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

CASE NO: 12870/19

REPORTABLE

In the matter between:

THOMSON & DE KOCK CONSTRUCTION COMPANY (PTY) LTD	Applicant
and	
HELGAARD MULLER MEIRING TERBLANCHE N.O	First Respondent
JOHANNES JACOB THERON N.O	Second Respondent
MBULLO MOSES SIDYIYO N.O	Third Respondent
HELGAARD MULLER MEIRING TERBLANCHE	Fourth Respondent
JOHANNES JACOB THERON	Fifth Respondent
MBULLO MOSES SIDYIYO	Sixth Respondent

Coram: P.A.L.Gamble, J
Date of Hearing: 4 December 2019; 5 & 6 February 2020.
Date of Judgment: 19 May 2020

JUDGMENT DELIVERED ELECTRONICALLY ON 19 MAY 2020

GAMBLE, J:

INTRODUCTION

1. This opposed application arises from the liquidation of a property development business known as Cape Vernacular Properties CC ("*CVP*") which was finally wound up by order of this court on 27 October 2009. Pursuant to the winding up, the first to third respondents were duly appointed by the Master as the joint liquidators of CVP. Now, more than 10 years later, the winding up process is unresolved and is unlikely to be completed in the immediate future. So much for the suggestion of Kuper J in *SA Clay*[1] that "*the whole machinery of the [Companies] Act is directed towards a speedy liquidation and distribution of the assets of the insolvent estate."*

THE RELEVANT FACTS

2. The applicant company, Thomson and De Kock (Pty) Ltd ("*TDK*"), was employed by CVP to install certain bulk services for a housing development being constructed by CVP on the remainder of Erf 185, Blue Downs, Cape Town (hereinafter referred to as "*the property*"). The development ran into financial difficulty and in the process of the winding up that ensued, TDK submitted to the liquidators a claim for its civil engineering services in the sum of R3 053 120,46. It is common cause that the only other creditor of CVP is a company known as Slip Knot Investments 777 (Pty) Ltd ("*Slipknot*") which had advanced loan finance to CVP in excess of R20m and had also subsequently taken cession of a further loan to CVP of

[1] SA Clay Industries v Katzenellenbogen NO and another 1957(1) SA 220 (W) at 224

more than R2m by Imperial Bank. The property is the only asset owned by the liquidated entity.

3. Slipknot's loans were secured by various mortgages over the property and the liquidators automatically assumed that its secured claims ranked ahead of that of TDK. Not so, said TDK. Its claim was in respect of an "*improvement and salvage lien*" (having performed construction work on the property prior to the liquidation it is in truth an enrichment lien) and in early 2010 it asserted the right to rank first amongst the creditors.

4. The liquidators then sought legal advice, initially in March 2010, from counsel who confirmed TDK's stance on the basis of established authority, inter alia, *Smookler's Trustees*[2] and *Brooklyn House*[3]. However, the liquidators were not happy with such advice and in November 2010 they sought a second opinion from an attorney who distinguished the cases relied upon by counsel and, relying on *Buzzard Electrical*[4], advised the liquidators that their stance was correct in law.

5. On the strength of the second opinion the liquidators took the pre-emptive step of concluding a deed of sale with Slipknot in December 2011 in terms whereof the property was sold to Slipknot for R2 207 574,00 which equated to the capital of TDK's claim less interest and administration costs. This sale took place

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[2] United Building Society v Smookler's Trustees and Galombik's Trustees 1906 TS 623 at 630

[3] Brooklyn House Furnishers (Pty) Ltd v Knoetze and Sons 1970 (3) SA 264 (A) at 270-1.

[4] Buzzard Electrical (Pty) Ltd v 158 Jan Smuts Avenue Investments (Pty) Ltd and another 1996 (4) SA 19 (SCA) at 26E-F

without TDK's knowledge and almost 3 years before the confirmation of the First and Final Liquidation Account ("*the first L&D account*) by the Master.

6. In terms of the deed of sale no money passed hands: the intention was that the purchase price would be offset against Slipknot's claim in liquidation by way of an interim award. There was however a proviso in the deed of sale: a manuscript insertion in the typed document which reads -

> "*In the event the court or the master rule the claim of Thomson De Kock (sic) rank (sic) first or above Slipknot (sic) claim, the full purchase price will be payable."*

In June 2012 the liquidators went ahead and transferred the property to Slipknot without recovering payment of the purchase price.

7. In August 2014 the liquidators filed the first L&D account with the Master and reflected TDK as a secured creditor on the strength of its improvement lien but ranked its claim behind that of Slipknot. Thereafter TDK lodged an objection against the first L&D account with the Master who, on 27 June 2016, upheld TDK's objection and ruled that its claim enjoyed preference above all other claims of creditors in the insolvent estate of CVP.

8. As a consequence of this ruling, and by virtue of the manuscript insertion in the deed of sale referred to above, Slipknot became immediately liable to effect payment of the full purchase price to the liquidators. It did not do so, however, deciding rather to take the Master's ruling on review in terms of the provisions of s407

of the Companies Act, 61 of 1973 ("*the Old Act*"). On 21 February 2018 Fortuin J dismissed Slipknot's review application[5] and upheld the decision of the Master. Undaunted by this ruling, Slipknot appealed the order of Fortuin J before a Full Bench of this Division which, on 3 May 2019, upheld the order of the court *a quo.*

9. On 24 May 2019 the liquidators (pursuant to the written demand of TDK) lodged an Amended Liquidation and Distribution Account ("*the amended L&D account")* with the Master for confirmation and on 23 July 2019 this account was duly confirmed by the Master. This event brought Slipknot's obligation to pay the purchase consideration to the trustees unequivocally into effect and on the same day TDK demanded payment of its secured award from the liquidators. Their failure to do so gave rise to this application which was launched as a matter of urgency on 25 July 2019.

THE BASIS FOR THIS LITIGATION

10. The position adopted by TDK is that the provisions of s409(1), 410(4) and 387(4) of the Old Act are applicable to the amended L&D account. Accordingly, it argues that once confirmed by the Master, the award in its favour shall, in terms of s408(2) of the Old Act "*have the effect of a final judgment*" and that it is therefore entitled to payment forthwith. It accordingly requests the Court to compel the liquidators to pay the award to it.

11. The liquidators' response is that the confirmed account is incorrect in that it wrongly reflects that the proceeds of the sale of the property to Slipknot have

[5] Relying in the main on ***Smookler's Trustees***

been realized and that they are available for distribution to creditors as a secured award. They have accordingly filed a counter-application in which they seek the setting aside of the amended L&D account and, in addition, apply to lodge a further L&D account.

