Republic of South Africa

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

Case number: 9040/2019

Before: The Hon. Mr Justice Binns-Ward

Hearing: 4 November 2020
Judgment: 4 December 2020

In the matter between:

CHAVONNES BADENHORST ST CLAIR COOPER N.O.	First Applicant
AMAANULLAH AYUB N.O.	Second Applicant
(In their capacity as the co-liquidators of CPT TO CAIRO TRANSPORT (Pty) Ltd (in liquidation).)	

and

SEAN BILLY MYBURGH	First Respondent
DPMM PROPERTY TRUCKING (PTY) LTD	Second Respondent
DPMM HAULIERS (PTY) LTD	Third Respondent
JOHANNES STEPHANUS SPAMER	Fourth Respondent
MARIUS MYBURGH	Fifth Respondent
SEAN BILLY MYBURGH N.O.	Sixth Respondent
MARIUS MYBURGH N.O.	Seventh Respondent
SUSAN MYBURGH N.O.	Eighth Respondent
(The sixth to eighth respondents in their capacity as the trustees of the Sean Billy Myburgh Familie Trust IT 3501/2009)	

- **JUDGMENT**

BINNS-WARD J:

[1] The applicants are the co-liquidators of CPT to Cairo (Pty) Ltd (in liq.), a company which until very shortly before its liquidation had gone by the name DPMM Transport (Pty) Ltd. For convenience, I shall hereinafter refer to the company as 'Transport'. The principal relief sought in these proceedings is a declaration in terms of s 424(1) of the Companies Act 61 of 1973 that the respondents be liable to pay the debts of the company in liquidation. Claims for certain relief in terms of the Insolvency Act and for the enforcement of a contractual claim by Transport against a related company, DPMM Trucking (Pty) Ltd ('Trucking'), were not persisted with.

[2] Transport was incorporated in 2011. It was wholly owned by the Sean Billy Myburgh Familie Trust IT 3501/2009 ('the Trust'). The Trust or Sean Billy Myburgh (hereinafter 'Myburgh') personally, the position is not altogether clear on the papers, is also the sole shareholder of the second and third respondents, 'Trucking' and DPMM Hauliers (Pty) Ltd ('Hauliers'), respectively. All of these companies were established or acquired at the instance of Myburgh. Myburgh also established the Trust.

[3] It would appear that, upon its incorporation, Transport took over the trucking business of Denis Poole and Marius Myburgh (Pty) Ltd, a company that had been established by Messrs Denis Poole and Marius Myburgh in 1992. That company was also known, after its founders' initials, as 'DPMM' or 'DPMM (Pty) Ltd'. Marius Myburgh is Myburgh's father. He was cited in his personal capacity as the fifth respondent in the current proceedings and, qua co-trustee of the Trust, also as the seventh respondent. The application against Marius Myburgh in his personal capacity was withdrawn after the delivery of his answering affidavit. He however, remains as a party against whom relief is sought in his capacity as co-trustee of the Trust.

[4] Myburgh was the sole director of Transport. The company was liquidated at his instance. He is also the sole director of Trucking and Hauliers.

[5] In his personal capacity Myburgh is the first respondent in the current proceedings. He is also cited as the sixth respondent in his capacity as a co-trustee of the Trust.

[6] In describing the history of the company in his founding affidavit in the liquidation proceedings, Myburgh did not distinguish between Transport and Denis Poole and Marius Myburgh (Pty) Ltd, and incorrectly alleged that Transport had '*previously traded as DPMM (Pty) Ltd*'. His error in this regard was only one of a number of indications in the evidence that, notwithstanding the fairly elaborate structure of entities through which his business and proprietary affairs are conducted, Myburgh is not particularly sensitive or astute to the nature of corporate personality and all that entails. He acted as if the companies and the Trust were embodiments of himself.

[7] As mentioned, the applicants' principal object in the current litigation is to obtain a declaration, in terms of s 424(1) of the 1973 Companies Act, that one or more of the respondents should be responsible, without any limitation of liability, for all of the debts of Transport. Section 424(1) provides:

> When it appears, whether it be in a winding-up, judicial management or otherwise, that any business of the company was or is being carried on recklessly or with intent to defraud creditors of the company or creditors of any other person or for any fraudulent purpose, the Court may, on the application of the Master, the liquidator, the judicial manager, any creditor or member or contributory of the company, declare that any person who was knowingly a party to the carrying on of the business in the manner aforesaid, shall be personally responsible, without any limitation of liability, for all or any of the debts or other liabilities of the company as the Court may direct.

[8] The object of s 424 was eloquently summarised by Cameron JA in *Ebrahim and Another v Airport Cold Storage (Pty) Ltd* 2008 (6) SA 585 (SCA). That case was concerned

with s 64 of the Close Corporation Act 69 of 1984 but, as the learned judge pointed out,[1] that provision '*is for all intents and purposes identical to s 424 of the Companies Act*'.[2] In para 15 of the judgment, Cameron JA explained that '[t]*he section retracts the fundamental attribute of corporate personality, namely separate legal existence, with its corollary of autonomous and independent liability for debts, when the level of mismanagement of the corporation's affairs exceeds the merely inept or incompetent and becomes heedlessly gross or dishonest. The provision in effect exacts a quid pro quo: for the benefit of immunity from liability for its debts, those running the corporation may not use its formal identity to incur obligations recklessly, gross negligently or fraudulently. If they do, they risk being made personally liable.*' I would only add that the ambit of reckless or fraudulent conduct of a company's business for the purpose of the section is not limited to the incurrence of obligations by the company, it extends also, as illustrated by the facts in *Philotex (Pty) Ltd and Others v Snyman and Others; Braitex (Pty) Ltd and Others v Snyman and Others* 1998 (2) SA 138 (SCA), to the carrying on of the company's business in any way that recklessly or fraudulently prejudices the company's creditors, or '*disregards their interests*'.[3] When a company finds itself in financial difficulty, and especially if it is in a state of insolvency, those charged with the carrying-on of its business are obliged in addressing the situation to have reasonable regard for the interests of its creditors.[4]

[9] That obligation clearly does not preclude the persons concerned from taking reasonably calculated business risks. The concept of enterprise, something inherent in the conduct of any business, almost invariably involves some element of risk. Nothing ventured,

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[1] In para 13.

[2] See also *Sainic and Others v Industro-Clean (Pty) Ltd and Another* 2009 (1) SA 538 (SCA) at para 13.

[3] *Philotex*, at 174E.

[4] Id. at 179H.

nothing gained. This much was acknowledged in *Philotex*, where Howie JA stated at 146H-147D:

> Participation in business necessarily involves taking entrepreneurial risks but s 424 only penalises the subjection of third parties to risk where (apart from the case of fraudulent trading) it is grossly unreasonable. If, therefore, in a given case there is some ground for thinking that creditors will be paid but a reasonable businessman would nonetheless, because of circumstances creating a material but not high risk of non-payment, refrain from running that risk, the director who does run that risk by incurring credit, and thus falls short of the standard of conduct of the reasonable businessman, trades unreasonably and therefore negligently *vis-à-vis* creditors. That departure from the reasonable standard could not fairly be described as gross, however, and the director concerned would not be hit by the section. By contrast, an instance that manifestly would fall foul of the section is where the reasonable businessman would realise that in all the circumstances payment would not be made when due. To incur credit in that situation would, as a matter of degree, be so plainly more serious a departure from the required standard than the conduct in the first example that one has no difficulty categorising it as grossly unreasonable and therefore grossly negligent. This second example, one must emphasise, is an extreme one and it would, in my view, impose an unduly heavy burden on a plaintiff in s 424 proceedings to require proof of circumstances in which a reasonable businessman would assess non-payment as a virtual certainty. So, if a plaintiff were to present evidence warranting the conclusion that when credit was incurred there was, objectively regarded, a very strong chance, falling short of a virtual certainty, that creditors would not be paid, that case would, I think, also involve the mischief which the section was intended to combat. It is not possible to attempt to draw the line between negligence and recklessness more exactly. Each case must turn on its own facts and involve a value judgment on those facts.

