Republic of South Africa

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

Case number: 14657/2019

Before: The Hon. Mr Justice Binns-Ward

Hearing: 4 August 2021
Judgment: 5 October 2021

In the matter between:

OSCAR JABULANI SITHOLE N.O. First Applicant

BEATRICE LINDA MILLS N.O. Second Applicant

(In their capacities as co-liquidators of **Sachal Hauliers (Pty) Ltd (in liq.)**)

and

SACHAL & STEVENS (PTY) LTD First Respondent

MARK CATER STEVENS Second Respondent

JUDGMENT
(Delivered by email to the parties and release to SAFLII.)
The judgment shall be deemed to have been handed down at 10h00 on 5 October 2021.

BINNS-WARD J:

Introduction

[1] In these proceedings the applicants, who are the joint liquidators of Sachal Haulers (Pty) Ltd (in liq.), seek relief, under various heads, against the first and second respondents, Sachal & Stevens (Pty) Ltd and Mark Cater Stevens, respectively. I shall refer to the company in liquidation as 'SH' and to the first respondent, Sachal & Stevens (Pty) Ltd, as 'S&S'. The second respondent will be referred to by his surname, Stevens. He was a director and the controlling mind of both SH and S&S. He remains at the helm of S&S.

[2] SH was placed into liquidation at the instance of one of its creditors, Kroucamp Plumbers CC, by reason of its inability to settle its debts. The application for liquidation was lodged on 9 November 2015 and, despite opposition, a provisional winding-up order was granted on 5 August 2016. A final order followed on 6 September 2016.[1]

[3] It is common ground that SH, whose sole business would appear to have been to undertake earth transportation work for Arcelor Mittal, ceased active operations in July 2015 after it was denied access to Arcelor Mittal's site in Saldanha. Arcelor Mittal gave formal notice of the termination of its contract with SH in August 2015. Stevens claims to have learned of the termination only at the beginning of November 2015, although the circumstances are such that it is highly improbable that he could have been unaware that SH had ceased its operations in July. I say that because Stevens stated in affidavits made in earlier proceedings that Randall Kapot, the co-director and operations manager of SH, stopped work in July and, in these proceedings, he testified to the sale during July 2015 of various vehicles and equipment that were used in SH's operations. Some vehicles were disposed of at that time as payment in kind of SH's debts.

[4] Whilst Kroucamp Plumbers did not receive any payment in respect of its outstanding claim for services rendered to SH when the company was still in business, Stevens caused SH to make several payments to S&S during the interval between SH's cessation of business and the date on which the order was granted placing the company into liquidation.

[5] The payments involved comprised of the following:

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[1] The date of the final liquidation order may be deduced from the return day of the provisional order (which is apparent from the copy of the judgment attached as annexure OJS4 to the founding affidavit) and the certificate of appointment of liquidators (annexure OJS1 to the founding affidavit).

1. R513 000 on 3 August 2015;
2. R236 854,30 on 3 August 2015;
3. R297 161,26 on 4 August 2015;
4. R237 408,19 on 4 August 2015;
5. R255 531 on 25 August 2015;
6. R255 531 on 2 September 2015;
7. R228 171 on 2 October 2015;
8. 228 000 on 4 December 2015;
9. R40 000 on 10 December 2015; and
10. R5 600 on 19 January 2016.

The effect of the payments was to clear out SH's cash resources and leave the company unable to pay its debt to Kroucamp Plumbers.

[6] The applicants challenge the validity or lawfulness of the payments on a number of grounds.

[7] In respect of the three payments made on 4 and 10 December 2015 and on 19 January 2016, respectively, an order is sought that they be declared void in terms of s 341(2) of the Companies Act 61 of 1973;[2] alternatively, that the payments be set aside in terms of ss 26(1), or 30(1) or 31 of the Insolvency Act 24 of 1936;[3] further alternatively, that they be set aside

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[2] Section 341(2) provides:
'*Every disposition of its property (including rights of action) by any company being wound-up and unable to pay its debts made after the commencement of the winding-up, shall be void unless the Court otherwise orders.*'
The provision falls to be read together with s 348 of the Act, which provides:
'*A winding-up of a company by the Court shall be deemed to commence at the time of the presentation to the Court of the application for the winding-up.*'

[3] The provisions of the Insolvency Act on which the applicants rely provide as follows:

'*26.* ***Disposition without value***
(1) Every disposition of property not made for value may be set aside by the court if such disposition was made by an insolvent-

(a) more than two years before the sequestration of his estate, and it is proved that, immediately after the disposition was made, the liabilities of the insolvent exceeded his assets;

(b) within two years of the sequestration of his estate, and the person claiming under or benefited by the disposition is unable to prove that, immediately after the disposition was made, the assets of the insolvent exceeded his liabilities:

in terms of the common law based on unjust enrichment or fraud. In respect of the other payments, the applicants seek relief also in terms of the aforementioned provisions of the Insolvency Act, alternatively, on the grounds of unjust enrichment or fraud.

[8] The applicants also seek an order, in terms of s 424 of the old Companies Act,[4] declaring Stevens to be personally liable for the debt of SH to Kroucamp Plumbers CC in the amount of R454 317,31 plus mora interest.

[9] In addition, they seek an order, in terms of s 423(1) of the old Companies Act,[5] that an enquiry be held into the conduct of Stevens as a director of SH, including a direction that

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Provided that if it is proved that the liabilities of the insolvent at any time after the making of the disposition exceeded his assets by less than the value of the property disposed of, it may be set aside only to the extent of such excess.

30 ***Undue preference to creditors***
(1) If a debtor made a disposition of his property at a time when his liabilities exceeded his assets, with the intention of preferring one of his creditors above another, and his estate is thereafter sequestrated, the court may set aside the disposition.

31 ***Collusive dealings before sequestration***
(1) After the sequestration of a debtor's estate the court may set aside any transaction entered into by the debtor before the sequestration, whereby he, in collusion with another person, disposed of property belonging to him in a manner which had the effect of prejudicing his creditors or of preferring one of his creditors above another.
(2) Any person who was a party to such collusive disposition shall be liable to make good any loss thereby caused to the insolvent estate in question and shall pay for the benefit of the estate, by way of penalty, such sum as the court may adjudge, not exceeding the amount by which he would have benefited by such dealing if it had not been set aside; and if he is a creditor he shall also forfeit his claim against the estate.
(3) Such compensation and penalty may be recovered in any action to set aside the transaction in question.