SUPPLEMENTARY MASTER'S REPORT

12. When the matter served before this Court on 4 December 2019 it became apparent during the course of counsel's addresses that a further report by the Master might assist the Court in considering the matter. Accordingly, the matter was postponed by agreement until 5 February 2020 and the Master was requested to furnish a supplementary report in which she was directed to answer certain questions which the parties' had jointly formulated. That supplementary report was filed on 8 January 2020 and in it the Master comprehensively dealt with the issues presented to her. For the sake of convenience I shall reproduce in full the various questions posed in the Court order of 4 December 2019 and the Master's reply thereto *ad seriatim.*

13. Question 3.1: "*Was the Master aware, at the date that the Master issued her directive of the 27th of June 2016, that the proceeds of the sale of CVP's property had not been received by the liquidators?*

Answer: *No, the Master was not aware at the time of making her ruling that the proceeds of the sale had not been paid. The Master became aware that the proceeds of the sale had not been paid when she received a letter from [TDK's attorneys]… dated 24 April 2017. Paragraph 6.11.6 states 'there is no evidence that the liquidators*

have secured the purchase price of R2 297 574,00 from Slipknot'. This was further confirmed by the liquidators in their letter dated the 12th of June 2017…"

14. Question 3.2: "*If the Master was so aware, did the Master give consideration as to how the secured award would be paid by the liquidators and if so, in what manner did the Master envisage that the liquidators would make payment thereof?"*

Answer: *As the Master was not aware of the fact that the purchase price had not been paid at the time of making her ruling on the 27th of June 2016, the Master never considered how the liquidators would make payment in terms of the liquidation account."*

15. Question 3.3: *"Was the Master aware that the Court Order of 21 February 2018[6] had directed the Master to confirm the amended account?"*

Answer: *"Yes an email was sent by [TDK's attorneys] on the 23rd of February 2018 to Delphine Smith of the Masters (sic) Office, Cape Town… which attached the judgment dated the 21st of February 2018."*

16. Question 3.4: "*If so, did the Master confirm the L&D account of 23 July 2019 in compliance with such directive?"*

Answer: *"Yes, on the 13th of March 2018 Dalphine Smith of the Masters Office received an email from Marthie Nel… who represented Slipknot Investments 777 (Pty)*

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[6] The order of Fortuin J.

Ltd. Attached to the email was the Applicants' Application for Leave to Appeal. The application for leave to appeal was granted and judgment in respect of the appeal delivered on 3 May 2019. The Master was subsequently advised of the judgment under cover of [TDK's attorneys'] letter dated the 15th of May 2019…"

17. Question 3.5: *"Was the Master aware, when she confirmed the said account on 23 July 2019, that the proceeds of the sale of CVP's property had not been paid to the liquidators?"*

Answer: "*Yes, the Master was aware that the proceeds of the sale had not been paid at the time of confirming the First & Final Liquidation, Distribution Account."*

18. Question 3.6: "*Is the Master of the view (having regard to the fact that the proceeds of the sale had not been received by the liquidators) that:*

3.6.1 the L&D account (confirmed on 23 July 2019) is correct or incorrect?"

Answer to 3.6.1: *"It is the Masters (sic) belief that the confirmed First & Final Liquidation, Distribution account is incorrect. The confirmed liquidation account… reflects the sale price of R2 516 634,36 and interest thereon of R1 409 315,24 under vouchers 11 and 21. It is the Masters (sic) understanding that the interest portion is disputed by Slipknot Investments 777 (Pty) Ltd and the sale price has not been paid. As the liquidators are required to make payment in terms of the account immediately after confirmation of*

the account, the liquidators are unable to comply with their obligations in terms of section 410(1) and (2) of the Companies Act 61 of 1973. Ultimately because the purchase price has not been paid and the interest thereon is disputed the liquidation account should not have been lodged or confirmed pending final resolution of the collection of the purchase price and interest. Therefore the liquidation account is incorrect because it doesn't reflect the true state of affairs of the income received in the estate. A correct liquidation account will only be able to be lodged once the issues relating to the purchase price and interest have been concluded and the liquidators can undisputedly state what was actually received."

"3.6.2 there are any grounds on which the account of 23 July 2019 should be re-opened?"

Answer to 3.6.2: *Yes, as it stands now the liquidators are unable to pay dividends as they are obliged to do in terms of section 410 furthermore the account may have to be re-opened depending on what is decided on the interest portion of the sale price."*

THE APPLICABLE STATUTORY REGIME UNDER THE OLD ACT

19. The point of departure is s391 which describes the general duties of a liquidator.

"*A liquidator in any winding-up shall proceed forthwith to recover and reduce into possession all the assets and property of the company, movable and immovable, shall apply the same so far as they extend in satisfaction of the costs of the winding-up and the claims of creditors, and shall distribute the balance among those who are entitled thereto."*

20. Under s403 the liquidator is required to prepare and lodge a liquidation and distribution account.

"*(1)(a) Every liquidator shall, unless he receives an extension of time as hereinafter provided, frame and lodge with the Master not later than six months after his appointment an account of his receipts and payments and a plan of distribution, or, if there is a liability among creditors and contributories to contribute towards the cost of the winding up, a plan of contribution apportioning their liability.*

(b) If the account lodged under paragraph (a) is not a final account, the liquidator shall from time to time as the Master may direct, but at least once in every period of six months (unless he receives an extension of time), frame and lodge with the Master a further account and plan of distribution: Provided that the Master may at any time and in any case where the liquidator has funds in hand, which ought in the opinion of the Master to be distributed or applied towards the payment of debts, direct the liquidator in writing to frame and lodge with him an account and plan of distribution in respect of such funds within a period specified.

(2) Any account shall be lodged in duplicate in the prescribed form, shall be fully supported by vouchers, including the liquidator's bank statements or certified extracts from his bank and building society accounts showing all deposits and withdrawals, and shall be verified by an affidavit in the prescribed form."

21. The objection lodged to the first L&D account by TDK was founded on s407 as was the review by Slipknot of the Master's decision in favour of TDK.

"*(1) Any person having an interest in the company being wound up may, at any time before the confirmation of the account, lodge with the Master an objection to such account stating the reasons for the objection.*

(2) If the Master is of the opinion that any such objection ought to be sustained, he shall direct the liquidator to amend the account or give such other directions as he may think fit.

(3)….

(4)(a) The liquidator or any person aggrieved by any direction of the Master under this section, or by the refusal of the Master to sustain an objection lodged thereunder, may within fourteen days after the date of the Master's direction and after notice to the liquidator apply to the Court for an order setting aside the Master's decision, and the Court may on any such application

confirm the account in question or make such order as it thinks fit…."

22. And once that review was finally determined by the Full Bench and the amended account confirmed by the Master, the liquidators were obliged to take action in terms of s409(1).

"*Immediately after the confirmation of any account the liquidator shall proceed to distribute the assets in accordance therewith…."*

23. In the event that a liquidator fails to comply with the statutory obligation imposed under s409(1), a disgruntled creditor is entitled to approach the court under s410.

"*(4) Any creditor or member of the company entitled to any dividend may, if payment thereof is delayed, after notice to the liquidator, apply to the Court for an order compelling the liquidator to pay that dividend to such creditor or member."*

It is under this subsection of the Old Act that TDK approached the Court in July 2019 for an order that its claim be paid.

24. In the result, to succeed in this application TDK must establish the following jurisdictional requirements for the relief sought.

[24.1.] That it is a creditor of the insolvent company. This is common cause.

[24.2.] That it is entitled to a dividend. This is common cause to the extent that the amended L&D account currently reflects TDK as the first ranking secured creditor but for reasons which will follow, the liquidators claim that they are unable to pay the dividend and that TDK is not so entitled.

[24.3.] That payment of the dividend has been delayed. This is not in issue.

[24.4.] The liquidators must have been given notice of the intended application. This has taken place and they have opposed the application.

THE BASIS FOR THE LIQUIDATORS' OPPOSITION

25. The basis on which the liquidators contest their liability to TDK is their contention that the amended L&D account is incorrect and should therefore be set aside and re-opened. While they do not fully articulate the basis for the defence in the answering affidavit, they do set out their position in a little more detail in the founding affidavit in the counter-application.

26. In that regard the first respondent contends that the amended L&D account is incorrect for the following reasons.

> "*101. The [amended L&D] account reflects inter alia the following;*
>
> > *101.1. That the proceeds of the sale of the property is (sic) the sum of **R2 516 634.36**;*

101.2 The proceeds of the interest (on the sale price) is (sic) ***R1 409 315.24****;*

. *101.3 An award to 'Creditor 3' (i.e. TDK Construction) of* ***R3 053 120.46****.*

102. Although it is the case that the property will realise proceeds and interest, and that there will be a secured award to TDK Construction, the account incorrectly reflects that (sic) the proceeds and interest as having been realised, and that same is available (in part) for distribution as a secured award.