[10] The position in respect of the responsibilities of those in charge of the carrying on of company's business when it is factually insolvent was well put, in my respectful view, by Zulman JA in *Heneways Freight Services (Pty) Ltd v Grogor* 2007 (2) SA 561 (SCA) at para 11:

> It is well to bear in mind the following remarks in *Ex parte De Villiers and Another NNO: In re Carbon Developments (Pty) Ltd (In Liquidation)* [1993 (1) SA 493 (A) at 504E]:

> 'In short, the mere carrying on of business by directors does not constitute an implied representation to those with whom they do business that the assets of their company exceed its liabilities. The implied representation is no more than that the company will be able to pay its debts when they fall due.'
>
> In other words it is not a corollary to this proposition that where the assets of a private company exceed its liabilities this has no bearing on whether its directors are justified in carrying on business. On the contrary, where a company is technically solvent it must often follow that it will be in a position to pay its debts either because it will be in a position to realise its assets or because it will be able to obtain loan finance on the security thereof. What is important in this context is to enquire, proper regard being had to the *onus* of proof, whether the directors of the company genuinely believed that 'the clouds will roll away and the sunshine of prosperity will shine upon them again and disperse the fog of their depression', entitling them to incur credit to enable them to get over the bad times.

I would only add that the learned judge's reference to a 'genuine' belief by the directors must be read to imply, as I think he made clear in the immediately following paragraph of his judgment, also a reasonably held belief.

[11] The fundamental tenet is that those involved in the carrying-on of a company's business should not ordinarily permit it to continue to trade or carry on business in circumstances where it is reasonably foreseeable that it will be unable to pay its debts when they fall due. If that situation should arise, there is a duty on the persons concerned to conscientiously consider liquidation, business rescue, or a compromise with the creditors.[5]

[12] The import of the phrase '*knowingly a party*' in s 424 was elucidated by Howie JA in *Philotex* supra, at 143A-B: *'"Knowingly" means having knowledge of the facts from which the conclusion is properly to be drawn that the business of the company was or is being carried on recklessly; it does not entail knowledge of the legal consequences of those facts: Howard's case* [*Howard v Herrigel and Another NNO* 1991 (2) SA 660 (A)] *at 673I-674A. It follows that knowingly does not necessarily mean consciousness of recklessness.*'

[5] See s 155 of the Companies Act 71 of 2008, s.v. 'Compromise between company and creditors'.

[13] The appeal court's judgment in *Philotex* also usefully rehearses the import of, and test for, recklessness in the given context.[6] It includes 'gross negligence',[7] which the judgment treats as including '*an attitude or state of mind characterised by "an entire failure to give consideration to the consequences of one's actions, in other words, an attitude of reckless disregard of such consequences"*.' Howie JA explained that the '*test for recklessness is objective insofar as the defendant's actions are measured against the standard of conduct of the notional reasonable person and it is subjective insofar as one has to postulate that notional being as belonging to the same group or class as the defendant, moving in the same spheres and having the same knowledge or means to knowledge.*'[8] The learned judge proceeded '*In the application of the recklessness test to the evidence before it a Court should have regard, inter alia, to the scope of operations of the company, the role, functions and powers of the directors, the amount of the debts, the extent of the company's financial difficulties and the prospects, if any, of recovery; Fisheries Development Corporation of SA Ltd v Jorgensen and Another; Fisheries Development Corporation of SA Ltd v A W J Investments (Pty) Ltd and Others 1980 (4) SA 156 (W) at 170B-C.*'

[14] Of relevance to some of the questions to be decided in the current case, in particular in respect of the claim against the trustees of the Trust, is the observation in *Philotex* that '[b]*eing a party to the conduct of the company's business does not have to involve the taking of positive steps in the carrying on of the business; it may be enough to support or concur in*

[6] At p. 143C-144A.

[7] See also *Heneways Freight Services (Pty) Ltd v Grogor* supra, at para 4; *Tsung and Another v Industrial Development Corporation of South Africa Ltd and Another* 2013 (3) SA 468 (SCA) at para 29-31 and *Gihwala and Others v Grancy Property Ltd and Others* 2017 (2) SA 337 (SCA) at para 144.

[8] At p. 143G-H.

the conduct of the business'.[9] Dependent on the factual context, support or concurrence might be evidenced even by the adoption of a supine attitude; see *Howard* supra, at 674H.

[15] A director of a company may quite properly act on advice in discharging his or her duties, but he or she may not follow such advice blindly. The position was expressed as follows in *Howard* supra, at 674E-G:

> A director of a company, however, has a duty to observe the utmost good faith towards the company and, in doing so, to exercise reasonable skill and diligence. In *Fisheries Development Corporation of SA Ltd v Jorgensen and Another; Fisheries Development Corporation of SA Ltd v AWJ Investments (Pty) Ltd and Others* 1980 (4) SA 156 (W), Margo J said at 166D - E:
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> > 'Obviously, a director exercising reasonable care would not accept information and advice blindly. He would accept it, and he would be entitled to rely on it, but he would give it due consideration and exercise his own judgment in the light thereof. *Gower* (op cit [10] at 602 et seq) refers to the striking contrast between the directors' heavy duties of loyalty and good faith and their very light obligations of skill and diligence. Nevertheless, a director may not be indifferent or a mere dummy. Nor may he shelter behind culpable ignorance or failure to understand the company's affairs.'
>
> In other words, a director has an affirmative duty to safeguard and protect the affairs of the company.

[16] So much for those principles upon which s 424 is applied that seem to me to be relevant on the facts of the current matter.

[17] The factual basis for the liquidators' claim is essentially uncontentious.

[18] Transport, which, as mentioned, carried on business in the transport business employing a fleet of trucks and trailers, found itself in serious financial difficulty in 2014. Its unaudited financial statements for the year ended 28 February 2014 showed that the company was trading in insolvent circumstances. They also indicated that that had also been the situation in the 2013 financial year. At the end of its 2014 financial year the company's current liabilities exceeded its current assets by a ratio of more than 5:1.

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[9] At p. 143B-C, citing *Howard v Herrigel and Another NNO* 1991 (2) SA 660 (A) at 674H.

[10] L.C.B. Gower, *The Principles of Modern Company Law* 4 ed.

[19] The deteriorating picture painted in the financial statements is consistent with the depressing historical narrative by Myburgh in paragraph 11-15 of his founding affidavit in the application for the winding-up of the company:

> 11. In 2011, and as a result of poor economic conditions both locally and internationally, the transport industry experienced a severe decline in the demand for road transport.
> 12. To compound matters further, in 2012 the transport industry as a whole, including the respondent [i.e. Transport], experienced crippling labour strikes and action.
> 13. Due to the adverse trading conditions, a substantial increase in the running costs of the transport business and tariff wars between large transport companies with virtually "unlimited" resources, the respondent was no longer able to make a profit. During this time the respondent also suffered financial prejudice through the loss of vehicles and trailers, which placed additional financial pressure on the respondent.
> 14. Many small transport companies in South Africa were forced to close their doors as a result of the aforesaid.
> 15. Although the respondent managed to keep trading until 2015, it was clear that the respondent would not [be] able to continue trading.

Myburgh confirmed the parlous state of Transport's financial position in his answering affidavit in the current matter, and stated that he had been advised by the independent auditor (one Hendrik Vos of Claassen Stone Auditors) that he could not allow the company to continue trading. He said that he had engaged the independent auditor on the advice of the company's attorney.

[20] The company's attorney was one Johannes Spamer of the firm Spamer Triebel Inc.. Mr Spamer was cited as the fourth respondent in these proceedings. It would appear that he advised Myburgh on a range of matters over a period of several years.

[21] Transport's 2015 financial statements which, unlike those for the two previous financial years, were audited (by Claassen Stone), carried an adverse opinion from the auditor. The adverse opinion noted that the company had been trading in insolvent circumstances and stated that the company's financial statements, which had been prepared on a going concern basis did not fairly represent the company's situation. The latter point

was highlighted by the content of the Director's Report, dated 24 August 2015, signed by Myburgh and released as part of the company's financial report[11]. In the Director's Report, Myburgh stated '*The director has reviewed the company's cash flow forecast for the year to February 2016 and in the light of the review and the current financial position he is satisfied that the company has or has access to adequate resources to continue in operational existence for the foreseeable future'*. The statement was not reconcilable with his evidence in the winding up application that the company had ceased trading at the end of the 2015 financial year, nor with the content of the advice he said he was given by Mr Vos. It is in fact difficult to understand how the company could have continued trading beyond August 2014 when, in circumstances to be described, it alienated all of its trucks and trailers to another company. Myburgh has offered no explanation of how he could have allowed such a false and misleading director's report to be included in the financial statements.

