nie, sou sy beslissing op hersiening geneem kan word.'

[25] This judgment, confirms that a decision by a Master is not 'a mere formality' but holds a 'profound legal effect'. The nature of the Master's decision brings into play the so called *Oudekraal Estates* doctrine to the effect that a decision of an

administrative nature such as that given by the Master is valid until set aside. See *Oudekraal Estates (Pty) Ltd v City of Cape Town* 2004 (6) SA 222 (SCA). The point is again captured by Cameron J in *Merafong City v Anglo Gold Ashanti* 2017 (2) SA 211 (CC) at para 36:

> 'Hence the central conundrum of Oudekraal, that 'an unlawful act can produce legally effective consequences', is constitutionally sustainable, and indeed necessary. This is because, unless challenged by the right challenger in the right proceedings, an unlawful act is not void or non-existent, but exists as a fact and may provide the basis for lawful acts pursuant to it. This leads to a logical corollary, which this court recognised in Giant Concerts, that an own-interest litigation may be denied standing 'even though the result would be that an unlawful decision stands'.'

[26] Moving more specifically to the present dispute, there is a passage in the *Oudekraal* judgment at para 36 which appears to be fatal to the first respondent's argument. It reads thus:

> 'It is important to bear in mind (and in this regard we respectfully differ from the Court *a quo*) that in those cases in which the validity of an administrative act may be challenged collaterally a court has no discretion to allow or disallow the raising of that defence: The right to challenge the validity of an administrative act collaterally arises because the validity of the administrative act constitutes the essential prerequisite for the legal force of the action that follows and ex *hypothesi* the subject may not then be precluded from challenging its validity. On the other hand, a court that is asked to set aside an invalid administrative act in proceedings for judicial review has a discretion whether to grant or to withhold the remedy.'

[27] In summary, absent any challenge which was not forthcoming by first respondent to the Master's decision, even if the arguments presented by first respondent that set off had occurred have merit, there is a fatal obstacle to its argument. The liquidators were entitled to disregard set off because of the application of s 46 of the Act, which applies as a consequence of the decision of the Master. This position remains so until and unless a successful review is brought by first respondent, which, by contrast, had done nothing to assail the Master's decision.

The CTS Afrit payment

[28] According to the respondents' the balance owed by first respondent to fourth applicant was paid by the former to the second respondent on 31 January 2018. The first respondent relies on an email sent by Mr Prinsloo to Ms van Rhyn, who had been the financial manager of fourth applicant and Mr Watters which reads thus:

> 'Mark en Leon het vergader en ek het telefonies ook met Mark Watters gesels en ons gaan die verskillende rekeninge teen mekaar afspeel en CTS Trailers gaan vir Afrit die balans betaal na ontvangs van die Fast & Fresh se gelde. My berekeninge wat ek laas gedoen het kom die verskil op R 2, 597, 623.60.
>
> Ek sal Maandag met Hilgard van Fast & Fresh opvolg oor die betalings en terugvoer gee. As ek dit reg het CTS nog net 2 van die 8 se betaling ontvang en kan dus die joernale deursit teen mekaar se rekenninge.
>
> Kan julle asb bevestig dat dit die bedrae is en met mekaar kommunikeer hoe en wanneer julle die betalings / joernale allokeer.'

[29] According to first respondent, eleven days later, on 31 January 2018 and after the accounts department of fourth applicant and first respondent had conducted a reconciliation in order to determine the exact amount owing, the impugned payment was made. By contrast, the liquidators contend that the allegation of an agreement was 'utterly implausible given the common cause facts.'

[30] In support of this submission, Mr van der Merwe referred to the record of the enquiry convened before the Master of the High Court where Mr Prinsloo and Mr van Wetering were constrained to admit that it was unprecedented for first respondent to discharge its debt to fourth applicant by paying over the latter's debt to second respondent. It had never happened before.

[31] A further question arose that, as at January 2018, fourth applicant was struggling to pay its employees, had taken out an R 2.5 million loan from a third party to do so. It was, in short, desperate for money and it was contended by Mr van der Merwe that it was unlikely that it would have agreed to such an arrangement which had the effect of denuding it of much needed liquidity.

[32] In this connection, Mr van der Merwe referred to the affidavit deposed to by Ms van Rhyn, who prior to its liquidation had been employed as the financial manager of fourth applicant, a post which she had held for some 18 years, in which she stated the following:

> 'On 19 January 2018, Prinsloo sent and we received the email letter annexed to the founding affidavit … I remember that Watters was furious when we received the letter which would effectively result in transactions being done and recorded contrary to the longstanding agreement between the parties, and effectively "killed Elite Fibre". He definitely denied that he agreed to such purported transaction, but told me that

there was however nothing that we could do to prevent these unilateral acts of CTS Trailers and Afrit. At that stage, I could tell that Watters realised that Elite Fibre could not continue with its business.'