103. That is simply not the case.

104. A further account needs to be lodged, or the account needs to be amended and re-lodged, this time reflecting the claims against Slipknot Investments in terms of the deed of sale (as opposed to reflecting the proceeds of sale of the property and interest)."

27. In a notice of counter-application which accompanies that affidavit the liquidators contend, firstly, that the main application falls to be struck from the roll due to lack of urgency. That issue is live only to the extent of liability for the wasted costs occasioned by the postponement of the matter before Savage J on 15 August 2019.

28. Then, by way of substantive relief, the liquidators ask for, *inter alia* –

[28.1.] the setting aside and re-opening of the amended L&D account;

[28.2.] leave to lodge an amended or further L&D account;

[28.3.] an order directing them to lodge any such amended or further L&D account with the Master within 30 days, and to comply with sections 403(1)(a) and 403(2) of the Old Act in doing so; and

[28.4.] the stay of the main application until such amended or further account as submitted by the liquidators has been confirmed by the Master.

TDK'S ANSWER TO THE COUNTER-APPLICATION

29. TDK accepts that the liquidators are not possessed of sufficient funds in the bank account of the insolvent company with which to pay the claim which Fortuin J found was due to it. Counsel for TDK, Adv. J.A. van der Merwe SC, argued that the absence of such funds was directly attributable to the cavalier way in which the liquidators had disposed of the property to Slipknot, knowing full well that TDK challenged the liquidators' view that Slipknot ranked first. That, after all, was the purpose of the manuscript insertion in the deed of sale.

30. Counsel further pointed out that what the liquidators evidently did not reckon on was the fact that Slipknot would renege on its obligation when called upon to pay in terms of the deed of sale. And so, counsel argued, the liquidators find themselves in a pickle: they complain that they cannot comply with their statutory obligation pursuant to the order of Fortuin J and they now have to sue Slipknot for payment of the purchase price under the deed of sale. In this regard the Court was informed that summons had been issued against Slipknot, that the claim was being

defended (although the basis for Slipknot's defence was not explained) and that the matter was far from trial ready.

31. In this regard, the Court was told by the first respondent in a late affidavit deposed to on 5 February 2020 that discovery on the part of Slipknot was still outstanding and that the liquidators were in the process of compiling their own discovery affidavit in anticipation of it being called for. The court was informed that the Judge President was going to be approached for directions for judicial case management in accordance with Rule 37A. To date, this Court has not been informed of any such appointment.

32. When this matter was heard in early February 2020, Covid 19 was a phrase that those who even knew of, associated with the city of Wuhan in China. In the interim the pandemic has erupted world-wide and the response in South Africa to Covid 19 has had the result that the work of courts throughout the country has been severely interrupted. As matters presently stand, it is most unlikely that the liquidators' claim against Slipknot will be accorded any priority on the reconstituted court rolls, given that it is a purely commercial matter. It is reasonable to infer in the circumstances that the trial action initiated by the liquidators is unlikely to be heard in this Division before 2021. The possibility of subsequent appeals to other courts leads one to the conclusion that TDK might well only be paid its due in 2 or 3 years hence.

33. And so, when TDK looks for payment of money that has been owing to it for 10 years now (and in respect whereof its entitlement to interest on its claim is hit by the *in duplum* rule), the liquidators metaphorically shrug their shoulders and assert that their collective hands are tied.

34. Mr. van der Merwe SC, ultimately eschewing a suggestion made earlier in argument that the liquidators had acted fraudulently in selling the property to Slipknot, argued that the liquidators had nevertheless acted imprudently and that an order should be made against them personally in terms of s387(4) of the Old Act. Counsel relied in this regard on the judgment of Binns-Ward J in the ***Million Up Investments*** liquidation[7] in which the Court was called upon to adjudicate the consequences of an advance payment to a secured creditor by liquidators in a fairly complex web of competing claims by other secured creditors which ultimately led to a dissatisfied secured creditor approaching the Court for an order that she should be paid forthwith.

35. The approach contemplated by the learned judge (which TDK's counsel accepted was an *obiter dictum*) is to be found in the following paragraph of his judgment which commences with a reference to the general duties of a liquidator[8], and continues thus -

> "*[13].... Creditors are not entitled to enforce payment from the trustee (or liquidator) other than to the extent that their claims have been recognised in terms of a confirmed liquidation and distribution account; and the trustee is obliged to make payment of the dividends awarded in terms of a confirmed account. The purpose of the framing, advertisement and confirmation of such an account is to facilitate the achievement of accountability, finality and certainty in the winding up of*

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[7] Gore N.O and others v Shaff and others [2013] ZAWCHC 186 (13 December 2013) at [13]

[8] s319 – see [19] above

the estate in issue. A liquidator who has made an advance payment of claim is obliged to account for it in the liquidation and distribution account. Confirmation of a distribution account has the effect of a judgment in favour of creditors against the trustee. It is a procedure that renders payment of a proved claim due. Confirmation of the liquidation and distribution account obliges the trustee or liquidator to make payment of the dividends awarded in terms thereof according to the tenor of the account; it does not, in terms, prohibit him from making a payment of an amount owing in terms of a claim before it falls due. In making a payment before it is due, a trustee or liquidator should, of course, ***act responsibly and conscious of his duty to administer the estate for the benefit of the concursus of creditors****. It is open to any person aggrieved by a decision by a liquidator to approach the court, which may grant any relief it considers just (s387(4) of the [Old Act]). In a case in which* ***the trustee or liquidator is unable to meet his obligations from the liquidation proceeds by reason of having made an imprudently judged advance payment to a creditor, he would be personally liable to make payment in accordance with the account,*** *and the interests of creditors potentially prejudiced thereby should be safeguarded by the security that every trustee or liquidator is required to furnish before assuming office."* (Emphasis added)

36. After a further reference to the general duties of a liquidator, the learned judge referred to an established practice on the part of liquidators.

"*[15]….. By making payment of the amount owed to a secured creditor whose claim has been admitted to proof it cannot be said, in my view, that a liquidator would be acting outside his powers merely because payment is not yet due to, or exigible by the creditor.* ***The liquidator undertakes a risk that he may render himself personally liable to make good on the advance payment if the dividend is subsequently not confirmed in the a (sic) relevant liquidation and distribution account and he is unable to recover the amount from the creditor,*** *but in dealing with the proceeds of the realisation of mortgaged immovable property in favour of the secured creditor whose claim has been formally accepted, the risk will usually be negligible; a fortiori, when, as usually is the case, the mortgagee is a registered financial institution. The practical reason for taking the risk is usually that by making payment before it is due the liability for payment of interest on the claim is limited, which no doubt explains how the practice of making such advance payments in the circumstances described in Meskin's work*[9] *became established and has stood the test of time. In my view, in* ***making a reasonably determined upon advance payment*** *to a secured creditor from the proceeds of the realised security, a trustee or liquidator is acting within the ambit of his general duties."* (Emphasis added)

37. The practice adopted by the liquidators in this matter of allocating the property to Slipknot does seem to be generally in accordance with established

[9] Meskin, *Insolvency Law (Magid et al, ed.)* at 11-8 s.v. '*Contents of accounts'.*

authority. *Mars*[10] provides the following useful summary of the position in regard to a trustee in insolvency, it being trite that the same approach applies also to liquidators:

> "*Until an account has been confirmed a creditor even though preferent e.g. in respect of the funeral expenses, has no right to be paid.* ***A trustee may pay the creditor before confirmation of the account, but he does so at his own risk****. Although it has been said that a trustee may pay a creditor before his claim has been proved such payment would be improper and it has been decided that* ***it is improper for a trustee to pay out a dividend before confirmation of an account****, and that the court may restrain him from doing so and even order him to repay such dividends. The exception to this rule is a secured creditor who has realised his own security and who has proved the claim. Premature payment is sometimes made to a secured creditor where the trustee has realised the security and wishes to limit the estate's liability for payment of further interest, but* ***a prudent trustee would make such payment conditional upon immediate repayment upon demand if for any reason the Master refuses to confirm the account*** *in which payment is eventually awarded to the creditor."* (Emphasis added")

38. However, in this matter the liquidators do not say that they sold and transferred the property to Slipknot to halt the running of interest. On the contrary, as will appear shortly, they show how they attempted to discharge their statutory duty

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[10] Bertelsmann et al, *Mars, The Law of Insolvency in South Africa, 9th ed* at 541 *(*authorities omitted).

under s319 by disposing of the property through private treaty and two public auctions, only to be stymied at every turn by Slipknot's steadfast refusal to agree to a sale unless the price met with its approval.

39. Ultimately, said Mr. van der Merwe SC, the Court has a wide discretion under s387(4) and he argued that this should be exercised in favour of TDK on account of the liquidator's imprudent handling of the sale of the property to Slipknot. He stressed that he was not asking the court to hold the liquidators delictually liable.

THE BASIS FOR THE COUNTER-APPLICATION

40. In the founding affidavit of the counter-application the first respondent explains the liquidators' motivation for the sale to Slipknot as follows.

> "*The transfer of the property to Slipknot*
>
> *78. We exerted pressure on Slipknot to allow us to deal with the property.*
>
> *79. The response was a (verbal) offer to purchase the property for a price of* ***R1.05 million****.*
>
> *80. The liquidators refused to sell the property to Slipknot Investments at that price.*
>
> *81. However, it was apparent that:*

81.1. Selling the property in a difficult property market without the consent of the sole bondholder was an unpalatable prospect (fraught with the potential for litigation and delays);

81.2. Slipknot Investments would not consent to a sale unless the exposure was substantially reduced thereby.

82. *In the circumstances, a decision was taken to transfer the property to Slipknot Investments. The deed of sale concerned… was concluded on 11 December 2011…*

83. *The deed of sale provided for:*

83.1 A purchase price in a sum equal to TDK Construction's claim;

83.2 Payment thereof in the event that it was held that its claim ranked first or above that of the claim of Slipknot Investments.

84. *The effect of the sale was to ensure that the person whom the liquidators (on legal advice) regarded as the only secured creditor received the property that was the subject of its secured claim, whilst at the same time ensuring that TDK Construction's claim could be met in the event that - for whatever reason - it was found to be a secured creditor ranking in preference to the bondholder, Slipknot Investments.*

> *85. The property was transferred to Slipknot Investments shortly after the deed of sale was concluded. Based on my knowledge of the affairs of Slipknot Investments, I was satisfied that it could pay the purchase price."*

41. The liquidators then go on to deal with the history of the various steps undertaken by the Master, the review thereof by Slipknot and the unsuccessful appeal against the decision of Fortuin J. They point out that after the appeal failed they demanded payment of the purchase price from Slipknot on 24 May 2019.[11] In the email to Slipknot containing that demand the liquidators pointed out that they had drafted the amended L&D account in accordance with the judgment of the Full Bench and that such account had been lodged with the Master the same day. The liquidators say that the account was thereafter confirmed by the Master on 23 July 2019.

42. In amplification of their claim now that the amended L&D account is wrong[12] and needs to be corrected, the first respondent says the following.

> "*[105] The liquidators were under pressure to lodge an account, and had been directed to do so.*
>
> *[106] But for such direction I would, in light of the fact that I had not procured the proceeds of the sale of the property, have requested the Master for an extension of time in which to file an account.*

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[11] They fail to say that they were obliged to do so by virtue of a court order procured by TDK which was concerned by the prospect of the prescription of the claim against Slipknot.

[12] Para's 101 – 104. See para 26 above.

[107] Under the pressure of the direction I lodged the account in the form that I did.

[108] In retrospect, however, the account is quite clearly incorrect since, as Applicants confirm, the proceeds of the sale had not been received."

THE STATUTORY BASIS FOR RE-OPENING A CONFIRMED ACCOUNT

43. In opposing the counter-application, Mr. van der Merwe SC argued that the liquidators had not met the established test which entitled them to the re-opening of the confirmed amended L&D account. He referred to the recent judgment in the *Zonnekus Mansion* liquidation[13] in which this Court gathered the authorities relevant to that question. I shall draw in part on that judgment for sake of convenience, assuming the correctness of the approach, with which Mr.I.C.Bremridge SC (who appeared with Mr.J.Ord for the liquidators) did not take issue.

44. The point of departure is s408 of the Old Act.

"***408. Confirmation of account***

When an account has lain open for inspection as prescribed in section 406 and –

(a) no objection has been lodged; or

[13] Van der Merwe N.O and others v Moodliar N.O and another [2020] 1 All SA 558 (WCC) at [70] *et seq*

(b) an objection has been lodged and the account has been amended in accordance with the direction of the Master and has again lain open for inspection, if necessary, as in section 407 (4) (b) prescribed, and no application has been made to the court within the prescribed time to set aside the Master's decision; or

(c) an objection has been lodged but has been withdrawn or has not been sustained and the objector has not applied to the court within the prescribed time,

the Master shall confirm the account and his confirmation shall have the effect of a final judgment, ***save as against such persons as may be permitted by the court to reopen the account after such confirmation but before the liquidator commences with the distribution****."* (Emphasis added)

45. In *Kilroe-Daly*[14] Galgut AJA explained the circumstances under which a confirmed L&D account may be reopened.

"*Section 408 provides that once the account has been confirmed it may only be re-opened by such persons as may be permitted by the Court so to do. We were referred to decisions in our Courts in which application was made to have the account of a liquidator (or trustee in insolvency) re-opened. The principle which runs through all these cases is that an*

[14] Kilroe-Daley v Barclays National Bank Ltd 1984 (4) SA 609 (A) at 626 *et seq*

applicant must show grounds for restitution in integrum such as iustus error or dolus before a Court will order the re-opening of a confirmed account. See SA Clay…..at 223 – 224 and the cases there cited…

It may well happen, after the first account has been confirmed, that additional facts come to the liquidator's notice. If, as in my view, the whole account is, after confirmation, final, the liquidator cannot reopen it. This would not preclude him from, in his later account, reducing or increasing a creditor's claim or increasing or reducing a creditor's contribution. He will probably have to make the necessary mathematical adjustments in the amounts to be paid or collected. It could hardly be said that the items in the first account were equivalent to judgments."

46. What then is meant by *iustus error* in the context of the present debate? In *Wispeco*[15] (an application under s112 of the Insolvency Act), Tebbutt J referred to an extract from the 7th edition of *Mars*[16] which was to the following effect.

"*Thus, error not caused by negligence, or just and probable, but not culpable, ignorance of a person's rights is such a ground, and consequently under certain circumstances a creditor might obtain relief against a confirmed account on establishing his ignorance that it was lying for inspection, but the onus would be on him to show that his ignorance was justifiable, because it is the duty of a proved creditor to keep his eyes and ears open to enquire as to the fate of his proof, and*

[15] Wispeco (Pty) Ltd v Herrigel N.O and another 1983 (2) SA 20 (C) at 27H

[16] At p407 of that edition.

prima facie his ignorance in the matter must be imputed to his own negligence."