[22] The auditor's report also pointed out that '*Subsequent to the year-end* [viz. 28 February 2015], *the company has ceased trading and is in the process of realising its assets and settling its liabilities. No arrangement has been made to settle the remaining liabilities of the company in the event that the proceeds of realised assets are insufficient to meet all liabilities*.'

[23] Myburgh approached the fourth respondent for advice. It would appear from the contextual indicators that he must have done so in mid-2014, a year before he issued his rosy sounding director's report from which I have quoted above, in August 2015.

[24] The fourth respondent's advice was set forth in an email to Myburgh, dated 20 August 2014. It bears setting out in full:

> Hallo Sean/Shirleen

[11] In terms of s 30(3)(b) of the Companies Act 71 of 2008.

Verder tot ons vergaderings en gesprekke hierin, insluitende die vergadering met Hendrik Vos.

Ek gaan nou nie ’n gedetaileerde (sic) opinie vir julle gee nie, ons het al gesels oor alles – insluitende gevolge ens.

Dit is duidelik uit die 2014 finansiële state dat DPMM Transport se laste sy bates oorskry – as sulks [is] dit *de facto* insolvent.

In die 2014 finansiële jaar het DPMM Transport egter daarin geslaag om ’n wins te toon teenoor die verlies in 2013. Dit wil egter voorkom asof daar nie te veel van hierdie wins gemaak moet word nie, aangesien die primêre rede blyk te wees dat die trokke en trailers afbetaal is en dat daar dus nie groot maandelikse paaimente (sic) was nie. Die situasie mag weer verander sodra trokke en trailers vervang moet word. Verdermeer (sic), die onlangse stakings in die industrie het weereens kontantvloeiprobleme veroorsaak en DPMM Transport was verplig om geld te leen by Logistics om SARS ens. te betaal.

Dit is duidelik dat Transport nie oor fondse beskik om sy SARS verpligtinge na te kom nie en die Bargain (sic) Council het aangedui dat hulle vonnis gaan neem vir bedrae aan hulle verskuldig. Transport sal dus nie sy skuld kan betaal soos dit verskuldig raak nie, wat dit ook kommersieel insolvent maak.

Indien SARS en die Bargain Council sy skuld invorder by wyse van veilings in eksekusie, sal Transport se bates opgeveil word en in ons ervaring is die opbrengs by veilings in eksekusie baie min. Dit mag tot gevolg hê dat daar nog skuld uitstaande is en natuurlik sal ’n verkoping van die trokke en trailers die einde van Transport se besigheid beteken.

Aangesien Transport *de facto* en kommersieel insolvent is, is daar regtens ’n plig op die direkteure (sic) om nie in die omstandighede handel te dryg (sic) nie en kennis te gee van die toestand aan geaffekteerde partye. Dit blyk nie dat daar ’n kans is dat DPMM Transport uit sy situasie sal kan uit “trade” nie.

Ons voorstel is dat:

1. Die trokke, trailers en toerusting van Transport teen ’n markverwante prys verkoop word. Dit sal tot voordeel van al die skuldeisers wees en nie net SARS en die Bargain (sic) Council nie – die betaling kan gestruktureer word oor ’n periode. Die skuldeisers sal langer moet wag, maar ten minste kry hulle meer as by ’n veiling in eksekusie.
2. Transport gelikwideer word so gou as moontlik.

Daar is ’n risiko by likwidasie dat SARS na die verteenwoordigende persoon kan kyk vir betaling van die belasting, maar dit is iets wat hulle ongeag likwidasie kan doen, so ons sal daai brug kruis as ons daarby kom.

Die likwidateur sal ook na die verkoping van bates kan kyk, maar in my mening is dit (sic) transaksie tot voordeel van almal, en veel beter as verkopings in eksekusie.

Ek wil net weer benadruk dat daar nie ’n “quick fix” is nie -soos gesê, na my mening is die verkoopstransaksie die beste opsie in die omstandighede, maar die skuldeisers sal julle kontak en die lewe vir jou moeilik maak tot alles uitgesorteer is.

Yours sincerely

Johannes Spamer [12]

[25] The reference in the email to 'Logistics' is to DPMM Logistics (Pty) Ltd, yet another company established by Myburgh. Transport's 2014 and 2015 financial statements do not reflect any outstanding indebtedness by Transport to Logistics.[13] The 28 February 2014 balance sheet reflects a liability to DPMM Property Holding (Pty) Ltd in the amount of R1 002 777 in respect of a non-interest bearing unsecured loan with no fixed term of repayment. Despite the parlous financial state of Transport, the company's reported liability

[12] 'Hallo Sean/Shirleen
Further to our meetings and discussions in this matter, including the meeting with Hendrik Vos.
I do not propose to provide a detailed opinion at this stage; we have already discussed everything - including consequences etc.
It is clear from the 2014 financial statements that DPMM Transport's liabilities exceed its assets - and as such the company is *de facto* insolvent .
In the 2014 financial year, however, DPMM Transport enjoyed a profit in contrast to the loss shown in 2013. It would appear, however, that not much can be made of this profit if account is had that the primary reason for it appears to be that the trucks and trailers have been paid off and that therefore there were not large monthly instalments to be paid. The situation might again change when these trucks and trailers have to be replaced. Furthermore, the recent strikes in the industry have once again caused cash flow problems and DPMM Transport was obliged to borrow money from Logistics to pay SARS etc.
It is clear that Transport is not possessed of the funds to meet its SARS obligations, and the Bargain Council has indicated that they intend to take judgment for the amounts due to them. Transport will consequently not be able to meet its debt as it becomes due, which makes it also commercially insolvent.
If SARS and the Bargain Council enforce their claims by way of sales in execution, Transport's assets will be auctioned off, and in our experience the proceeds of sales in execution are very meagre. It might have the result that more debt remains outstanding, and, of course, a sale of the trucks and trailers will mean the end of Transport's business.
Seeing that Transport is factually and commercially insolvent, there is a legal duty on the directors (sic) in the circumstances not to continue trading and to give notice of the situation to affected parties. There does not appear to be any prospect that DPMM Transport will be able to trade itself out of the situation.
Our suggestion is that:

1. The trucks, trailers and equipment of Transport be sold at a market-related price. That will be to the advantage of all the creditors, and not just SARS and the Bargain Council - the payment can be structured over a period of time. The creditors will have to wait longer, but at least they will get more than in a sale in execution.
2. Transport is liquidated as soon as possible.

There is a risk, on liquidation, that SARS will look to the representative person for payment of the tax, but that is something that they can do irrespective of liquidation, so we shall cross that bridge if we come to it.
The liquidator will also be able to take a critical look at the sale of assets, but in my opinion the transaction would be to the advantage of everyone, and much better than sales in execution.
I wish to emphasise again that there is not a "quick fix" - as they say, (but) in my opinion the sale transaction is the best option in the circumstances, although the creditors will be in touch and make your life difficult until everything has been sorted out.
Yours sincerely
Johannes Spamer
(My translation.)

[13] The Statement of Affairs lodged by Myburgh in terms of s 363 of the 1973 Companies Act after the liquidation of Transport indicated that Logistics was indebted to Transport in the sum of R409 221.

to DPMM Property (Pty) Ltd would appear to have been redeemed during the 2015 financial year because there is no reference to it in Transport's 2015 financials. The 2014 financials also reflect a liability by Transport to M Myburgh (whom I take to be Marius Myburgh) in the amount of R1 001 607.[14] The notes to the statements indicate that the liability arises from a loan, which is described as 'unsecured, bears no interest and has no fixed term of repayment'. It is also recorded that the loan '*is subordinated in favour of all creditors*'. In the 2015 financials, the loan from M. Myburgh is reflected in the amount of only R183 073, and the description of it as being a subordinated claim is omitted.