[33] The argument put up by the liquidators was that first respondent had unilaterally paid what it owed fourth applicant to second respondent as a related company in order to prevent the R 2.7 million from falling into the possession of what was assumed to be a liquidated company.

[34] In the alternative, the liquidators contended that, if it was found that the payment made by first respondent to second respondent on 31 January 2018 in the amount of R 2 642 245.48, constituted a payment by fourth applicant to second respondent, then an order was sought declaring that the set off as well as the payment were dispositions of or by fourth respondent of its property as contemplated in and by s 2 read with s 31 of the Act, the setting aside of the payment in terms of s 31 read with s 32 of the Act and directing first and second respondents jointly and severely to pay to the first, second and third applicant the sum of R 2 642 245.48 to make good the loss caused to the insolvent estate of fourth applicant caused by the payment disposition. See also s 29 of the Act which was invoked by the liquidators in support of their case against the CTS-Afrit payment.

[35] Mr van der Merwe submitted on the basis of ss 29, 31 and 32 of the Act, that the payment between respondents had occurred on 31 January 2018 and therefore was a disposition of property by an insolvent company, which may not be made more than six months before the launching of the application for the insolvent company's winding up, (in fourth applicant's case after 23 September 2017) and

which had the effect of preferring one of the company's creditors above another and after which disposition, the company's liability exceeded its assets.

[36] All this had been proved, according to Mr van der Merwe, which meant that the respondents' could only avoid the operation of these sections of the Act by proving, on a balance of probabilities, that the disposition was made in the ordinary course of business and that it was not the debtor's intention to prefer one creditor over another.

[37] Mr van der Merwe contended that the disposition had the effect of preferring second respondent over fourth applicant's other creditors in that R 2.7 million of second respondent's claim of R 3.9 million against fourth applicant, had been satisfied. Thus, instead of the latter obtaining payment of R 2.7 million from first respondent which would then have been distributed amongst all the creditors of fourth applicant this amount should have been for the benefit of the pool of creditors.

[38] By the time this payment had occurred, it was clear that fourth applicant's liabilities greatly exceeded its assets. Mr van der Merwe further submitted that there had been no substantial evidence provided by the respondents to show that this payment had taken place in the ordinary course of business. In other words, on the evidence both the requirements of ss 29 and 30 of the Act had been satisfied. Thus the onus thus shifted to second respondent (the person in whose favour the disposition was made) to prove that the CTS – Afrit payment took place in the ordinary course of business and that it was not made with the intention to prefer it over other creditors.

[39] In answer, second respondent contends, by way of affidavit deposed to by Mr van der Wetering, that, on the basis of the financial information available to second respondent including the revised cash flow projection and overheads for 2018/2019 prepared by fourth applicant together with valuations of immovable property owned by the fourth applicant.

> 'It was inconceivable that the second respondent could on any premise conclude that the fourth applicant, at that stage, was factually and/or commercially insolvent as alleged by the applicants.'

[40] By contrast to the version proffered by first respondent, second respondent, through the affidavit of Mr van der Wetering states:

> 'The Honourable Court's attention is invited to the express allegations that the fourth applicant never authorised the payments to the second respondent and that the first respondent ostensibly acted unilaterally and without any authorisation. This, as illustrated earlier, effectively precludes any possibility of a disposition of the fourth applicant's property Consequently, the applicants' alternative relief sought against the second respondent falls to be dismissed.'

[41] Mr Wessels, who appeared on behalf of second respondent, also contended that for the liquidators to succeed with a claim against second respondent, either in terms of s 29, s 30 or s 31 of the Act, they were obliged to establish that a disposition by the fourth applicant in favour of the second respondent had occurred. In his view, this would imply that the liquidators would have to be establish in their founding affidavit, that the fourth applicant instructed or requested the first respondent to pay the amount owing to it, directly to the second respondent, as opposed to the fourth applicant. However, on the available evidence, the contrary was established,

namely that the payment by the first respondent to the second respondent occurred against the express wishes and instructions of the fourth applicant.

Evaluation

[42] In the case of the payment by CTS – Afrit payment, this Court is faced with a series of different versions. First respondent contends that the payment to second respondent was made on the instructions of Mr Watters. Second respondent's argument is that there was never any authorisation by fourth applicant and that the first respondent had acted unilaterally and without authorisation which precludes any possibility of an invalid disposition of the fourth applicant's property in terms of the relevant sections of the Act. The second respondent goes further and points to the basis of the claim against it, in the event that the set off of R1.9 million is disregarded. In this connection Mr Wessels referred to the essence of the liquidators claims against second respondent as summarised in the applicants' replying affidavit:

> 'At the outset, I reiterate that the relief sought against Afrit is only in the alternative to the main claim for payment of the full indebtedness by CTS Trailers to Elite and only in the event that this Court finds that the payment made by CTS Trailers to Afrit in the amount of R2 642 245.48 on or about 30 January 2018, constituted payment by and on behalf of Elite Fibre to Afrit.'