[4] Section 424 provides as follows, insofar as relevant in the current matter:

Liability of directors and others for fraudulent conduct of business
(1) 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.
(2)(a) Where the Court makes any such declaration, it may give such further directions as it thinks proper for the purpose of giving effect to the declaration, and in particular may make provision for making the liability of any such person under the declaration a charge on any debt or obligation due from the company to him, or on any mortgage or charge or any interest in any mortgage or charge on any assets of the company held by or vested in him or any company or person on his behalf or any person claiming as assignee from or through the person liable or any company or person acting on his behalf, and may from time to time make such further orders as may be necessary for the purpose of enforcing any charge imposed under this subsection.

[5] Section 423(1) provides:
'***Delinquent directors and others to restore property and to compensate the company***
(1) Where in the course of the winding-up or judicial management of a company it appears that any person who has taken part in the formation or promotion of the company, or any past or present director or any officer of the company has misapplied or retained or become liable or accountable for any money or property of the

he be required to deliver a written account, fully supported by source documents, concerning various vehicles, plant and equipment for the purpose determining the ownership of such objects and the true nature and cause of all payments made by him on behalf of SH to S&S in connection with any of the aforementioned vehicles, plant or equipment, and that orders be made for the repayment of any amounts found to be have been misapplied or retained or paid in breach of Stevens' fiduciary duty to SH.

[10] The respondents have indicated that they do not oppose the institution of an enquiry in terms of s 423 of the old Companies Act. They oppose all the other relief sought by the applicants and contend that it would, on any approach, be premature to determine the application for relief under those heads before the finalisation of the contemplated s 423 enquiry. In support of that contention, they say that if the plant and equipment that they say belonged to S&S were in fact the property of SH, then it would follow that SH could not have been insolvent at the times the payments that the applicants seek to impeach were made, which would pose a fatal impediment to their ability to obtain the relief sought in terms of the Insolvency Act. They also argue, persuasively in my view, that it would be inappropriate to make an order against Stevens in terms of s 424 whilst the possibility of an order being made against him in terms of s 423 remained undetermined.

[11] As I shall explain presently, the institution of an enquiry in terms of s 423 is a matter within the court's discretion. It is not a procedure that is made available merely for the asking, and it therefore does not follow that the respondents' consent to such an enquiry in any way obliges the court to hold one. The court will order such an enquiry only if a proper case for one has been made out, and even then only if the court is satisfied that the exceptional procedure afforded in terms of the provision would be appropriate in the circumstances.

The applicants' allegations and other information apparent on the founding papers

[12] The applicants' case falls into two broad categories. The first category concerns the setting aside of the above-mentioned payments, all of which, they contend, were made at a

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company or has been guilty of any breach of faith or trust in relation to the company the Court may, on the application of the Master or of the liquidator or of any creditor or member or contributory of the company, enquire into the conduct of the promoter, director or officer concerned and may order him to repay or restore the money or property or any part thereof, with interest at such rate as the Court thinks just, or to contribute such sum to the assets of the company by way of compensation in respect of the misapplication, retention, breach of faith or trust as the Court thinks just.'

time that SH was factually insolvent. The second category concerns the determination of the ownership of certain vehicles and equipment. It is in relation to the second category that the applicants have sought an enquiry in terms of s 423 of the 1973 Companies Act. The contemplated enquiry would also examine the propriety of the rental payments by SH to S&S for the vehicles and equipment should it be found that the company in liquidation had not been the owner thereof. There is an overlap between the two categories because the applicants also claim the repayment of the amounts ostensibly paid as rental even if S&S is the owner of the vehicles and equipment. They do so on the basis that they do not accept that there was a lease agreement in place and that SH did not use or obtain any benefit from the vehicles and equipment after it ceased to trade.

[13] The vehicles and equipment involved are identified in paragraph 5.1 of the notice of motion as follows:

1. A Man truck tractor with registration no. CA201 884;
2. A Man truck tractor with registration no. CA 386 976;
3. Two tip trailers;
4. A 950CAT front-end loader;
5. A Manitou forklift;
6. A lowbed trailer;
7. A horse for the lowbed trailer with registration no. CA 933 737;
8. A digger loader;
9. Two dump trucks;
10. An excavator;
11. A Toyota 3-litre diesel bakkie;
12. A Toyota bakkie;
13. A Man truck tractor with registration no. CA 933 737[6] or CAW 3013;

[6] The same registration number as that given for the vehicle identified in item 7 above.

14. A trailer with registration no. CA 570 336 (this vehicle was registered in SH's name on 21 June 2010 and registered ownership thereof was transferred to CT Trucking on 31 May 2016);

15. A trailer with registration no. CA 563 043;

16. A Toyota bakkie with registration no. CA 928 298;

17. A trailer with registration no. CA 928 278

18. The (sic) box trailer;[7]

19. The (sic) trailer light tanker; and

20. Two Land Rover Defenders. (Two Land Rover Defender 110 TDIs with registration numbers CA 460 378 and CA 837 337, respectively, are listed as '*private vehicles*' on the schedule to a Hollard Insurance Co policy issued to SH and S&S as joint insured for the period 1 June 2014 to 31 May 2015, a copy of which is annexed to the founding affidavit.)

[14] At the enquiry conducted in terms of s 415 of the 1973 Companies Act into the affairs of SH, the company's co-director, Randall Kapot, testified that SH had purchased the vehicles identified in items 1-12 of the preceding paragraph. Kapot reportedly testified that the purchase of the vehicles was financed by means of loans of obtained from S&S.

[15] The first applicant, who was the deponent to the principal founding affidavit averred that the Kapots' evidence is supported '*to an extent*' by the '*limited documentation*' made available to the applicants by Stevens. He pointed out that several vehicles claimed by Stevens to be the property of S&S were registered in the name of SH. In this regard, he identified the vehicles listed as items 1, 2, 13,[8] 14, 15, 16 and 17 in paragraph [13] above.

[16] The documentation evidencing the registration of some of the vehicles in SH's name in point of fact appears to be the only objective evidence in support of any claim by SH to ownership of them. Moreover, the financial statements of SH do not reflect any liability to

[7] A schedule to an insurance policy issued by the Hollard Insurance Company Ltd to S&S and SH as joint insured (annexure OJS 17 to the founding affidavit) lists a 2000-registered 'homebuilt box trailer' with registration number CA 203 311.

[8] Which, as noted in footnote 6, corresponds, by way of the given registration number, with the vehicle identified as item 8 in para 13 above.