[26] Myburgh stated in his answering affidavit that the intention had been that Hauliers, which judging by its registration number (2014/075363/07) would appear to have been established in 2014, '*would service the local transport market*' and that Logistics '*would explore the transport brokering market, a market which DPMM has not previously explored*'. He said that '[t]*ransport brokers do not normally do the actual transport. They obtain the best rates from existing transport companies, like Hauliers, and place the order for the transport on behalf of the customer with the relevant transport company*'. The papers were silent on the extent of Hauliers and Logistics actual operations, if any, at the time the abovementioned email was sent to Myburgh by the fourth respondent. However, inasmuch as Myburgh's averment about Hauliers might imply that it was intended to conduct a transport business within South Africa whilst Transport conducted business elsewhere, it should be noted that Transport's director's report indicates that '*the company operates in South Africa*'. What is clear, as will become apparent later in this judgment, is that in August 2014 Hauliers took over Transport's business operation holus-bolus.

[14] Marius Myburgh had no knowledge of his reported loan account in Transport. He did testify, however, that in 2013 he had been required to expend approximately R1 million in settlement of DPMM (Pty) Ltd's tax liabilities. In the context of Myburgh's tendency to treat DPMM (Pty) Ltd and Transport as if they were one and the same entity, that might explain Marius Myburgh's loan account in Transport.

[27] Apparently accepting the advice furnished by the fourth respondent, Myburgh, acting on behalf of each the companies concerned, entered into the following transactions: (a) the sale by Transport to Trucking of 'the trucks, trailers, forklifts, tools and equipment and office furniture' as described in annexure A to the deed of agreement, and (b) the lease by Trucking of the aforementioned goods purchased by it from Transport to Hauliers. The deed of sale was dated 22 August 2014. The deed of lease is undated, but its terms suggest that it must also have been executed in August 2014. Transport was also party to the deed of lease because that agreement provided for the goods sold by Transport to be rented by Trucking to Hauliers with immediate effect, including the period until 1 September 2014, when Transport still remained the owner thereof in terms of the aforementioned deed of sale.

[28] The terms of the sale to Trucking provided for a purchase price of R4 200 000, (i.e. R4 788 000 inclusive of VAT at the then applicable rate of 14%). The amount of R4,2 million was the assessed market value of the goods concerned. (Despite the fact that the sale in effect entailed the disposal of Transport's entire undertaking, the selling price contained no consideration for the value of the goodwill in its business.) The purchase price was payable in equal instalments of R65 000 per month (exclusive of VAT) over 60 months. Remarkably in the context of Transport's liquidity constraints and the fact that Trucking was a dormant company, the agreement recorded that the first 22 instalments (amounting to R1 430 000, exclusive of VAT and R1 630 200 inclusive of VAT) would be paid '*up front ... by way of set off on the date of this agreement against the amount owed by the Seller to Purchaser*'. It also contained these further, rather peculiar, provisions in clauses 2.4 and 2.5:

> 2.4 The Purchaser shall thereafter pay the next [i.e. 23rd] instalment on the 1st October 2016, but subject to its right to set off at any stage any other amounts that are owed by the Seller to the Purchaser.
>
> 2.5 In lieu of the upfront payment of the first 22 instalments by the Purchaser, no interest shall be payable by the Purchaser in respect of the purchase price.

Therefore, despite the pressing claims by Transport's creditors, it disposed of all of its assets to Trucking by way of a transaction that gave the latter a generous payment holiday.

[29] In these proceedings, Myburgh testified that the amount referred to in the sale agreement as being owed by the Seller to the Purchaser comprised of the loan account claims of himself and Marius Myburgh in Transport, which, he said, had been ceded by them to Trucking. He spoke of he and his father having 'sacrificed' their loan claims against Transport. Marius Myburgh, however, professes ignorance of having any loan claim against Transport and denies having ceded to Trucking any claim that he may have had. Marius Myburgh also testified that he certainly would not have ceded any claim without a quid pro quo.

[30] In the Statement of Affairs lodged in terms of s 363 of the 1973 Companies Act and also in his founding affidavit in the winding-up application, Myburgh stated that he had an extant loan account claim in the amount of R1 630 000 in Transport. The basis upon which he could have built up such a substantial loan account claim in Transport after the 'sacrifice' of his then existing loan account in August 2014 between that time and the end of the company's 2015 financial year was not explained. It is difficult to conceive how that could have been done when the company had ceased to trade in August 2014. It also seems a remarkable coincidence that the alleged amount of his loan account claim as at the end of February 2015 corresponded virtually exactly with the VAT-inclusive amount credited to Trucking against the purchase price for Transport's assets.

[31] Myburgh's loan account claim in Transport, as stated in his application for Transport's winding-up, was not reconcilable with the company's 2015 financials. The relevant part of the financial statements referred to reflected in the balance sheet that the company's assets included '*Loans to related parties*' in the amount of R4 788 000 (i.e. the

VAT-inclusive purchase price for the assets sold to Trucking). The balance sheet item was related to Note 3, which stated as follows:

	2015	2014
3. LOANS TO RELATED PARTIES		
DPMM Trucking (Pty) Ltd This loan is unsecured, bears no interest and has a fixed term of repayment of R65 000.	4 788 000	
SB Myburgh This loan is unsecured, bears interest at market rates, and has no fixed term of repayment.	(1 830 200)	(220 647)
M Myburgh This loan is unsecured, bears interest at market rates, and has no fixed term of repayment.	(183 073)	(1 001 007)
	2 973 827	(1 222 254)
Non-current assets	4 788 000	
Non-current liabilities	(1 814 173)	(1 222 254)
	2 973 827	(1 222 254)

[32] It was perhaps not surprising in the circumstances that the applicants contended that the loan accounts were fictitious. In response to that allegation, Myburgh made the following averments in his answering affidavit:

> 18. In respect of the allegation that the loan agreements were fictitious because they did not reflect in the relevant financial statements, nothing could be further from the truth. In fact, the Applicants made the same mistake of reasoning during the insolvency inquiry and had to be corrected by the auditor, Mr Vos. Argument will be addressed to the Court in this regard at the hearing of the matter.
>
> 20. If the Applicants had proper regard to the affidavit in the liquidation application, they would realise that the loans due to my father and I (sic) varied constantly as we lent monies or

> received payments during the course of the year. At the time of the cession, the values of the loan accounts were as per the cession agreement. The loan accounts represented actual advances to or for the benefit of the company.

As already pointed out, these averments were contradicted both by the fifth respondent's evidence and the content of the financial statements. The contradictions were not addressed in argument.

[33] Myburgh's allegations concerning the substance of any set-off between Transport and Trucking are suspect, but it is not necessary for present purposes to make any determinative finding on the question. I shall assume, without making any finding, that the loan accounts were not fictitious and that they were ceded in the manner alleged by Myburgh. It is noteworthy on that approach that the implications of the set-off arrangement on Transport's liability to account for VAT on the transaction do not appear to have been addressed. I shall, however, also not concern myself with that aspect of the matter as it was not raised on the papers. I shall limit my assessment of the transactions as described by Myburgh to their eminently foreseeable, and therefore probably intended, effect on Transport's creditors.

[34] The lease by Trucking to Hauliers provided that the rental would be determined as provided in 'Schedule B'. There was no 'Schedule B', but Annexure B to the lease read as follows:

> 1. The monthly rental for the Vehicles & Equipment shall be the lesser of:
>
> 1.1 An amount of R65 000.00 (SIXTY FIVE THOUSAND RAND) per month; or
>
> 1.2 The rate per kilometre as determined by the Automobile Association of South Africa for trucks and trailers of the kind, age and condition as the Vehicles, multiplied by the distance travelled by each truck, trailer and forklift plus an amount of R8500 for all the other equipment.

(My underlining for emphasis.)

The lease agreement did not express whether the stipulated rental was VAT inclusive or not.