[43] For this reason, Mr Wessels contended that the nett effect of applicants' case against second respondent was to disregard the factual allegations contained in their own founding affidavit and to premise the entire case against the second respondent, on allegations contained in the first respondent's answering affidavit. In

the circumstances neither of the respondents have been afforded an opportunity to respond to the allegations contained in each other's answering affidavits.

The limitations of motion proceedings

[44] The injunction by Harms DP in *National Director of Public Prosecutions v Zuma* 2009 (2) SA 277 (SCA) that motion proceedings are designed for the resolution of legal disputes based on common cause facts looms large. The off cited test set out by Corbett JA (as he then was) in *Plascon-Evans Paints Ltd v Van Riebeeck Paints Ltd* 1984 (3) SA 623 (A) at 634 A is that when an applicant seeks to have a matter decided on motion, he or she or it is ordinarily obliged to accept the facts alleged by the respondent as true. This rule, of course, may not apply 'if the respondent's version consists of bald or uncreditworthy denials, raises fictitious disputes of fact, is palpably implausible or farfetched or so clearly untenable that the court is justified in rejecting them merely on the papers.' (*NDPP v Zuma* at para 26)

[45] In motion proceedings there is always the danger which must be faced by an applicant that, should a factual dispute arise which cannot be resolved adequately on the papers in terms of the approach set out in *Plascon Evans,* the application will be dismissed, in the event that a court in the exercise of its discretion does not refer the matter for the hearing of oral evidence. See *Gaunder v Top Spec Investments (Pty) Ltd* 2008 (5) SA 151 (SCA) at para 10. Further, the dismissal of the respondent's version in the light of this caution must be exercised with a considerable degree of circumspection. But, in this case, the court is faced not with bare denials but with conflicting versions by applicant and the two respondents; in short, three arguably plausible versions.

[46] This conclusion then leads to a consideration of the approach adopted by Kumleben J in *Moosa Brothers and Sons (Pty) Ltd v Rajah* 1975 (4) SA 87 (D) at 93 E-H regarding the approach to be adopted in applications to hear oral evidence in terms of the Uniform Rules 6 (5) (g) which has been approved by the Supreme Court of Appeal in *Minister of Environmental Affairs and Tourism v Scenematic Fourteen* 2005 (6) SA 182 (SCA) at para 29. The essential test set out in *Moosa Brothers, supra* can be summarised thus: the discretion afforded to a court in these circumstances is a wide discretion. It should be exercised when and if there are reasonable grounds for doubting the correctness of the applicants' allegations. In exercising its discretion, the court should take account of the fact that there may be facts peculiarly within the knowledge of an applicant which, for that reason, cannot be directly contradicted or refuted by the opposing party but which must be carefully scrutinised.

[47] In a case of sequestration or liquidation the very procedure is designed to determine the dispute designed should inure to the benefit of creditors. Where a material witness, in this case Mr Watters of fourth applicant, is deceased, the applicant is faced with considerably greater difficulty. That there are also two differing versions by the respondents in respect of the CTS-Afrit payment only compounds its problem. The facts It dictate that this is the kind of case in which a court should exercise its discretion and direct that oral evidence be heard on specific issues where applicant's version may be plausible in order that the Court may make an informed decision with a view to resolving these outstanding disputes as to the implications of the CTS-Afrit payment for creditors of fourth applicant.

[48] For these reasons the following order is made:

1. The first respondent is directed to pay to the applicants the amount of R 1 941 696.80 together with interest on this amount at a prescribed rate of interest of 10.25% per annum from the date of this order to the date of payment.
2. In terms of Rule 6 (5) (g) of the Uniform Rules of Court it is directed that, where applicable to the questions set out below, oral evidence be heard from Mr Christiaan Bester, Mr Deon Prinsloo and Mr Andre van Wetering on the following issues:
   2.1 whether the so-called no set off agreement was terminated and, if it was, when this occurred and the circumstances under which it occurred;
   2.2 whether fourth applicant and first respondent agreed that the payment between first and second respondents would discharge the former's remaining debt to fourth applicant.
   2.3 whether the set off and the payment between first and second respondents was a disposition that took place in the ordinary course of business;
   2.4 whether fourth applicant intended for these dispositions to prefer respondents over its other creditors; and
   2.5 whether these dispositions were made in collusion between fourth applicant and first and second respondents.
3. Costs are to stand over for later determination.

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DAVIS J