S&S in respect of the loans advanced by it to SH for the purchase of the vehicles according to Kapot's version.

[17] It is trite that registration of a vehicle in a person's name is not determinative of that person's ownership of the vehicle; cf. e.g. *Info Plus v Scheeke and Another* 1996 (4) SA 1058 (W) at 1060 and *Akojee v Sibanyoni and Another* 1976 (3) SA 440 (W) at 442C-F. See also the cases that distinguish between 'statutory' ownership of motor vehicles (evidenced by certification or registration etc.) and 'common law ownership' thereof; Cf. *Van Gend v Royal Exchange Assurance and Ano* 1969 (3) SA 564 (E) at 567, citing *Pottie v Kotze* 1954 (3) SA 719 (A). Any claim that SH might have to the vehicles would have to be predicated on its so-called 'common law ownership' thereof.

[18] The first applicant averred that Stevens had given inconsistent and mutually contradictory accounts concerning the ownership of the vehicles and equipment. He testified as follows in that regard:

> '*In the affidavit deposed to by Stevens in support of the warrant application* [an application successfully brought by S&S and Stevens to set aside a warrant obtained by the liquidators of SH in terms of s 69 of the Insolvency Act to search for and take possession from S&S and Stevens property alleged to be that of SH], *he admitted that some of the vehicles used by the company* [i.e. SH] *were registered in the name of the company. He blamed Kapot and his wife for what he described as the incorrect registration of the said vehicles in the company's name. He explained that Kapot and his wife erroneously believed that because the company used the vehicles, it had to be registered in its name. However, during the section 415 enquiry Stevens changed his tune and explained that the vehicles were correctly registered in the company's name as Arcelor Mittal required all vehicles operating on their site to be registered in the name of the operator. From Arcelor Mittal's perspective, the company was the operator.*'[9]

[19] The applicants confirm that they have been provided with tax invoices evidencing the purchase by S&S of the following vehicles:

[9] In para 40 of the founding affidavit.

1. A Manitou forklift for R182 400 (incl. VAT). The invoice, issued by Window Wide Traders CC of Velddrift, reflects a transaction date of 30/06/2011 and shows that a deposit of R20 000 was paid on 7 July 2011, with the balance payable on 1 August 2011. Handwritten endorsements on the invoice suggest that the balance was redeemed by way of EFT payments effected on 18 July, 4 August and 2 September 2011, respectively. On its face the invoice could quite feasibly relate to the vehicle identified in item 5 in paragraph [13] above. The invoice gives the Manitou serial number for the vehicle, so it should be easy to confirm that the items are indeed one and the same.

2. A (1997) Man truck tractor for R239 400. The invoice, issued by Anglo Commercial Enterprises (Pty) Ltd t/a Hermans of Somerset West, is undated but it reflects the engine and serial numbers of the vehicle sold. It also gives its registration number as CA 201 884. The vehicle accordingly appears to be that identified in item 1 in paragraph [13]. ENatis records indicate that the vehicle was registered in the name of SH on 24 May 2010, but SH's financials for the relevant period do not reflect it as an asset of the company. The records show that registered ownership of the vehicle was transferred to CT Trucking on 31 May 2016.

3. A (2003) Man truck tractor for R387 600. The invoice, also issued by Anglo Commercial Enterprises (Pty) Ltd t/a Hermans of Somerset West, is again undated but it reflects the engine and serial numbers of the vehicle sold. It also gives its registration number as BWP390 NC, which appears to be a Northern Cape vehicle registration number. The vehicle would presumably require to be reregistered with a Western Cape number. It should be possible by checking the engine and serial numbers to easily identify whether the vehicle is one of the truck tractors listed in paragraph [13] above.

4. A (2008) used 950 loader for R1,197 million. The invoice, dated 24 November 2010, was issued by Barlow World and gives the plant and serial numbers of the equipment. It should be possible by checking the engine and serial numbers to easily identify whether the invoiced item is in fact one of the two loaders listed in paragraph [13] above. It is identifiable by its engine serial number as one of the insured vehicles on

the schedule to the aforementioned Hollard Insurance Co policy issued to SH and S&S as joint insured.

5. A 'new' Caterpillar 950H wheel loader powered by a Caterpillar C7 engine for R1,824 million. The invoice, issued by BarlowWorld Equipment, is dated 02.11.2011. It gives the serial numbers for both the wheel loader and the engine. It should be possible by checking the engine and serial numbers to easily identify whether the invoiced item is one of the two loaders listed in paragraph [13] above. It is identifiable by its engine serial number as one of the insured vehicles on the schedule to the aforementioned Hollard Insurance Co policy issued to SH and S&S as joint insured.

6. A new CPCD50-RWX19 5-ton diesel forklift for R323 091,96 (including delivery). The invoice, dated 06/05/2013, and issued by Manhand (W.P.) CC – part of the D&H Engineering Group, reflect the serial, chassis and engine numbers of the vehicle that was sold. On the face of it the vehicle that is the subject of this invoice does not appear to correspond to any of the items listed in paragraph [13] above.

All but one of the above invoices reflect what appears to be S&S's VAT number as part of the purchaser's particulars.

[20] It seems to be common cause that SH sold a used lowbed trailer to S&S for R114 000 (including VAT) and that the purchase price was paid. SH issued S&S with a VAT invoice for the transaction, dated 30 July 2015.

[21] Copies of SH's independently reviewed financial statements for the years 2011 to 2015 were attached to the founding affidavit.[10] It was only from the 2013 financials, in respect of the year ended 28 February 2013, that 'motor vehicles' at a cost price valuation of R381 000 were first reflected in the notes to the company's balance sheet as part of SH's assets. Stevens' loan account claim against the company increased by R254 810 during the same period. The financial statements for the next two years (2014 and 2015) indicate that the 'motor vehicles' reportedly acquired by SH in the 2013 financial year were depreciated.

[10] The independent reviewer's report records '*The procedures performed in a review engagement are substantially less than those performed in an audit conducted in accordance with International Standards on Auditing. Accordingly, we do not express an audit opinion on these financial statements.*'

There is no indication in the financials that further vehicles or plant were acquired. There is also no indication in the financials that S&S ever acquired a loan account claim against SH.