[35] The goods sold by Transport to Trucking comprised all of its plant and equipment. That much is confirmed in the company's balance sheet dated 28 February 2015, which reflects that it was possessed of no property, plant and equipment, and also from the averment in Myburgh's answering affidavit in the current proceedings that the sale transaction reflected his idea that '*the best solution for all, particularly* [Transport's] *creditors, would be to sell* [Transport's] *assets to another company in the DPMM Group*'. Elsewhere in the affidavit Myburgh addressed the (intended) consequences of the disposal of Transport's hard assets to Trucking and the related lease of them by the latter to Hauliers as follows: '*I caused all of the assets of* [Transport] *to be sold to the second respondent* [Trucking]'. He proceeded '*I had no choice but to cease the business of* [Transport] *... . At the same time I had responsibilities to meet and clients to service, so I had to find an alternative. It is clear for all to see what I did. All relevant agreements have been recorded in writing. ... As stated above, with the business of* [Transport] *having ceased, I had to conduct business through another entity. For this purpose I used another company in the DPMM Group of companies, being Hauliers'*.

[36] The disposal of the goods was preceded by the adoption by the company's shareholders, the trustees of the Trust, of a special resolution in terms of s 115 of the Companies Act, 2008. Such a special resolution was required by the Act to enable Transport to lawfully dispose of all or the greater part of its assets or undertaking. The resolution, dated 1 August 2014 (some three weeks prior to the date of the fourth respondent's abovementioned email of advice), was signed by all three of the trustees. It was the conduct of the trustees in resolving that Transport could dispose of its assets to Trucking that resulted in the applicants claiming a declaration against them in terms of s 424 in the current proceedings.

[37] Marius Myburgh filed a notice to abide the judgment of the court in his capacity as a cited trustee of Trustee. He also, presumably as fifth respondent, delivered an affidavit

setting out his role in the relevant matters. He said that he was excluded from any role in the DPMM transport business from shortly after the incorporation of Transport in February 2011. In reaction to his exclusion from any meaningful role in its management, he resigned as a director of Transport only a few weeks after his appointment. CIPC records show that he remains registered as the sole director of DPMM (Pty) Ltd, which appears no longer to be a trading entity.

[38] Marius Myburgh said that he and his late wife signed whatever documentation regarding the Trust that Myburgh from time to time put before them. He explained '*We trusted* [Myburgh] *in his business dealings on behalf of the Trust and due to the fact that we had no involvement in DPMM Transport whatsoever, we thought of it as just a mere formality to sign these documents on behalf of the Trust.*'

[39] Addressing, the signature of the aforementioned special resolution by the trustees of the Trust for the disposal of Transport's assets to Trucking, Marius Myburgh testified that the resolution had been telefaxed to him and his wife in Gansbaai, where they lived, on 21 August 2014. He said that he and his wife signed the document '*without making any enquiries regarding the purpose thereof due to the fact that neither of us were in any way whatsoever involved with DPMM Transport*'. He had not previously been aware of the existence of a company by the name DPMM Trucking (Pty) Ltd and stated that he became aware of DPMM Hauliers (Pty) Ltd for the first time only when he read the founding papers in the current proceedings.

[40] Marius Myburgh's affidavit was served on the offices of Spamer Triebel Inc. on 13 November 2019. Although the fourth respondent delivered a supplementary affidavit in response to it, Myburgh, who was represented in these proceedings by the same firm of attorneys as the fourth respondent, did not.

[41] Trucking, which according to its registration number appears to have been incorporated in 2009, the same year as that in which the Trust was established, did not carry on any business at the time of conclusion of the aforementioned agreements with Transport and Hauliers, respectively. It was also not possessed of any assets. Accordingly, after the execution of the sale agreement it became indebted to Transport for the outstanding balance of the purchase price, and its only means of satisfying that liability was the income stream that it might expect from the lease of the purchased goods to Hauliers.

[42] It is evident from the terms of the lease described above that Transport, which had been divested of all its hard assets (its 28 February 2015 balance sheet indicated that it had 'financial' assets worth R19 889 and 'receivables' quantified at R443 721 as of that date), might look forward to some form of income stream to pay its outstanding creditors only two years later, in October 2016; and even then at a maximum of R65 000 per month, and very conceivably significantly less than that. The set-off effect engineered by the cession to Trucking of the Myburghs' loan accounts in Transport very obviously exacerbated the prejudice occasioned to Transport's creditors by the alienation of the company's operational assets.

[43] Trucking, to which Transport would look for any income to service its debt to creditors, was in turn entirely reliant on Hauliers, which had taken over Transport's faltering business to be able to provide the funding to meet its obligations to Transport under the sale agreement.

[44] The formulation of the basis upon which Hauliers' rental obligation under the lease agreement fell to be calculated was unfavourable to Trucking's ability to be able to fund the instalments to Transport when those eventually became payable two years after the sale of Transport's assets. The rental actually payable by Hauliers could be significantly less than

R65 000 per month because of the agreed rental determination quoted in paragraph [34] above.

[45] It is evident from the content of the fourth respondent's email of advice quoted above that Transport had current creditors who were pressing for payment in August 2014 and threatening legal action. There is no cogent explanation by either Myburgh or the attorney advising him how selling all of Transport's assets to another company controlled by Myburgh on what the applicant's counsel described as 'the never-never', an d interest- free to boot, would advantage anyone other than Myburgh. If the intention of the scheme put in place by Myburgh were to advantage Transport's creditors, why were the rentals payable by Hauliers to Trucking not to be made immediately available to them through Transport? As events have proven, the measures taken were not to the advantage of Transport's creditors at all. On the contrary, they were manifestly, and very foreseeably, to their prejudice.

[46] Hauliers, which, as I have mentioned, appears to have been incorporated in 2014 - the year in which Myburgh's scheme was devised and implemented – would, to the knowledge of Myburgh at the time he caused Transport to alienate its assets, be operating in the same challenging environment that had caused Transport to run into difficulty. That much was essentially confirmed by Myburgh in his answering affidavit at para 15:

> As stated above, with the business of [Transport] having ceased, I had to conduct business through another entity. For this purpose, I used a different company in the DPMM Group of companies, being Hauliers. The business was and is to this day still under pressure in the difficult economic environment and Hauliers would not have been able to raise the finances to purchase the assets, then held by [Transport], and sold to Trucking. Consequently, Hauliers entered into a lease agreement in terms of which it leased the assets from Trucking, which bought them from [Transport]. The rentals would be applied to the balance of the purchase price due to [Transport]. In this way, the business had the best chance of surviving and of paying its creditors.

[47] The last sentence in the paragraph from Myburgh's answering affidavit quoted in the preceding paragraph is especially telling. It discloses that Myburgh, with the knowledge that

Transport could not legitimately continue to trade because it was factually and commercially insolvent, decided to dispose of its assets to another company controlled by him. The disposition was made to a company that was unable to afford to purchase them in the ordinary course, even on the basis of a financed transaction. The obvious and inevitable effect of the transactions was to keep Transport's creditors with currently due and payable claims out of any prospect of recovery, remote as that might be, for several years.[15] Myburgh's scheme also ensured that, upon liquidation, Transport would have no assets other than a claim against Trucking, a company with no tangible assets and only a tenuous expectation of an income stream from Hauliers that would not necessarily be sufficient to cover its liability to Transport. Myburgh's professed belief that this would be to the advantage of any of Transport's creditors is so far-fetched and fanciful as to be nothing short of risible.

[48] Even if one were, ex hypothesi, to accept Myburgh's claim on the papers to have acted honestly in accordance with the advice given to him by his attorney, his conduct in doing so was so grossly unreasonable as to be indicative of recklessness. The advice furnished by the fourth respondent, especially if it were understood to include the conclusion of the contracts subsequently entered into between Transport and Trucking and between Trucking and Hauliers,[16] was so palpably misconceived that any businessman applying his mind would have recognised as much. I need do no more than refer to the passage in *Howard* at p. 674E-G, quoted in paragraph [15] above in support of this finding.

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[15] According to the Statement of Affairs Myburgh lodged in terms of s 363(2) of the Companies Act, 1973, the company's creditors included what appears to be a fuel supplier with a claim for R1 706 534,[15] SARS, in respect of a claim for the payment of VAT in the amount of R2 678 598 and the Bargaining Council – which had been threatening to take judgment against the company – in the amount of R851 715. All of these could have enforced their claims by taking judgment against Transport and executing against its assets,

[16] It seems reasonable to make this assumption because at the insolvency inquiry the fourth respondent conceded that he had probably been drafter of the sale and lease agreements involved.