In the 9th edition of *Mars* at p 535 the current authors express a similar view.

47. Tebbutt J also referred, with approval, to the following extract from *SA Clay*[17].

"*After confirmation and before the payment of a dividend the aggrieved person must show something more than ignorance and prejudice: he must show that his failure to object has been induced by iustus error or by fraud… I have therefore come to the conclusion that in order to succeed the applicant must establish a ground for restitutio in integrum."*

48. In concluding his analysis of the law, Tebbutt J had the following to say.

"*The onus furthermore is on the Applicant for the reopening of an account to establish one of the grounds for restitutio in integrum*…

It seems to me, however, that such an Applicant bears a further onus: he would have to show the Court that there is merit in the reopening of the account. A Court will not reopen an account if it cannot be shown that the Applicant has some prospect of success of having the account varied or corrected… No purpose would obviously be served in merely reopening the account if it is likely to remain in the same form as

[17] At 224

originally drawn. The applicant must establish at least prima facie that the account is incorrect and would have to be amended."[18]

49. It is true that the majority of reported cases for re-opening a confirmed L&D account involve claims by creditors in respect of whom fairly strict criteria are laid down. This serves a practical purpose to ensure transparency and certainty and to enable the winding-up to be brought to a speedy conclusion. Creditors are expected to have their proverbial ears to the ground and the metaphorical "*Johnny-Come-Lately*" will have his work cut out explaining why a timeous claim was not lodged. But what of the situation where the applicant for re-opening is the liquidator? Is the test any different?

RE-OPENING AT THE REQUEST OF THE LIQUIDATOR

50. Much of the case law dealing with applications for re-opening relate to insolvency proceedings rather than winding-up. Thus the commentary in *Mars* focuses on s112 of the Insolvency Act, 24 of 1936. However, the wording of s408 of the Old Act is, to all intents and purposes, identical to s112 and over the years the courts have applied the jurisprudence that has developed under that section of the Insolvency Act to the interpretation of s408. In arguing this point (really the crux of the liquidators' case), Mr.Bremridge SC relied heavily on the judgment of Hugo J in *Morris and Strydom*[19].

[18] At 28A - C

[19] Morris and Strydom NNO v The Master and others 1994 (2) SA 731 (N)

51. The case involved an application under s112 of the Insolvency Act and was unopposed. That notwithstanding, the learned judge reserved judgment for a couple of days and delivered a reasoned judgment which has since been cited by *Meskin*[20] as authority.

> "*It is submitted that the principles adverted to in the preceding paragraph do not operate to preclude the Court's allowing at the instance of the liquidator an amendment or setting aside of a confirmed account prior to payment of a dividend thereunder* ***where the liquidator bona fide erroneously prepared such account."*** (Emphasis added)

52. Mr. van der Merwe SC nevertheless urged the Court not to follow *Morris & Strydom* arguing that Hugo J did not explain the basis upon which a court could ignore the express provisions of s408 which provide that the confirmation of an L&D account by the Master has the effect of a final judgment. In such circumstances, said counsel, the common law requirements for the setting aside of a final judgment should apply and there was no legally tenable basis upon which Hugo J decided the case in favour of the trustees. In my view it is not necessary to decide that point for the reasons that follow.

PAYMENT OF DIVIDEND?

53. In the first place, it must be borne in mind that the proviso in s408 to the entitlement to apply to re-open is that the liquidator must not yet have effected payment of a dividend. There is a sound reason for this requirement: the liquidator

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[20] Meskin *op cit* at 866(1)

should not thereafter have to set about recovering amounts already paid to creditors and, similarly, creditors already in receipt of their dividends are entitled to conduct their business affairs accordingly. The position was summed up thus by De Villiers CJ in *Stewart's Assignee*[21].

> *"It might be productive of the greatest injustice to vigilant creditors if, long after they have received their dividends and regulated their business accordingly, they can be compelled to refund what they have received merely because of less vigilant creditors who have proved have not taken further payments to enquire how their proof has been dealt with by the Trustee."*

The approach is thus based both on questions of equity and commercial expediency.

54. In this matter, as in the *Million Up Investments* liquidation, the liquidators have effectively made part payment of a dividend in the winding-up by transferring the property to Slipknot. (The fundamental difference here is that the property is the only asset in the insolvent company which has any value.) And the result of their action has led to precisely what De Villiers CJ cautioned against in the passage just cited. More than 10 years after the event the liquidators have become embroiled in protracted litigation to recover the value of the dividend from a creditor which was incorrectly paid while the creditor actually entitled to payment is being made to wait for its money and cannot even be compensated with an adequate award of interest.

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[21] Stewart's Assignee v Walf's Trustee and Others 3 SC 243 at 247

55. I am driven to conclude that in the circumstances, whatever the difference in approach may be in regard to an application to re-open by a creditor or a liquidator, on the facts of this case the liquidators, having effected the payment of a dividend by transferring the property to Slipknot, have not brought themselves within the ambit of s408 and are not entitled to ask for an order to re-open.

56. In the event that I am wrong on this score, I shall proceed to consider the matter on the basis argued by Mr.Bremridge SC that the judgment of Hugo J was applicable to the counter-application.

57. In *Morris and Strydom* the Court permitted the re-opening of the confirmed L&D account because there were errors in the calculation of the dividend which would have resulted in the creditors receiving more than they were actually entitled to and, importantly, which would have required the trustees to pay in the difference between the allocated amount and the correct amount out of their own pockets.

58. During the course of hearing the application, the learned judge adjourned the matter on two occasions to enable the trustees to supplement their papers to demonstrate to the court that their errors were *iustus.* Ultimately the Court was more than skeptical about their explanations.

> "*I shall not attempt to set out the explanations given for the errors, save to say that I am by no means satisfied that the applicants were not negligent. Each tried to lay the blame elsewhere, the first applicant on his partner and the second applicant on the first applicant and the fact*

that they were distant from each other physically. Even accepting at face value what they have said, in both cases they quite clearly did not perform their functions properly. In their favour, however, I must state that I cannot find evidence of gross negligence."

59. The learned judge adopted the approach advocated in *Wispeco* and *Kilroe-Daley* and required of the applicants to "*establish a ground for restitutio in integrum such as fraud* or *iustus error*." Clearly, they did not pass muster on that score. Nevertheless, the learned judge had the following to say in ultimately coming to the assistance of the trustees.

"*In all the cases referred to however the application has been brought by a creditor and it is understandable why the Courts have been strict in limiting the rights of creditors who only act after confirmation of the accounts, and I respectfully associate myself fully with all the judgments to this effect. See the Wispeco* case *supra at 27-8.*

This case however is different. If the application fails there would remain a shortfall of over R42 000 in the estate accounts. The only way in which the shortfall could be met would be for the trustees to pay it into the estate from their own pockets. If they did so then the body of creditors would benefit to that extent and would in fact receive R42 000 more than their entitlement under the Act. In the absence of fraud (or perhaps gross negligence) this seems to me to be too harsh a penalty to impose on the trustees and in any event too great a benefit to bestow upon the creditors."

In the instant case of course there is no question of any of the creditors receiving more than their share fair: it is common cause between the liquidators and TDK that its claim has been correctly calculated and that it ranks first.

HAVE THE LIQUIDATORS ESTABLISHED ANY GROUND FOR REOPENING?