[22] The copy of the 2011 financials for SH attached to the founding papers as part of annexure OJS5 is incomplete. It may be discerned from the 2012 financials, however, that SH was reported to have paid R668 791 to S&S (which is disclosed as a related party) in rent during 2011 and R2 475 763 in 2012. The corresponding figures for the succeeding three years (2013, 2014 and 2015) are given in the notes to the SH's financial statements as R1 831 233, R1 711 469 and R1 427 273, respectively. The said amounts are recorded in the notes to the financials in each of those three years as –

'*Operating lease charges*
Motor vehicles

- *Contractual amounts*'

[23] The financials for the entire period show that SH's liabilities exceeded its assets as of each of the five reporting dates involved. However, a significant part of SH's liabilities comprised Stevens' loan account claim, which was subordinated until such time as the company's assets exceeded its liabilities. Stevens' evidence also suggests that SH's financial statements were inaccurate in various material respects; so, whilst it may be accepted that the statements were drafted with the bona fide intention of properly reflecting the company's financial affairs, they must nevertheless be examined with circumspection in the context of the evidence that exposes their inaccuracy. The applicants have identified a number of other inaccuracies in SH's financials that suggest that the company's accounts were sloppily written up.

The respondents' answer

[24] The respondents, represented by Stevens, deny that the vehicles and equipment that the applicants suggest belong to SH in fact do so. They point to the fact that that SH's financials have consistently reflected that the only vehicle owned by the company is that acquired for R381 000 in July 2013 during the company's 2014 financial year. They identify the vehicle in question as a lowbed trailer with registration number CA 112 425 and provide its serial number. They give the name of the concern from which the trailer was purchased. This was the vehicle that S&S purchased from SH for R100 000 (excl. VAT) after SH ceased

operations on the Arcelor Mittal contract. It was identified as an asset of SH in the company's 2013 financials, but that was clearly erroneous.[11]

[25] Stevens asserts that the vehicles purchased by S&S that were registered in SH's name were so registered only because Arcelor Mittal required the vehicles brought onto the site by SH to be registered in its name. He points out that the vehicles were reregistered in the name of S&S after SH ceased to operate on the Arcelor Mittal site.

[26] Stevens gave the following explanations (printed in italics) in respect of each of the vehicles listed in para 5.1 of the applicant's notice of motion (as set out in paragraph [13] above):

1. A Man truck tractor with registration no. CA201 884; *the subject of the invoice listed as item 2 in paragraph [19] above. It was sold on 26 October 2020 for R67 800*
2. A Man truck tractor with registration no. CA 386 976; *serial number provided, purchased by S&S from Hermans for R340 000 on 18 May 2010.*
3. Two tip trailers; *serial numbers and CA registration numbers provided in respect of two Copelyn tip trailers purchased for R80 000 each from Graceful Transport & Logistics on 21 May 2010. One of the trailers was scrapped and the other disposed of at a consideration of R60 000 on 15 July 2015 to West Coast Builders in part settlement of a R240 000 indebtedness to the latter by SH.*
4. A 950CAT front-end loader; *Stevens provided particulars in respect the two front end loaders evident from the invoices described in items 4 and 5 of paragraph [19] above. The first mentioned is currently not in working order and being kept at an address in Velddrift. The other is in working condition, and also kept at the Velddrift address*.
5. A Manitou forklift; *Stevens identifies this as the vehicle subject of the invoice listed as item 1 in paragraph [19] above. He states that it is in S&S's possession, having been returned by one Lauren Coetzee in early 2019 with major parts missing. The circumstances in which it came to be in Coetzee's possession are described at para 57-59 of the supporting affidavit of Stevens in support of the application by him and*

[11] The independent reviewer's report on the 2013 financials was signed on 16 September 2013, which suggests that the statement might well have been drawn up after July 2013.

S&S to set aside a warrant in terms of s 69 of the Insolvency Act obtained by the liquidators of SH. A copy of the relevant part of the affidavit was attached as annexure OJS7 to the applicants' founding affidavit in the current application. The information provided by Stevens in the current application suggests that the vehicle is in the process of being rebuilt.

6. A lowbed trailer; *the vehicle described in paragraph [24] above.*

7. A horse for the lowbed trailer with registration no. CA 933 737; *Man Truck CAW*[12] *purchased by S&S from HG Fourie Vervoer as a used vehicle for R200 000 on 2 April 2011 and sold on 20 October 2020 for R86 900.*

8. A digger loader; *Stevens has given particulars of a Caterpillar 416C Backhoe loader reportedly acquired by S&S from BarlowWorld in 1999 for R275 000. The equipment is reported to be on site in Rawsonville in working condition*.

9. Two dump trucks; *Stevens has given particulars of two dump trucks, being Bell articulated dump trucks with registration numbers CW 36786 and CW 36785, respectively. S&S reportedly acquired the vehicles as used vehicles from Bell / Burger Wallace for R500 000 each on 16 October 2002. Both vehicles are reported to be on site at a given address in Velddrift and in a 'not functional' condition.*

10. An excavator; *Stevens has given particulars of a Caterpillar 318B Hydraulic Excavator acquired from BarlowWorld for R1 202 000 on 22 October 2002. The vehicle is reported to be on site at a given Velddrift address in a 'partly functional' condition.*

11. A Toyota 3-litre diesel bakkie; *a Toyota bakkie with registration number CFG 19841 belonging to SH purchased from S&S for R35 000 on 13 August 2010 was disposed of to West Coast Builders on 15 July 2015 for a consideration of R20 000 in part settlement of the latter's R240 000 claim against SH.*

12. A Toyota bakkie; [It is not clear on the papers from where the reference to a third Toyota bakkie derives. According to the founding papers, Kapot testified at the s 415 enquiry that SH acquired *two* Toyota bakkies.[13]]

[12] Taking judicial notice that CAW denotes a George vehicle registration number, I have assumed that the 'CAW' is a reference to the vehicle's George registration particulars at time of acquisition.

13. A Man truck tractor with registration no. CA 933 737[14] or CAW 3013; (*This would appear to be the same vehicle as that described in item 7, above.*)

14. A trailer with registration no. CA 570 336 (this vehicle was registered in SH's name on 21 June 2010 and registered ownership thereof was transferred to CT Trucking on 31 May 2016); (*This appears to be one of the two Copelyn tip trailers described in item 3, above. The one that, according to Stevens, was scrapped.*)

15. A trailer with registration no. CA 563 043; *This appears to be the other one of the two Copelyn tip trailers described in item 3, above.*

16. A Toyota bakkie with registration no. CA 928 298; *given to Mr Kapot's son as it was in a poor state of repair and had had an engine and gearbox failure*.[15]

17. A trailer with registration no. CA 928 278; *described by Steven as a bowser trailer. Reportedly acquired by S&S from CTC Plant Hire for R12 000. Currently on site at a given Velddrift address, having been officially deregistered on 18 August 2020 as unroadworthy.*

18. The (sic) box trailer;[16] a schedule to an insurance policy issued by the Hollard Insurance Company Ltd to S&S and SH as joint insured (annexure OJS 17 to the founding affidavit) lists a 2000-registered 'homebuilt box trailer' with registration number CA 203 311. *Stevens has not dealt with this vehicle in the schedule annexed to his answering affidavit as annexure MCS 17.*

19. The (sic) trailer light tanker; (*not dealt with in the schedule annexed to Stevens' answering affidavit as annexure MCS 17*).