[49] Myburgh was an experienced businessman. He had previously been employed by Absa Bank and thereafter, from 1998, he had been engaged in the management of what appears to have been for many years a successfully conducted trucking business. It is also evident that he was astute to structuring his affairs in such a way as to protect him from personal liability by the establishment of a number of companies, loosely referred to as 'the DPMM Group', and by the establishment of a trust in which assets might be sequestered for the benefit of himself and his family and over which he exercised effectively absolute control. He was no babe in the commercial woods. His conduct fell signally short of the standard of conduct prescribed for company directors in s 76 of the Companies Act, 2008.

[50] Dealing with the disappearance or disposal of assets after their sale to Trucking, Myburgh testified '*In the course of time, some of the assets were sold to third parties by Trucking. The rotation of assets is normal for the type of business of the group. Some assets were also lost through theft, or damaged*.' It was not explained how Trucking could come to sell assets that it had leased to Hauliers. It also was not explained how the sale of the leased goods could not but diminish Hauliers' liability in respect of the rental therefor, and consequently, also adversely impact upon Trucking's ability to service its instalment payment obligations to Transport. Whilst these actions did not entail the carrying on of Transport's business, they do nevertheless tend to contradict Myburgh's professed state of mind when he caused Transport, Trucking and Hauliers to enter into the contracts described above. They were wholly inconsistent with the conduct of anyone concerned with the best interests of Transport's creditors.

[51] In my judgment a very clear case of reckless, if not fraudulent, conduct within the meaning of s 424(1) of the 1973 Companies Act has been made out against the first respondent, and a declaration that he bear personal liability for Transport's debts will follow accordingly.

[52] A case has not been made out for such relief against Trucking and Hauliers, the second and third respondents. It cannot be said that those companies were involved in the carrying on of Transport's business. The evidence suggests that any order against those companies would in any event be worthless. That, no doubt explains why the applicants have not persisted with a claim against Trucking for payment of the purchase price under the sale agreement with Transport. The leased trucking assets in Hauliers possession have reportedly been disposed of by Myburgh notwithstanding that some of them were under judicial attachment at the time. It seems to me that the second and third respondents were actually joined in these proceedings in relation to relief sought in the notice of motion that has not been persisted with.

[53] I am also of the view that the fourth respondent's role in giving advice to Myburgh as the director of Transport did not amount to being party to the carrying on of the company's business. No relief will be granted against the fourth respondent.

[54] Turning now to the position of the trustees of the Trust. Their authorisation, qua shareholders of Transport, was a prerequisite to the company's ability to dispose of all of its operational assets. It is established that the disposal by a company of its assets is a manifestation of the carrying on of its business. See the full court's judgment in *Currin and Another v Van Zyl NO and Another* [2019] ZAWCHC 98 (7 August 2019) at para 19. The judgment by Oliver J (later Lord Oliver of Aylmerton) in *Re Sarflax Ltd.* [1979] 1 All ER 529 (Ch.D) in this regard, of which mention was made in *Currin*, has been referred to approvingly by Court of Appeal; see *ESS Production Ltd (In Administration) v Sully* [2005] EWCA Civ 554 (11 May 2005) in para 82.

[55] The application against the trustees raises some interesting questions, which are not free from difficulty.

[56] The first of these questions is whether by adopting the special resolution in terms of s 115 of the 2008 Companies Act to permit the disposal by Transport of its assets, the trustees could be said to being party to the carrying on of Transport's business. I have already found that the disposal of the company's assets may be characterised as carrying on its business. The conduct of a company's business is ordinarily undertaken by its directors and employees, not by its shareholders. It seems to me, however, that the effect of s 115 (and its statutory predecessors, s 228 of the 1973 Act and s 70 *dec* (2) of the 1926 Act) is to bring about an exception to the ordinary position.

[57] It has been observed in the jurisprudence that the effect of the provision is to take control of the disposition of the greater part of a company's assets or its undertaking out of the hands of the directors and to put it in the hands of the shareholders; see *Sugden and Others v Beaconhurst Dairies (Pty) Ltd and Others* 1963 (2) SA 174 (E) and *Lindner v National Bakery (Pty) Ltd and Another* 1961 (1) SA 372 (O). In *Lindner*, Smuts AJ held that the object of s 70 dec (2) of the 1926 Act was '*evidently that the shareholders are to exercise control over the disposal of the undertaking or the greater part of the assets of the company*'.[17]

[58] The provision has been held to be one for the protection of the shareholders. The question then is, in exercising the power reserved to them in terms of the statutory provision, are the shareholders required to have regard only to their own interests, or also to matters such as the good governance of the company in general, including considering the interests of the company's creditors? As far as I have been able to ascertain, the question has not yet been considered in the reported jurisprudence.

[17] At 379D.

[59] In my judgment, when shareholders exercise the control reserved to them in terms of s 115 of the Companies Act over the alienation of a company's assets or undertaking they are obliged to have regard not only to their own interests, but also to the effect of their decision on the company's ability to meet its obligations to third parties. A failure to do so, certainly a reckless disregard by them of the company's obligations when they resolve to dispose of its assets or undertaking, amounts to an abuse of the limitation of personal liability for the company's obligations that corporate personality affords to stockholders.

[60] It is necessary in the context of that conclusion on the applicable principles to examine in some detail the character of the Trust and the manner in which the trustees exercised their functions.

[61] It will be recalled that Myburgh was the founder of the Trust. At all times material the trustees of the Trust were Myburgh and his parents, Marius and Susan Myburgh. Unbeknown to the applicants when they instituted the current proceedings, Susan Myburgh had passed away in December 2018. The trustees of the Trust (including Myburgh's late mother) were joined *nomine officii* as the sixth to eight respondents in the application. The deed in terms of which the Trust was established provides that there must at all times be at least two trustees. [18] As Myburgh and his father remain as trustees, it was not necessary to adjourn proceedings until a substitute for the deceased trustee was appointed.

[62] The trust deed shows that Myburgh and his offspring were designated as the principal beneficiaries of the Trust. It also appears that Myburgh has the casting vote at the trustees' meetings and, if that were not sufficient, he also has a right of veto in respect of any trustees'

[18] Clause 5.2. and 5.3 of the trust deed.

decision.[19] Additionally, he is vested by the trust deed with the power to unilaterally relieve any other trustee of his or her office as such.[20]

[63] The terms of the trust deed show the Trust to be a glaring example of the sort of 'family trust' that Cameron JA, in *Land and Agricultural Bank of South Africa v Parker* 2005 (2) SA 77 (SCA), deprecated for being an abuse of the trust form. It is disturbing in the circumstances that, notwithstanding the pertinent admonishments in that judgment, the Master did not appoint an independent trustee and does not appear to have required annual audit reports in respects of the Trust's affairs.[21]

[64] As mentioned, it appears that the fourth respondent has acted for the first respondent in various matters over a period of several years. The trust instrument of the Trust is endorsed with his firm's name, which suggests that it was drafted there. A letter addressed by the fourth respondent to the Master of the High Court in November 2009, a copy of which was annexed to the founding affidavit, suggests that the fourth respondent was involved in the lodgement of the Trust's trust instrument with the Master at the time the Trust was established. The fourth respondent stated in the letter that he 'specialises in commercial legal work'. He referred to his firm as the 'administrators of the Trust'. Myburgh and his parents also individually submitted identically worded letters to the Master when they sought approval of their respective appointments as the first trustees of the Trust and requested to be exempted from furnishing security. They too stated that 'the administrators' of the Trust were Spamer Triebel Inc. (the name of the fourth respondent's firm).

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[19] Clause 13.2 of the trust deed provides as follows (in translation from the Afrikaans text): '*All decisions and actions of the trustees shall be unanimous. Sean Billy Myburgh shall have a deciding vote where there is a difference of opinion which will give rise to a deadlock. Sean Billy Myburgh will also have a veto in respect of any decision requiring to be made by the trustees.*'

[20] Clause 15.3.1 of the trust deed provides as follows (in translation from the Afrikaans text): '*Sean Billy Myburgh, for so long as he is a trustee, shall have the right by written notice to discharge any trustee from his/her office.*'

[21] *Parker* at para 35, and see the discussion in para [64] -[67], below.