60. In the passage already quoted from *Meskin*, in which the approach in *Morris & Strydom* was cited with approval, the learned authors are of the view that a court might grant relief "*where the liquidator bona fide erroneously prepared such account.*" In the passages from the affidavit of the first respondent in support of the counter-claim referred to above there are manifestly no allegations in support of the established test for reopening an L&D account – they have set up no grounds for *restitution in integrum* such as fraud or *justus error.* Nor do the liquidators say that they erroneously and *bona fide* prepared either the first or the amended L&D accounts. Mr. Bremridge SC nevertheless urged the Court to follow *Morris & Strydom*, to find that the amended L&D account was clearly wrong and to permit the liquidators to correct it, lest an allegedly false set of circumstances was permitted to prevail.

61. I shall revert shortly to whether the amended L&D account is correct or not but first I need to deal with the approach adopted in *Morris & Strydom*. In the first place it has to be said that the case stands alone in the jurisprudence that has evolved around the application of s112 of the Insolvency Act and s408 of the Old Act. And, while Hugo J appears to have been at pains to require the applicants to get their papers in order before he delivered a considered judgment, His Lordship did not have the benefit of any argument to the contrary. Nevertheless, the court was concerned to ensure that the liquidators were not out of pocket as a consequence of creditors

receiving more than their just desserts. The decision is accordingly based on equitable considerations in relation to the facts before the court.

62. The facts of this matter are wholly different to *Morris & Strydom* and the case therefore falls to be distinguished on that basis alone. I say so for the following reasons. The liquidators saw fit to dispose of the property to Slipknot and to transfer ownership therein more than two and a half years before they filed what they presumed would be their first and final L&D account. However, they knew almost from the outset (early 2010) that TDK asserted the entitlement to be ranked first as a preferred creditor and, further, they were told so themselves by counsel when they sought advice, also early in 2010.

63. It was only late in 2010 that the liquidators managed to procure an opinion from an attorney that accorded with their preferred view of the matter which, subsequently, four judges have found to be wrong in law. Knowing full well that there was a dispute looming between TDK and Slipknot as to their respective rankings as preferred creditor, the liquidators were so bold as to elect to sell the property to Slipknot. In so doing, they thought it sufficient to include the manuscript clause in the deed of sale. But, in my view, they clearly did not take sufficient precautionary steps to cover the situation where Slipknot might refuse to pay when called upon to do so, or, for instance, to deal with the possible liquidation of Slipknot in the interim.

64. In this regard, there were conceivably any number of precautionary steps that the liquidators might have taken to ensure that Slipknot would make good on its contractual promise to settle their indebtedness to them – an unequivocal acknowledgment of debt or a covering mortgage bond over the property are just two

relatively simple commercial mechanisms that spring to mind. Yet, they chose to take no such steps, blithely alleging now that at the time they were satisfied that Slipknot was good for the money. Significantly, while the first respondent suggests that he was satisfied with Slipknot's solvency, he does not say that he had no reason to believe that Slipknot would not honour its obligation.

65. When they filed the first L&D account in 2014, s403(2) of the Old Act obliged the liquidators to lodge *"the prescribed form..... fully supported by vouchers, including [their] bank statements or certified extracts from [their] bank and building society accounts showing all the deposits and withdrawals, and [to verify these in] an affidavit in a prescribed form."*

66. The forms referred to in s403(2) are prescribed by regulation and are set out in Annexure CM 101 to the Old Act, paragraph 2 whereof reads as follows.

> "*2. A detailed account of the liquidator's receipts and payments in respect of the company must be given. The account of receipts must contain a record of receipts derived from the realisation of assets existing at the date of the winding-up order… including any balance in the bank debts and calls collected, property sold, etc. The account of payments must contain a record of all payments made in respect of costs and charges and of payments to creditors and contributories. Where property has been realised, the gross proceeds of the sale must be entered as a receipt and the necessary payments incidental to the sale must be entered as a payment. This account must not contain*

payments into or withdrawals from the bank, which must be shown separately by means of a bank statement.

Receipts and payments must be supported by satisfactory vouchers numbered consecutively in the top right-hand corner by reference to the number appearing in the account opposite the relative item.

Each receipt and payment, and the date thereof, must be entered in the account in such a manner as sufficiently to explain its nature…"

67. The contents of such a complete account are then required to be supported by an affidavit deposed to by the liquidator. In the affidavits filed of record deposed to by each of the liquidators on 18 and 19 July 2019 in support of the amended L&D account, they confirm that –

"*.. The aforegoing is (sic) true and correct account of the administration of the estate, and that to the best of my knowledge and belief there are no further assets to be realised and matters to be attended to."*

68. Although the bank statements which the liquidators were obliged to place before the Master in July 2019 do not form part of the record in these proceedings, it would have been obvious upon perusal thereof to the Master that the purchase price realised from the sale of the property to Slipknot had not in fact been received by the liquidators: the account would otherwise have reflected a substantial credit to that effect. In the circumstances the account (and its supporting documents) ultimately placed before the Master for confirmation would demonstrate that the

proceeds of the sale of the property had not yet been received by the liquidators and, in such circumstances, the account cannot be described as "*incorrect*".

69. Importantly, the Master says in terms (at para 6 of her report of 8 January 2020) that when she confirmed the amended L&D account on 23 July 2019 she was aware of the fact that the liquidators had not yet received payment from Slipknot. And, knowing this full well to be the case, the Master was satisfied that the account should be confirmed.

70. Similar affidavits by the liquidators would have been required to accompany the first L&D account. Thus the Master ought to have known, when she received the first L&D account in August 2014 and when she ordered in June 2016 in TDK's favour after its objection to the ranking of secured creditors, that the liquidators were not yet in receipt of the purchase price of the property. The Master's denial of this knowledge of the state of affairs in 2016 in her report of 8 January 2020 simply does not make sense in the circumstances.

71. Be that as it may, the mere say-so of the Master in her recent report that she now regards the account as wrong is merely an opinion which she expresses at this stage and is difficult to reconcile with her earlier acts of confirmation in which the true state of affairs were (or ought reasonably to have been) known to her. Rather, the correctness of the amended account falls to be decided on the undisputed facts which are that the liquidators knowingly submitted the accounts on two occasions in the same format, alleging the same facts and that both these accounts were approved by the Master. And, it was only when they encountered problems in recovering the purchase price from Slipknot that the alleged "*incorrectness*" came to the fore.

72. Having deposed to at least two sets of affidavits which were required to be placed before the Master, and in which they confirmed the correctness of the account, the liquidators have manifestly not shown that they were either *bona fide* or erroneous. In the circumstances, I am satisfied that the liquidators have not established a basis, either in fact or in law, for the relief sought in the counter-application which accordingly falls to be refused with costs.

A JUST ORDER UNDER S387(4)?

73. The remaining issue then is what order the court should make in relation to the main application. Mr. van der Merwe SC argued that the imprudent decision by the liquidators to transfer the property without adequately securing payment by Slipknot in the event that TDK's preference prevailed, warranted a just and equitable order directing them to pay TDK its long overdue dividend. Mr. Bremridge SC, on the other hand, cautioned against an order that would have the effect of fixing the liquidators with delictual liability.

74. Mr. Bremridge SC relied on *Kerbels Flooring*[22] and *Callinicos*[23] as authority for the submission that the liquidators were liable to be sued delictually for their breach of a statutory duty. *Kerbels Flooring* involved an exception taken to an alternative claim for breach of a duty of care owed by liquidators to an unpaid creditor whose main claim was founded in contract. In deciding the exception Mullins J formulated the issue thus.