20. Two Land Rover Defenders. *Stevens' private vehicles and still in his possession*.

The applicants' reply

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[13] Para 38 of the founding affidavit.

[14] The same registration number as that given for the vehicle identified in item 7 above.

[15] Stevens' answering affidavit, para 43.8.

[16] A schedule to an insurance policy issued by the Hollard Insurance Company Ltd to S&S and SH as joint insured (annexure OJS 17 to the founding affidavit) lists a 2000-registered 'homebuilt box trailer' with registration number CA 203 311.

[27] In reply, the applicants complained that the second respondent had failed to disclose much of the information set forth in the respondents' answering papers at an earlier stage. They highlighted the unreliability of SH's financial statements in various respects and emphasised Stevens' failure or inability to give a coherent indication of the terms of the lease relied upon by Stevens to justify the impugned rental payments.

The relief sought in terms of s 423 of the 1973 Companies Act

[28] As the respondents have purported to consent to an enquiry in terms of s 423 of the 1973 Companies Act, I shall treat of that aspect of the application first. I am not willing to grant the remedy, however, because in my view, as I shall explain presently, a proper case for such an enquiry has not been made out, and the applicants have in any event not exhausted more appropriate mechanisms of investigation that are available to them under the statute. Suffice it to say that if I had been persuaded that the court should institute an enquiry under the provision, I would have postponed much of the other relief sought by the applicants for later determination after the enquiry had been concluded, as the respondents indeed argued should happen.

[29] Section 423[17] affords an exceptional procedure for the summary enforcement of the claims of a company in liquidation against the limited classes of person identified in subsection (1) of the provision. It is a provision for the benefit of the creditors and members of such companies. Speaking of the immediate predecessor of the provision, s 184 of the Companies Act, 1926, which was similarly worded, Holmes JA remarked in *Lipschitz NO v Wolpert and Abrahams* 1977 (2) SA 732 (A) at 744A-C that it '*makes drastic inroads upon the normal procedure of enforcement of claims. It cuts across and dispenses with pleadings, discovery, and the right of a defendant not to testify. The Court may summarily require the alleged delinquent to give viva voce evidence and to be cross-examined. … The procedure may be robust and wholesome, but it is rough and ready; and the provision should not be construed widely.*'[18] On that approach the court held that a claim against a company's auditor did not fall within the purview of the provision. Similarly, in *Rennie NO v Holzman and Others* 1987 (4) SA 938 (C) and *Rennie NO v Holzman and Others* 1989 (3) SA 706 (A), it was found that the provision was not available for use in respect of a claim against the

[17] The wording of s 423(1) is set out in footnote 5 above.

[18] In *Timmers and Another v Spansteel (Pty) Ltd* 1979 (3) SA 242 (T) at 250B, the enquiry procedure in terms of s 423 was described as '(t)*his summary and rather drastic remedy*'.

erstwhile judicial managers of a company in liquidation. It follows that there can be no question of the procedure being available in respect of a claim to recover SH's property from S&S for the procedure in terms of s 423 is not available, according to the tenor of the provision, for use against the company.

[30] The procedure is available when it is made to appear to the court that the person against whom the remedy under s 423 is sought has been delinquent or transgressive regarding the management or administration of the company that is being wound up.

[31] A person wishing to use the mechanism afforded by s 423 for the prosecution of a company in liquidation's claim for any type of relief provided in terms of subsection (1) thereof must make out a prima facie case in support of its application for the institution of an enquiry contemplated by the provision. The nature of the case to be made out and of the court's discretion regarding applications brought in terms of s 423 was discussed by Coetzee J in the full court's judgment in *Timmers and Another v Spansteel (Pty) Ltd* 1979 (3) SA 242 (T).

[32] At p. 247 of *Timmers*, after referring to the abovementioned observations about the procedure made in *Lipschitz*, the learned judge said:

> This passage clearly illustrates the uniqueness of this special remedy to which an applicant is not entitled as of right. This examination into the conduct of another person is a departure from the basic principles of our adversary system of litigation. It has indeed inquisitorial elements and can only take place after the Court has so ordered upon application for this definite and distinct relief. Such an order should not be confused with one referring an application for viva voce evidence which falls in a completely different category, one which cannot even properly be sought in a notice of motion. Apart from the fact that the applicant for such an order under s 423 may not succeed in making out a prima facie case, it may be refused for a variety of reasons. This is discretionary relief and there may be facts which persuade the Court that it should not exercise its discretion or it may be that there are reasons in law why the application should be refused, for instance that the facts deposed to by the applicant do not come within the purview of the section, and so forth.

[33] As to the nature of the case that an applicant for an enquiry in terms of s 423 must make out, Coetzee J referred to the following passage in Price J's judgment in *Hamman v Hamman* 1949 (1) SA 1191 (W) (an application for maintenance *pendente lite* in a matrimonial cause) at 1193 –

> In order to decide whether a prima facie case has been made out in a petition of this character, the Court must ask itself whether, if all the allegations in the petition were proved, the applicant would

> succeed in the main action. The Court cannot speculate as to who is likely to succeed by nicely balancing the probabilities. Of course, where a respondent produces overwhelming proof (such as correspondence or documentary or equally convincing evidence) showing that there is no foundation at all for the allegations in the petition, the Court would be obliged to hold on the papers that the prima facie case had not been made out, and the test set out above would not be applicable. Short of such evidence by the respondent, however, the Court will assume that the allegations in the petition are capable of proof and will consider whether the applicant would be entitled to judgment in the main case if the facts set out in the petition were proved

And proceeded (at p. 249F-G):

> I would adopt this approach as apposite to the instant kind of application. This does not mean that bare allegations will suffice. The applicant must properly produce evidence in conventional manner in substantiation of the facts on which he relies for seeking a substantive order that this extraordinary procedure be made available to him. See *Du Plessis v Gunn* ([1962 (4) SA 7 (O)] at 14E). It is not a prima facie case for a claim for the payment of money which must be made out. All that the applicant has to establish is a prima facie case for the grant of an order for the holding of an enquiry. Consequently, he need not establish any probable amount which the Court will order the respondents to pay. That is a problem that may arise only in the course of the subsequent enquiry.