[65] It is not expressly apparent on the papers just what the fourth respondent meant by describing his firm as the 'administrators of the Trust'. *Ex facie* its terms, the letter (and those submitted by the trustees) was plainly written to address the Master's requirements as set forth in 'Memorandum (JM 21)'.[22]

[66] Those requirements were introduced by the then Acting Chief Master in response to the remarks of Cameron JA in *Parker* supra, at para 35, that the Master '*should, in carrying out his statutory functions* [under the Trust Property Control Act 57 of 1988], *ensure that an adequate separation of control from enjoyment is maintained ... by insisting upon the appointment of an independent outsider as trustee to every trust in which (a) the trustees are all beneficiaries and (b) the beneficiaries are all related to one another*'. The remarks were uttered in the context of the appeal court's expressed concern that so many so-called 'family trusts' involved a violation of the 'core idea of the trust' that entails the separation of ownership or control of the trust assets by the trustees from the enjoyment derived from the assets by the trust beneficiaries; see Bradley S Smith, *Parker, life partnerships and the independent tru*stee, 2013 SALJ 527 at 527-8.

[67] One of the courses the Master might follow to give effect to the court's enjoinder in *Parker* is to use s 7(2) of the Trust Property Control Act to appoint an 'independent trustee'. The information required to be provided in compliance with JM 21, notwithstanding that document refers expressly only to s 6(3)(a) and (d) of the Act, is self-evidently directed at providing the Master with a basis to make an informed decision in this regard.

[68] Para 8 of JM 21 provides for the following information to be furnished: '[w]*hat steps will be taken by the Trustee(s) to maintain accurate records of the trust; whether he will exercise direct personal control over the trust, if not, what agent or firm has been instructed*

[22] Memorandum MJ 21 is accessible on the Department of Justice and Correctional Services website at https://www.justice.gov.za/master/m_forms/JM21.pdf (accessed on 6 November 2020).

by him and to what extent'. The statement by the fourth respondent that his firm would be the 'administrators of the Trust' appears to have been directed at answering that question in Memorandum JM 21. The implication would therefore appear to have been that it was contemplated that the fourth respondent's firm would, on an ongoing basis, be closely involved in assisting or advising the trustees in respect of the administration of the Trust. The tenor of the fourth respondent's answering affidavit would indicate, however, that in reality that was not the case. The uncontroverted evidence indicates that Myburgh exercised effective control over the Trust - as the terms of the trust deed described above foreshadowed - and indeed, that his control over it was essentially unfettered.

[69] The fact that the seventh and eighth respondents blindly endorsed whatever Myburgh, as their co-trustee, put before them for signature implies that they abdicated their decision-powers and responsibilities to their son. It follows that in voting in favour of the decision to allow Transport to dispose of the major portion of its assets they were content to adopt Myburgh's knowledge as their own knowledge. I consider that Myburgh's knowledge in any event falls to be imputed to them. The law could not countenance any attempt by the seventh and eighth respondents to claim ignorance of the pertinent circumstances. Just as a director of a company will not be permitted to shelter behind culpable ignorance or failure to understand the company's affairs, so too will a shareholder in a private company required to decide, in terms of s 115 of the 2008 Companies Act, whether a company should dispose of its undertaking not be permitted to do so.

[70] This reasoning would support the conclusion that the trustees who supported the resolution that Transport dispose of its assets to Trucking should be exposed to being declared personally liable in terms of s 424(1) of the 1973 Companies Act. But the sixth to eighth respondents are joined in their capacity as co-trustees of the Trust, not personally. That is why Myburgh and his father were joined twice, personally and also, discretely, in

their capacity as co-trustees. The object of their joinder in that way would appear to have been to render the assets of the Trust liable to execution. That much is confirmed by the withdrawal of the claim against Marius Myburgh in his personal capacity, whilst the claim was persisted in against him qua co-trustee. It does not follow, however, that because the trustees exposed themselves to liability in terms of s 424 the assets of the Trust would be available to satisfy any order against the trustees to pay the debts of Transport.

[71] One cannot ignore the implications of the existence of a validly established trust by treating the trust property as if it were the property of the trust's controllers. That can be done only if it is shown that the trust is in fact a sham. It was pointed out in *Van Zyl and Another NNO v Kaye NO and Others* 2014 (4) SA 452 (WCC) that even if it were to be accepted that a trustee administered a trust without proper regard to his fiduciary duties and in a sense treated it as his 'alter ego', that would not, in itself, make the trust a sham.[23]

[72] In the current matter, notwithstanding the evidence that was available to them that might have supported such an allegation, the applicants did not even attempt to prove that the Trust was a sham. For that reason the claim against the sixth, seventh and eighth respondents cannot succeed.

[73] The evidence concerning the administration of the Trust is nevertheless a matter for concern, and I consider that it would be remiss of me to overlook it. I shall direct that the Chief Registrar must forward a copy of this judgment to the Master of the High Court so that she may consider taking appropriate action in the light of the findings and comments recorded above.

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[23] See *Kaye*'s case generally, but especially at para 28. (In *Osborne v Cockin NO* [2018] ZASCA 58 (17 May 2018), at para 23, the Supreme Court of Appeal noted that '[t]*he principles in respect of disregarding the form of the trust for the purpose of establishing that another person or entity is entitled to assets appearing to be those of a trust are set out in Van Zyl NNO v Kaye NO ...* .')

[74] In terms of para 1 of the notice of motion the applicants sought ex post facto authorisation in terms of s 386(5) of the 1973 Companies Act to institute the current proceedings. They also sought an extension of their powers in the terms set out in para 2.1 to 2.7 of the notice of motion and, in terms of para 3 thereof, ratification of certain other actions they had already taken. In para 4 of the notice of motion, the liquidators prayed for an order that '*the costs and fees incurred by* [them] *in connection with the actions already taken by them and hereby ratified and confirmed in terms of paragraph 3* [of the notice of motion] *shall be costs in the administration of the Company'*.

[75] As described above, notwithstanding the wide-ranging substantive relief sought in terms of the notice of motion, the only remedy of substance that was persisted with was the application for relief in terms of s 424. At the hearing there was some debate between counsel as to whether the applicants required an extension of their powers to institute proceedings in terms of s 424 of the 1973 Companies Act, for the provision itself in terms gives them legal standing to do so. During oral argument it appeared to be argued by the applicants' counsel that the effect of the judgment of Vorster AJ in *Ex parte Liquidator, Vautid Wear Parts (Pty) Ltd (in liquidation)* 2000 (3) SA 96 (W) - disapproving the approach adopted in this court by Brand J in *Fundstrust (Edms) Bpk (in likwidasie) v Marais en Andere* 1997 (3) SA 470 (C) that it was permissible for a liquidator to institute proceedings in terms of s 424 in the name of the company in liquidation - was that s 424 afforded self-executing authority to a liquidator to institute proceedings thereunder. After the hearing, however, and on my invitation, counsel made supplementary written submissions in which they appeared to withdraw that submission. I think that they were correct to do so. The criticism that has been directed at the judgment in *Fundstrust* has been limited to its implication that a company has

locus standi in terms of s 424(1). With respect, I think it is clear from the plain tenor of the provision that it does not.[24]

[76] The liquidators, by contrast, are expressly given standing in terms of the provision to institute proceedings in terms of s 424. Their power to do so is one comprehended by s 386(4)(i) of the 1973 Companies Act. By virtue of s 386(3)(a), it is a power they are able to exercise with the authority granted by meetings of creditors or contributories or on the directions of the Master given under s 387.

[77] The liquidators allege that they were unable to obtain authority from a meeting of creditors because no creditors had proved claims for fear of becoming liable to make a contribution. SARS belatedly proved a claim, and at this stage would appear to be the only proved creditor. It is common cause that the applicants did not seek directions from the Master in terms of s 387. They have offered no explanation for not having done so.