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[22] Kerbels Flooring and Carpeting (Pty) Ltd v Shrosbree and another 1994 (1) SA 655 (SECLD)

[23] Callinicos v Burman 1963 (1) SA 489 (A)

> "*The exception raises the interesting question of whether liquidators, or others who act in a representative capacity such as trustees, administrators and curators, can be held personally liable for negligence causing loss to others arising out the performance of their duties."*

75. After a detailed consideration of the authorities His Lordship came to the following conclusion.

> "*Whether a liquidator holds the position of the board of directors, or whether he is a trustee for creditors, or both, none of these authorities suggest that there is not personal responsibility for his actions under the normal criteria of Aquilian liability."*

Kerbels Flooring did not involve consideration of the nature or extent of the discretion conferred on a court under s387(4). Mullins J decided no more than that a liquidator might be held delictually liable in appropriate circumstances. In my view the decision does not assist the liquidators in this case.

76. In *Callinicos* the Appellate Division considered a situation under the Insolvency Act where a trustee in an insolvent estate had, when framing the L&D account, wrongly treated a preferent claim as a concurrent claim. He was then sued in the Magistrates' Court by the creditor for damages allegedly suffered as a consequence of the negligent breach of his statutory duty under s95 of the Insolvency Act. Exceptions were argued in the court of first instance and on appeal to the relevant Provincial Division before the matter served before the Appellate Division where Ogilvie Thompson JA delivered the main judgment of the Court.

77. The Learned Judge of Appeal analysed the relevant provisions of the Insolvency Act in detail, highlighting the procedural steps that preceded an application to re-open the L&D account under s112 of that Act. The Learned Judge of Appeal then went further and examined the interplay between the relevant sections of the Insolvency Act which afforded a dissatisfied creditor a procedural mechanism to correct a wrong allegedly inflicted on him by the errant trustee.

78. Finally, the court found, the structure of the Insolvency Act was sufficient to address any loss suffered by a creditor, thus precluding any basis for a damages claim.

> "*The real complaint of a proved creditor in the case postulated above is that he was paid out as a concurrent creditor when he ought to have been paid out as a preferent creditor. Prior to the confirmation of the account, the mere fact that the proved creditor's claim appears in the account as concurrent does not occasion the creditor any actual loss. Such loss supervenes, not when the account is drawn, but only when, in terms of sec 113(3) of the Act, the trustee becomes obliged to pay in accordance with the account and does so pay. The basis of the proved creditor's loss is, therefore, the confirmation of the account. That situation would, in my view, equally obtain in the case where the trustee had been negligent in treating the claimant as concurrent. The statute, as explained above, provides effective machinery enabling the proved creditor, by way of objection, to prevent the confirmation of the account which treats his claim as concurrent only. By failing to object, the*

> *creditor may thus be said to be himself the author of the harm of which he complains. It appears to me to be in the highest degree unlikely that the Legislature should have contemplated that the creditor should, despite his failure to object to the account, nevertheless be entitled to hold the trustee liable in damages. Conceivably special circumstances might take a particular case out of the general rule; for instance, where the creditor is wrongly informed by the trustee that his claimed preference is reflected in the account. Any such special circumstances would, of course, required to be sufficiently pleaded…*

After dealing with a number of authorities, the Learned Judge of Appeal concluded as follows.

> "*The foregoing considerations lead me to the conclusion that a trustee who, in his final account, treats as concurrent a proved creditor's claim which in terms of sec95(1) of the Act should have enjoyed a preference is not ordinarily liable, after confirmation of such account,* ***in damages*** *to such creditor for the resultant difference in dividend."* (Emphasis added)

79. In the result it seems to me that *Callinicos* does not support the argument put forward on behalf of the liquidators that TDK's remedy lies in a delictual claim. Rather, the decision tends to support TDK's case which is to the effect that s387(4) of the Old Act is part of the internal machinery in the statute designed to provide a creditor who is dissatisfied with any decision by a liquidator with a right of action to seek just and equitable relief from the court, thus obviating the long and

drawn out procedure inherent in having to launch review proceedings or sue the liquidator, whether in delict or otherwise.

CONCLUSIONS IN RESPECT OF THE SECTION 387(4) ARGUMENT

80. In the result, I come to the conclusion that in light of the facts of this matter, the liquidators are liable to be ordered (in their representative capacities) to effect payment of the amount which the Master has confirmed is due to TDK. This liability (*qua* liquidator) arises from the provisions of s408 of the Old Act which cloaks the award with the status of a judgment. In the normal course, and where there was money in the insolvent company's bank account, the liquidator would then be in a position to settle the confirmed creditor utilising such funds. But in the present case the liquidators complain that they are unable to meet such an obligation because there is no money in the bank account because they have been unable, thus far, to recover anything from Slipknot.

81. For the predicament that they thus find themselves in, the liquidators have only themselves to blame: it is they that acted pre-emptively; it is they who concluded a sloppily worded deed of sale[24] which now causes them embarrassment; and, it is they who vouched for the solvency and good faith of Slipknot. They are thus hoist by their own petard having fallen victim of Slipknot's noose. All the while, TDK has been entitled to payment and has patiently sat it out while others have sought to evade their obligations. It seems to me then in such circumstances that a court should

[24] The mere fact that the relevant clause was inserted in manuscript suggests that it was an afterthought that occurred to the parties at the time the document was signed.

craft a remedy to come to the assistance of the hapless TDK. I am of the view that s387(4) provides for that relief.

82. The express wording of s387(4) is to afford a court a wide and unrestricted discretion to make an order that justice requires should be made.[25] This discretion should be read, for example, in the context of the considerations mentioned by Binns Ward J in the *Million Up Investments* liquidation. The unreasonableness of the conduct of the liquidators in disposing of the asset in question is but one of the considerations to which regard might be had by the court. In so doing, it does not mean that the court is effectively fixing the liquidator personally with delictual liability as contended by Mr. Bremridge SC. Reasonableness in that context is no more than a consideration in the exercise of the court's discretion as to what is just and equitable.

83. I have already dealt with the short-comings in the deed of sale and with the trust that the liquidators reposed in Slipknot. In my view, their conduct was cavalier and fell short of the standard expected from a reasonable liquidator: the facts show that, come hell or high water, they were intent on acceding to the demands of Slipknot. And, when they did so they placed themselves at risk. They knew, firstly, that the account had not been confirmed by the Master and, secondly, there was a contrary legal opinion as to the preferential ranking of TDK's claim. But, rather than await the outcome of any determination thereof by the Master or a court, they took on a risk believing that Slipknot would not let them down. And, in so doing they disposed of the only asset of the insolvent company. If Slipknot did not make good on its

[25] Cohen NO v Ruskin and Smith NNO 1981 (1) SA 421 (W) at 425

promise to pay the amount of TDK's award, the liquidators knew that they would not be able to discharge their statutory duty towards TDK. Ultimately, they did not cater for that eventuality.

84. Further, there was no pressing need to dispose of the property to Slipknot at that stage: the liquidators do not contend that they were attempting to stop the running of interest on Slipknot's claim. As I have demonstrated in [40] above, the liquidators advance no cogent reason for disposing of the property at that stage. Nor did the liquidators alert TDK to the proposed sale or the price at which the property was to be transferred. In this regard TDK alleges in the papers before the court that the true value of the property was considerably more at that stage.