[34] In *Du Plessis v Gunn* supra, Hofmeyr J appears to suggest that, if possible, a proper evidential basis should be laid for an enquiry in terms of s 423 (the learned judge was dealing with an application under the provision's antecedent, s 184 of the 1926 Act) by appropriate use of other mechanisms such as s 415 (the learned judge referred to the antecedent of that provision in s 180 *ter* of the 1926). That puts the requirement for making out a prima facie case somewhat higher than in the passage from *Hamman* cited by Coetzee J. I find myself in respectful agreement with Hofmeyr J's approach and would emphasise the sentence in the aforementioned quotation from *Timmers* in which Coetzee J stated '(t)*he applicant must properly produce evidence in conventional manner in substantiation of the facts on which he relies for seeking a substantive order that this extraordinary procedure be made available to him*'.

[35] The cases consistently refer to the procedure in terms of s 423 as a 'summary' one. In my judgment, a summary procedure is indicated only when a strong or fairly clear-cut case is made out, albeit on a prima facie basis. This much seems to be supported by the observation in Henochsberg that s 423 '*creates no new rights but provides a summary procedure for the enforcement of rights of action which the company already owns arising from the conduct of*

the respondent'.[19] The procedure should not be seen as an alternative exploratory tool to the information gathering procedures available under s 415 or 417. Whereas the latter procedures are exploratory and can be used to confirm or establish the existence of rights of action, s 423 is directed at providing a summary enforcement mechanism for rights of action that have already been established, at least prima facie.

[36] I think this much is confirmed in the wording of the provision. The words '*it appears that .. any past or present director ... of the company has misapplied or retained or become liable or accountable for any money or property of the company or has been guilty of any breach of faith or trust in relation to the company the court may, on the application of ...., inquire into the conduct of the ... director ... concerned ...*' imply that the misfeasance involved must be apparent when the application for the enquiry is made. The primary purpose of s 423 is to provide a robust and expeditious means to a result, whether by payment of money or delivery up of property to the company by the delinquent director, officer or promoter, as the case might be.

[37] I have noted that Coetzee J in *Timmers* supra, at pp. 252-253, considered that there was a lacuna in the legislation by reason of its omission to lay down any procedural directions for enquiries in terms of s 423. The convention had been for orders instituting such enquiries to be granted in the simple and unadorned form used in *Waisbrod v Potgieter and Others* 1953 (4) SA 502 (W), viz. an order '*that the application be set down on a date to be fixed by the Registrar for viva voce examination and cross-examination* [of the alleged delinquents] *and of those witnesses who have made affidavits and of any other witnesses whom the Court may allow the parties call*'. Coetzee J feared that orders in such terms were liable to result in the enquiry lapsing into a '*"free for all", casting unnecessary extra burdens on the Judge hearing the matter*'. The learned judge considered it desirable that the issues to be dealt with at the enquiry be defined (he appears to have in mind something in the nature of the so-called 'Metallurgical order'[20]), that there be discovery as provided in the Uniform Rules of Court and a 'pre-trial conference under Rule 37'.

[38] In my view, however, the undelimited application of such ordinary pretrial procedures in an enquiry under s 423 would be at odds with the very object of the provision, being the

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[19] Kunst et al (eds), *Henochsberg on the Companies Act 61 of 1973* 5 ed. (LexisNexis) at p.906.

[20] After the order made by Colman J in *Metallurgical and Commercial Consultants (Pty) Ltd v Metal Sales Co (Pty) Ltd* 1971 (2) SA 388 (W).

provision of a *summary* procedure to obtain an exigible substantive result. An enquiry under s 423 is a procedure appropriately availed of when a trial should not be necessary by virtue of the apparent strength of the prima facie case made out against the respondent. The evidence adduced in support of an application in terms of s 423 should be such that little more might be expected to happen at the enquiry than a hearing of the apparently delinquent director's evidence as to why the substantive relief sought from him should not be granted.[21] That would represent a realisation of the 'summary' character of the remedy crafted by the provision.[22]

[39] In the current case, as the summary of evidence above bears out, all the indications are that S&S is the owner of the vehicles and equipment in issue. The information that can be vouched in support of that conclusion has been provided. In the circumstances, it is of little consequence that evidence previously given by Stevens has not been consistent in all respects. An enquiry is unlikely to take matters further, and s 423 in any event does not afford the machinery by which S&S could be ordered to restore the property. The evidence does not support a case for the institution of an enquiry to summarily dispose of a case against Stevens for having misapplied SH's property or committed a breach of faith or trust in relation to SH. It goes no further than to suggest that the possibility of such delinquency should be explored.

[40] If the applicants consider that it would be fruitful to interrogate Stevens further in respect of the information given in the respondents' answering papers, the appropriate way of doing that would be by means of a reconvened examination in terms of s 415 of the Act. Such examinations may be convened at any time before the company in liquidation is finally dissolved; cf. *Standard Bank of South Africa Ltd v Master of the High Court* [1999] 1 All SA 299 (A), 1999 (2) SA 257 (SCA).

[41] For all these reasons, I have concluded that it would be inappropriate to accede to the applicants' application for the institution of an enquiry in terms of s 423 of Act 61 of 1973.

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[21] Compare the procedure applied in the enquiry in terms of s 423 in *Spansteel (Pty) Ltd v Timmers and Another* 1980 (3) SA 422 (W) and the order made in *L Suzman (Rand) Ltd v Yamoyani (2)* 1972 (1) SA 109 (W).

[22] The *Oxford Dictionary of the English Language* gives the following pertinent definition of '**summary**': '*Law (of a judicial process) conducted without the customary legal formalities*'.

The application for a declaration that the payments made to S&S post 9 November 2015 are void in terms of s 341(2) of Act 61 of 1973

[42] The pertinent provisions of the 1973 Companies Act have been set out in footnote 2 above. Consideration of those provisions makes it clear that the declaratory order sought by the applicants is unnecessary. The statutory provisions are clear and speak for themselves. The payments to S&S made after the presentation on 9 November 2015 of the application for SH's liquidation are void.