[78] Section 387 of the 1973 Companies Act provides as follows:

> **Exercise of liquidator's powers in winding-up by Court**
>
> (1) Subject to the provisions of this Act, the liquidator of a company which is being wound up by the Court, shall, in the administration of the assets of the company, have regard to any directions that may be given by resolution of the creditors or members or contributories of the company at any general meeting.
>
> (2) In regard to any matter which has been submitted by the liquidator for the directions of creditors and members or contributories in general meeting, but as to which no directions have been given or as to which there is a difference between the directions of creditors and members or contributories, the liquidator may apply to the Master for directions and the Master may give or refuse to give directions as he may deem fit.
>
> (3) Where the Master has refused to give directions as aforesaid or in regard to any other particular matter arising under the winding-up, the liquidator may apply to the Court for directions.
>
> (4) Any person aggrieved by any act or decision of the liquidator may apply to the Court after notice to the liquidator and thereupon the Court may make such order as it thinks just.

[24] The question of mode of citation raised in *Fundstrust* seems to me in any event to have been based on a highly technical objection; cf. *Gainsford N.O. and Others v Tanzer Transport (Pty) Ltd* [2014 ZASCA 32 (28 March 2014), 2014 (3) SA 468 (SCA), [2014] 3 All SA 21 (SCA).

[79] As mentioned, the applicants have sought authority to institute the proceedings by resort to s 386(5), which provides;

> In a winding-up by the Court, the Court may, if it deems fit, grant leave to a liquidator to raise money on the security of the assets of the company concerned or to do any other thing which the Court may consider necessary for winding up the affairs of the company and distributing its assets.

[80] There is nothing in s 386(5) which could support the view that a court might grant leave thereunder to a liquidator to do anything only if directions have first been sought from and refused by the Master. The scheme of the legislation does suggest, however, that directions should ordinarily be sought from the Master before the court is approached. In a properly functioning system an approach to the Master would ordinarily afford a quicker and more cost-effective procedural route than an application to court. Unnecessary applications to court should therefore be discouraged as a matter of policy.

[81] It seems to me that the legislative framework has an inbuilt mechanism to promote the policy in question. Unnecessarily incurred costs may be disallowed as costs in the liquidation by the Master in terms of s 407(3) and also, consequent upon any permission or ratification granted to the liquidators in terms of s 386(5) to engage legal attorneys and counsel, in terms of s 73 of the Insolvency Act. It is because I would not wish to impinge on the Master's discretionary powers in this regard that I am unwilling to grant the order sought by the applicants in terms of paragraph 4 of the notice of motion. My decision in this respect should not however be construed as intended in any way to anticipate or influence the exercise by the Master of her discretion. It is in any event a matter in which I would expect that the views of the proved creditors would weigh heavily.

[82] In order to obtain leave in terms of s 386(5), a liquidator must demonstrate that the leave sought is *necessary* for the winding up the affairs of the company and distributing its

assets.[25] The founding papers in the current matter were not drawn with that requirement in mind. The relief sought in terms of paragraph 2 of the notice of motion is essentially a rehash of all the powers in s386(4)(a) to (h). The supporting affidavit does not make out a case that all of them are necessary in this matter. A stark example is the power sought to carry on any part of the business of the company. Quite why that power should be needed in the case of a company that divested itself of all of its operational capital and ceased trading more than six years ago is a mystery which nothing in the founding papers is directed at solving. The question was also not addressed by any of the parties in argument. The relief that will be granted in terms of paragraphs 2 and 3 of the notice of motion will be trimmed down accordingly.

[83] The applicants have not succeeded in obtaining any relief against any of the respondents except Myburgh. I nevertheless do not intend to grant costs orders in favour of the other respondents. The second and third respondents and the Trust were nothing more than tools used by Myburgh in the implementation of his scheme to alienate Transport's assets at a time when the company was unable to pay its current creditors. In a very real sense they represent nothing more than Myburgh's alter ego. Insofar as the fourth respondent is concerned, I take a very sceptical view of the probity of the advice that he furnished to Myburgh. The indications are that the obviously ill-conceived advice was used by Myburgh to try to clothe his conduct with a cloak of respectability. As a mark of the court's disapproval, the fourth respondent will be left to bear his own costs in the application, notwithstanding that the relief sought against him is refused.

[84] I have already mentioned that this judgment will be drawn to the attention of the Master so that she may, if she considers it appropriate, review the manner in which the Trust

[25] See the commentary on the subsection in Kunst et al., *Henochsberg on the Companies Act* at 830 [Issue 31], and the authorities mentioned there.

is being administered. I also think the conduct of Myburgh as a director of companies deserves attention. The evidence suggests that he has no respect for the separate personality of the various companies that he controls and is grossly deficient in his appreciation of the nature of his responsibilities as a director. In line with legislative reform of corporations law elsewhere in the world, the new Companies Act invests the regulatory body primarily charged with the administration of the Act, in our case the Companies and Intellectual Properties Commission,[26] with the power to apply in appropriate cases to disqualify delinquents from holding office as directors. The power is clearly, and appropriately, considered necessary in the public interest. The Chief Registrar will therefore also be directed to forward a copy of this judgment to the Commissioner for consideration whether it would be appropriate for the Commission to make application in terms of s 162(3) of the 2008 Companies Act for an order declaring Myburgh to be a delinquent director.

[85] In the result an order will issue in the following terms:

1. The applicants are hereby authorised, in terms of s 386(5) of the Companies Act 61 of 1973 ('the Act'), with retrospective effect to the extent applicable, to bring the current application and, subject to the provisions of s 73(5) of the Insolvency Act 24 of 1936, to incur the costs and fees associated therewith as costs in the winding-up.

2. The applicants are hereby granted leave, also in terms of s 386(5) of the Act, to exercise the following powers:

    2.1 To bring or defend in the name and on behalf of CPT to CAIRO Transport (Pty) Ltd (in liquidation) ('the Company') any action or other legal proceedings of a civil nature, and, subject to the provisions of any law relating to criminal procedure, any criminal proceedings;

[26] See ss 185 - 188 of the Act

2.2 To obtain legal advice on any question concerning the administration of the Company and to engage the services of attorneys and counsel in connection with any matter arising out of or related to the affairs of the Company;

2.3 To agree with such attorneys and counsel on the tariff or scale of fees for the rendering of services to the Company and to conclude written agreements thereanent as contemplated in s 73(2) of the Insolvency Act;

2.4 Subject to s 73(5) of the Insolvency Act, to pay the fees and disbursements of such attorneys and/or counsel out of the funds of the Company as costs in the administration of the Company, as and when invoices for such fees and disbursements are rendered;

2.5 To compromise or admit any claim or demand against the Company, including any unliquidated claim;

2.6 To agree to any reasonable offer of compromise made to the Company by any debtor and to accept payment of any part of a due debt in settlement thereof or to grant extensions of time for the payment of any such debt;

2.7 To abide by or terminate any agreements entered into by the Company either before or after its liquidation.

3. It is declared, in terms of s 424(1) of the Act, that the first respondent (Sean Billy Myburgh) shall be personally responsible, without any limitation of liability for all of the debts or other liabilities of the Company.

4. It is directed, in terms of s 424(2) of the Act, that the first respondent shall make payment of any amount for which he has been declared personally liable in terms of paragraph 3 of this order to the liquidators for distribution to the Company's creditors on the basis provided for in the Insolvency Act.

5. It is further directed in terms of s 424(2) of the Act that the applicants shall be and are hereby empowered to institute proceedings against the first respondent on behalf of any creditors of the Company to exact payment of any amount for which he has been declared personally liable in terms of paragraph 3 of this order.

6. Save as aforesaid, and to the extent that it was persisted with by the applicants, the application for the other substantive relief sought in the application is refused.

7. The first respondent shall pay the applicants' costs of suit in the application.

8. Save as provided in paragraph 7 above, there shall be no order as to costs.

9. The Chief Registrar is directed to forward a copy of this judgment to the Master of the High Court, Cape Town, for general consideration and with especial attention to paragraphs [61] to [73].

10. The Chief Registrar is further directed to forward a copy of this judgment to the Commissioner of the Companies and Intellectual Properties Commission for general consideration and with especial attention to paragraph [84].

A.G. BINNS-WARD
Judge of the High Court

APPEARANCES

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Applicants' attorneys:	**Lombard & Kriek Attorneys** **Tygervalley** **McGregor Stanford Kruger Inc.** **Cape Town**
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