85. Moreover, in this matter (and unlike in *Morris & Strydom*) the liquidators will not ultimately be left out of pocket if they are ordered to pay TDK now. Firstly, they elected to place their faith in Slipknot's integrity (without seeking TDK's input at the time as to the commercial wisdom of their decision) and have sought to recover from Slipknot what is unequivocally due to TDK. Secondly, in the affidavit filed in support of the counter-application, the fourth respondent (who is clearly the driving force behind the liquidators' case) says that he is "*a member of Muller Terblanche Trustees CC".* It would then appear that, although the fourth respondent took his appointment as liquidator in this matter personally (as he was obliged to do under the Old Act), he conducts a business as an insolvency practitioner through the medium of a close corporation that bears his name. Further, when taking their appointments as such, the liquidators were required to put up security to the satisfaction of the Master. There are therefore collateral sources from which they can ultimately recover any shortfall. To

repeat, the liquidators will not be out of pocket at the end of the day but in any event, it is they who must now bear the financial consequences for the ill-considered risk they took when they transferred the property to Slipknot.

86. TDK on the other hand has done everything required of it in law. It raised its objection to the proposed ranking of Slipknot as the preferred secured creditor at the earliest possible opportunity and it has been vindicated in that stance by the ruling of the Master and 2 different courts. To expect it to sit back and wait for its money for a dozen years or more, when its entitlement to be compensated fully by way of interest has been hit by the *in duplum* rule, does not sound fair to me in the circumstances.

87. I agree with Mr. van der Merwe SC's submission that the facts of the case, even on the liquidators' version of events, inevitably lead one to conclude that they acted imprudently, improperly and grossly negligently in the circumstances. By way of summary then such conduct includes the following.

[87.1.] The decision to follow only the instructions of Slipknot in the administration of the insolvent company to the exclusion of TDK;

[87.2.] Their decision (with the full knowledge of TDK's secured claim and against its instructions), to sell the only asset of the insolvent company to Slipknot at a significantly reduced purchase price which would be insufficient to cover the administration costs and the claim of TDK;

[87.3.] The decision to sell the property on terms which provided that the purchase price constituted a deemed interim award to Slipknot in circumstances where TDK's claim potentially outranked Slipknot's claim, and then in the absence of a confirmed account;

[87.4.] The sale of the property with a warranty in the deed of sale[26] that there was no builder's lien or other encumbrance over the property, which warranty was to their knowledge incorrect and false because TDK's improvement lien was the very basis of its uncontested claim in the liquidation. By reason of this warranty and the subsequent transfer of the property, TDK is now legally precluded from enforcing that lien against Slipknot;

[87.5.] The transfer of the property to Slipknot in June 2012 without receiving or securing the purchase price, or without making provision for the payment of interest by Slipknot to the insolvent estate on the proceeds of the said sale;

[87.6.] Their failure to take steps to recover payment of the purchase price from Slipknot (or to secure the purchase price earlier) either after the Master's ruling in 2016 or after two court orders had been handed down in favour of TDK, in circumstances where the deed of sale rendered its claim payable forthwith;

[87.7.] The fact that in June 2019 they lodged an account with the Master which (on their version now) was erroneous and false, but which they confirmed under oath to the Master as being true and correct;

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[26] See cl 15.9

[87.8.] Their conduct has had the effect of putting TDK to the trouble and expense of bringing an application for payment of what was rightfully due to it, only to be met with the response that the liquidators were out of pocket and TDK would have to sit it out until they were eventually placed in funds;

[87.9.] Lastly (and on a general assessment of the matter), they have revealed a manifest failure to act impartially, or in the interests of the company, or in the interests of TDK which, to their knowledge, claimed to be the first (and *de facto* the only) ranking creditor.

88. I am accordingly persuaded that I should exercise my discretion under s387(4) in favour of TDK and order the liquidators to pay now for the calculated, yet imprudent, risk that they took in 2012. Given their stance that they cannot pay in their nominal capacities, it is only just and fair that they be ordered to pay what is due to TDK jointly and severally in their personal capacities.

COSTS

89. Mr. van der Merwe SC asked that costs of suit be awarded in favour of TDK against the liquidators personally on the attorney and client scale. The submission was premised in the first place on the provisions of s405 of the Old Act which is to the following effect.

> "***405. Failure of liquidator to lodge account or to perform duties***
>
> *(1) If any liquidator fails to lodge an account with the Master as and when required by or under this Chapter or to lodge any*

vouchers in support of such account or to perform any other duty imposed upon him by this Chapter or to comply with any reasonable demand of the Master for information or proof required by him in connection with the liquidation of the company, the Master or any person having an interest in the company may, after giving the liquidator not less than two weeks' notice, apply to the Court for an order directing the liquidator to lodge such account or vouchers in support thereof or to perform such duty or to comply with such demand.

(2) The costs adjudged to the Master or to such person shall, unless ordered otherwise by the court, be paid by the liquidator de bonis propriis.

The default position then is that when a creditor, for example, applies to Court for an order directing the liquidator to comply with his/her statutory duty to pay such creditor in terms of a confirmed L&D account, the liquidator will be liable for the creditor's costs *de bonis propriis.*

90. This is consistent with the general principle that such awards are appropriate where persons act (and litigate) in a representative capacity.[27] Moreover, and as Prof. Cilliers points out, such costs orders have been awarded in cases even where it was doubtful that the conduct of a trustee in an insolvent estate could be

[27] AC Cilliers, Law of Costs at 10-22(2)

described as improper, willful or vexatious but the court was nevertheless of the opinion that the conduct was so unreasonable as to render it negligent.[28]

91. But there is an even more compelling reason in this matter why such an order should be made in this case. The liquidators have racked up a substantial bill of costs which they now expect should to be paid out of the insolvent corporate estate thereby diminishing the award which is payable to TDK (and for which it in any event cannot be fully compensated due to the *in duplum* rule) even further.

92. As to the scale of such costs, I am of the view that the award should be made on the attorney and client scale in accordance with the established principle in *Alluvial Creek*[29]. Even though it might be contended that the liquidators have not behaved vexatiously, their conduct has had the effect that TDK has been put to unnecessary expense in circumstances where this was not warranted.

93. Mr.Bremridge SC asked that the wasted costs of the hearing before Savage J on 14 August 2019 be granted in the liquidators' favour. I agree. At a relatively early stage of this application it was clear that the matter was not of such pressing urgency that it required the immediate attention of the Motion Court judge sitting in the Fast Track. The liquidators made a reasonable proposal in the run-up to that hearing that the matter be postponed to the semi-urgent roll with an agreed timetable for the filing of papers. TDK's response was unreasonable in that it insisted on the filing of papers by the liquidators under severe time constraints, only for it to meekly concede before Savage J that the matter did not warrant priority on her roll.

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[28] *Ibid* at 10-26

[29] *In re* Alluvial Creek Ltd 1929 CPD 532 at 535.

94. Had TDK's legal representatives conducted their client's case responsibly the costs of the day would not have been incurred. As a mark of the Court's displeasure with the manner in which the liquidators were hustled into court on that day, such costs will be awarded on the punitive scale.

ORDER OF THE COURT

It is accordingly ordered as follows –

1. The first, second and third respondents were ordered to pay to the applicant the sum of R3 053 120.46 in terms of the confirmed liquidation and distribution account in the liquidation of Cape Vernacular Properties CC dated 21 July 2019.

2. The fourth, fifth and six respondents are declared, in terms of section 387 (4) of the Companies Act, 61 of 1973, to be personally liable, jointly and severally with first, second and third respondents, to pay the sum of R3 053 120.40 to the applicant.

3. The first to sixth respondents are ordered, jointly and severally, to pay interest on the aforesaid sum of R3 053 120.40 at the prescribed rate from date of judgment to date of payment.

4. The respondents' counter-application is dismissed.

5. The respondents are directed, jointly and severally, to pay the applicant's costs of the application, and the counter application, on

the attorney and client scale, save that the respondents' wasted costs occasioned by the hearing of this matter in the Fast Track of the Motion Court on 14 August 2019 are to be paid by the applicant on the attorney and client scale.

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GAMBLE, J