[43] The court is vested with a discretion to declare that payments made between the lodging of the winding-up application and the making of an order placing a company into liquidation (whether such be a provisional or a final order matters not). The respondents have contended in the answering papers that the court should not make such an order in this case, but there is no counter-application formally seeking such relief. The respondents adopted the position that a determination whether to exempt the payments from the voiding effect of s 341(2) should stand over until after the enquiry in terms of s 423 to which they had consented. That was a misdirected approach. An enquiry in terms of s 423 is not, according to the terms of the provision, directed at determining whether a case for an exemption from s 341(2) can be made out. The payments are void *ex lege*, and if the respondents sought a special exemption it was for them to make out a case for it.

[44] The considerations that are generally applicable when an order exceptionally exempting payments from the generally voiding effect of s 341(2) is considered were very recently rehearsed in *Pride Milling Company (Pty) Ltd v Bekker NO and Another* [2021] ZASCA 127 (30 September 2021). See also *Gainsford NO and Others v Tanzer Transport (Pty) Ltd, In Re; Gainsford NO and Others v Tanzer Transport (Pty) Limited and Others* [2014] ZASCA 32 (28 March 2014); 2014 (3) SA 468 (SCA); [2014] 3 All SA 21 (SCA). An exemption order will be granted only in very limited circumstances because the making of such an order goes against the object of the subsection, which is to protect the interests of the *concursus creditorum* and ensure that the company's creditors are treated equally. As the judgment in *Tanzer Transport* illustrates, the mere fact that a payment was allegedly made in the ordinary course of business will not, of itself, afford sufficient reason to have it declared valid and effective. The respondents have not shown any good reason for this court to make an order exempting the payments made to S&S from the effect of s 341(2).

[45] In the current matter Stevens has contended that the debt to Kroukamp Plumbers was not due when the impugned payments by SH to S&S were made. That is of no consequence in the application of s 341(2). Even if Kroucamp Plumbers had agreed to wait for payment until Arcelor Mittal had fully redeemed its indebtedness to SH, improbable as that seems, that would not detract from the fact that the payments to S&S after 9 November 2015 afforded the latter company the sort of unfair preference in insolvency that s 341(2) is directed at preventing.

[46] S&S is accordingly liable to repay to the company in liquidation the payments listed as 8-10 in paragraph [5] above, totalling R273 600.

The Claim for Repayment of the Amounts paid to S&S in settlement of the latter's invoices in respect of the rental of vehicles and equipment.

[47] The payments listed in items 2 to 10 of the list in paragraph [5] above were purportedly in settlement of the rentals that Stevens avers were due by SH to S&S in respect of certain vehicles and equipment allegedly leased by SH from S&S. S&S rendered invoices for the said amounts.

[48] It will be recalled from the description at the beginning of this judgment of the various heads under which the applicants have advanced their claim for the repayment of the moneys paid by SH to S&S that the ostensible rental payments are being reclaimed either on the basis that they were impeachable transactions under the Insolvency Act or on the basis of unjust enrichment.

[49] Whilst I think that SH could very well have been factually insolvent when the impugned rental payments were made, I am not satisfied that this has been established with the required degree of certainty on the probabilities, especially as the applicants appear to wish to further investigate the issue of the ownership of the relevant vehicles and equipment. That seems to put paid to any determination in the applicants' favour under the Insolvency Act in respect of those payments.

[50] If one assumes in the applicants' favour that the property is that of SH, then, of course, there could be no question of the company in liquidation having hired its own property, and the so-called rental payments would be demonstrably bogus. If, on the other hand, it is assumed the property was, as the respondents contend and as appears to me to have

probably been the case, owned by S&S, the rental payments would be valid only if they were made by SH in terms of an underlying contractual obligation, for it is clear that SH did not use them from July 2015 onwards. The respondents assert the existence of a contract of lease. The applicants, however, contend that the evidence does not support the respondents' assertion. If there was not a lease, there would be no obligationary basis for the payments during the period after SH had ceased to trade and did not use the vehicles and equipment. The applicants would then be entitled to reclaim those ostensible rent payments on the grounds of unjust enrichment.

[51] The essential elements of a contract of lease are trite, but they bear repetition for the purpose of the current case. These essential terms are the temporary use and enjoyment of the property let, and the rent as payment for that use and enjoyment.[23] The amount of the rent must be certain or ascertainable for the obligation to pay it to be enforceable; see *Proud Investments (Pty) Ltd v Lanchem International (Pty) Ltd* 1991 (3) SA 738 (A) at 746H. An arrangement permitting one of the parties, in its unfettered discretion, to determine the rent does not give rise to a valid lease agreement; cf. *Benlou Properties (Pty) Ltd v Vector Graphics (Pty) Ltd* 1993 (1) SA 179 (A) at 182G and *Murray & Roberts Construction Ltd v Finat Properties (Pty) Ltd* 1991(1) SA 508 (A) at 514H.

[52] In the current matter S&S issued rental invoices to SH monthly in notably disparate amounts, ostensibly in respect of the rental of the same vehicles and equipment. Thus, the invoices for the '(h)*ire of 3 MAN truck tractors and Copelyn Tip Trailers and Bell ADT's Caterpillar 318 excavator and 2 x Caterpillar 950 FELs*' for the months of February, March, April, May, June, July, August, September, October, November and December 2015 were in the VAT-exclusive amounts of R251 450, R172 912.48, R207 766.93, R208 252.80, R260 667.77, R224 150, R224 150, R200 150, R240 000, R240 000, respectively. Rental for the same equipment in respect of January 2012 was invoiced in February 2012 in the VAT-exclusive amount of R131 207.09 and in June 2011 S&S invoiced SH in the VAT-exclusive amount of R242 987.91 for the hire of '*3 Man truck tractors and Copelyn Tip Trailers and Bell ADT's for month of May 2011*' (i.e. only some of the vehicles and equipment listed in the 2015 invoices). Rental for the same equipment was charged in the VAT-exclusive sum of R94 698.27 for the month of November 2011.

[23] LAWSA vol 26(1) (Third Edition), s.v. 'Lease' (GB Bradfield), at para 80.

[53] Stevens has been afforded several opportunities to explain the terms of the alleged lease, which he says was concluded orally. He has not disclosed who represented the respective companies in making the alleged orally concluded agreement and has provided vague and inconsistent versions concerning the terms of the alleged lease in respect of the determination of the rent.

[54] The applicants have founded their allegation that there is no enforceable lease on Stevens' inability to describe its terms. In my view the applicants' allegation was of a character that imposed an obligation on Stevens to answer it with corroborative detail if the respondents were to neutralise its prima facie effect. The situation is of the sort contemplated in the appeal court's judgment in *Wightman t/a JW Construction v Headfour (Pty) Ltd and Another* 2008 (3) SA 371 (SCA) at para 13, in which Heher JA observed:

> 'A real, genuine and bona fide dispute of fact can exist only where the court is satisfied that the party who purports to raise the dispute has in his affidavit seriously and unambiguously addressed the fact said to be disputed. There will of course be instances where a bare denial meets the requirement because there is no other way open to the disputing party and nothing more can therefore be expected of him. But even that may not be sufficient if the fact averred lies purely within the knowledge of the averring party and no basis is laid for disputing the veracity or accuracy of the averment. When the facts averred are such that the disputing party must necessarily possess knowledge of them and be able to provide an answer (or countervailing evidence) if they be not true or accurate but, instead of doing so, rests his case on a bare or ambiguous denial the court will generally have difficulty in finding that the test is satisfied. I say 'generally' because factual averments seldom stand apart from a broader matrix of circumstances all of which needs to be borne in mind when arriving at a decision. A litigant may not necessarily recognise or understand the nuances of a bare or general denial as against a real attempt to grapple with all relevant factual allegations made by the other party. But when he signs the answering affidavit, he commits himself to its contents, inadequate as they may be, and will only in exceptional circumstances be permitted to disavow them. There is thus a serious duty imposed upon a legal adviser who settles an answering affidavit to ascertain and engage with facts which his client disputes and to reflect such disputes fully and accurately in the answering affidavit. If that does not happen it should come as no surprise that the court takes a robust view of the matter.'

[55] I consider that a robust approach to the issue of the existence of a lease is justified in the current case. It impels the conclusion that there was no valid lease for want of any certainty as to the rent. In the circumstances where the company in liquidation had no use of the allegedly hired out vehicles and equipment from August 2015, S&S was unjustly enriched at the expense of SH in respect of its receipt of the payments ostensibly in payment

of rent for the months August to December 2015. The applicants are entitled to an order requiring S&S to repay those amounts to the company in liquidation. The affected payments are those listed as items 6-10 in paragraph [5] above, which relate to the payment of the amounts, totalling R757 302 invoiced for August, September and October 2015. As discussed earlier, three of those payments were in any event void by virtue of s 341(2) of the 1973 Companies Act,

[56] An order will not be made for the repayment of the payments made ostensibly in respect of rent for the period before and including July 2015 because it appears that SH enjoyed the use of the vehicles and equipment during that period and it is therefore unclear to what extent, if any, S&S was unjustly enriched by such payments.

[57] The respondents allege that the payment by SH of the sum of R513 000 to S&S on 3 August 2015 was in settlement of an amount owed in respect of the repair of a front-end loader. The only basis for the claim for repayment of that amount made out in the applicants' papers is under the Insolvency Act. The applicants inferred that the payment was an unfairly preferential redemption of a loan account claim. The claim has not been established because, quite apart from the dispute between the parties concerning the reason for the payment, I am in any event not satisfied that it is has been established that SH was factually insolvent at the time the payment was made to S&S.

[58] I am also not satisfied that the applicants have made out a case for relief in terms of s 424 of the 1973 Companies Act against Stevens. Apart from any other consideration, it is not clear that SH (in liquidation) will be unable to pay the claim of the only creditor with a proved claim, namely Kroucamp Plumbers. As Harms JA pointed out in *Saincic and Others v Industro-Clean (Pty) Ltd and Another* 2009 (1) SA 538 (SCA) in para 27, with reference to *L&P Plant Hire BK v Bosch* 2002 (2) SA 662 (SCA) at para 39-40, the provision is directed at the protection of a company's creditors against the negative consequences of the fraudulent or reckless management of the company. See also *Fourie v Firstrand Bank Ltd and Another* NO 2013 (1) SA 204 (SCA) at para 28, where the point made in the aforementioned judgments is elucidated, and *Gihwala and Others v Grancy Property Ltd and Others* 2017 (2) SA 337 (SCA) at para 119. The creditors are not in need of such protection if despite the gross mismanagement of the debtor company, it is nevertheless in a position to settle the creditor's claim.

Costs

[59] The applicants have been substantially successful in respect of the claims brought against the first respondent and I consider that they are therefore entitled to their costs of suit against S&S. They have not, however, succeeded in obtaining any relief against the second respondent. Ordinarily, Stevens would have been awarded his costs of suit. It is clear, however, that his failure to cooperate conscientiously in the post-liquidation process of SH contributed materially to the instigation of the current litigation. The application for an enquiry in terms of s 423 of Act 61 of 1973 might well have been pre-empted had Stevens provided all of the information disclosed in the respondents' answering papers earlier, as he should have done. He admittedly failed to comply with his obligations under s 363 of the 1973 Companies Act, which is a criminal offence, and the information that he has subsequently furnished to the liquidators and creditors has in some respects been inconsistent and unreliable. I consider that it would be appropriate in the circumstances to mark the court's displeasure by withholding any costs order in his favour.

Order

[60] An order is made in the following terms:

a) The following payments made by Sachel Haulers (Pty) Ltd to Sachel & Stevens (Pty) Ltd are void by virtue of s 341(2) of the Companies Act 61 of 1973:

   i. The payment of R228 000 made on or about 4 December 2015;

   ii. The payment of R40 000 made on or about 10 December 2015; and

   iii. The payment of R5 600 made on or about 19 January 2016.

b) The first respondent is ordered to repay the said sums to the applicants for the credit of Sachel Haulers (Pty) Ltd (in liquidation), together with interest thereon at the prescribed rate from the dates on which the payments were received to the date on which the said sums are repaid.

c) The applicants' claim against the first respondent for the payment of R483 702 (being the sum of the payments of R255 531and R228 171 made by Sachel Haulers (Pty) Ltd to Sachel & Stevens (Pty) Ltd on or about 2 September 2015 and on or about 2 October 2015, respectively) is upheld on the grounds that such payments were made *sine causa* and the first respondent was unjustly enriched thereby.

d) The first respondent is ordered to pay the said sum of R483 702 to the applicants for the credit of Sachel Haulers (Pty) Ltd (in liquidation), together with interest thereon at the prescribed rate from the date of service of the notice of motion on the first respondent to date of payment;

e) Save as provided in paragraphs (a) to (d) above and in paragraph (f) below, the other relief sought in the notice of motion is refused;

f) The first respondent shall pay the applicants' costs of suit.

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

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