Republic of South Africa

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

Case No. 4424 / 2022

Before: The Hon. Mr Justice Binns-Ward

Date of hearing: 2 and 29 November 2022
Date of judgment: 17 January 2023

In the matter between:

GREGORY PAUL SMITH Applicant

and

SOFA PLANET CC First Respondent

(Registration No. 20[…])

Registered address: Unit 1, B[…] W[…] P[…], P[…], W[…] C[…].

KHAYALITSHA COOKIES (PTY) LTD Second Respondent

ADRI WILLIAMS Third Respondent

THOMKWA & JABEZ HOLDINGS (PTY) LTD Fourth Respondent

JUDGMENT

BINNS-WARD J:

[1] The applicant, who, in his capacity as a trustee of an *inter vivos* trust, is the sole member of the respondent close corporation, has applied in these proceedings for an order placing it into provisional liquidation. He brought the application as an alleged creditor of the corporation. The annual financial statements of the corporation for the year ended 28 February 2021 reflected that it was indebted to him in respect of monies lent and advanced in the amount of R7 956 821. By the time the exchange of papers was completed, the financial statements for the 2022 financial year had become available. They reflected that the debt had declined to R6 121 869. The reduction in the applicant's loan account was evidently attributable to his having received payment from the proceeds of the sale of the corporation's immovable properties and the accounting in respect of the payment by the corporation during the intervening period of a wide range of his personal expenses. The detail in this regard is rather obscure on the papers.

[2] A note to the financial statements records that '*the loan is unsecured, bears no interest per annum and* ... [has] *no fixed terms of repayment*'. The applicant alleged that he had demanded repayment of the loan, but had not received payment. He averred that the corporation had attempted to sell certain immovable property owned by it at Beacon Way Park, Parow, but that '*the sale, ..., according to legal advice received, is no longer extant*'. He averred that he had brought the winding-up application because he was no longer prepared to wait for payment.

[3] The applicant disclosed in his supporting affidavit that the building on the forementioned property had been destroyed in a fire in October 2016, and that after the accommodation was rehabilitated the corporation let it out to Khayelitsha Cookies (Pty) Ltd. The lease - which was for a period of five years, renewable for a further period of five years at the election of the lessee - was concluded in March 2018. He added that the property was subsequently sold to Thomkwa & Jabez Holding (Pty) Ltd in terms of a deed of sale executed in May 2021.

[4] The applicant averred that the corporation's relationships with its tenant and the purchaser of the property had been a troubled one. He claimed that the forementioned lease and sale agreements had been cancelled, alternatively lapsed. He averred, without providing any particularity, that there was still ongoing litigation between the corporation and the forementioned entities in the Bellville Regional Court and in this court. He explained that '[i]*n the light of the flurry of litigation, as well as the long and time consuming litigation between* [the corporation] *and Khayelitsha Cookies (Pty) Ltd, which I cannot be requested* (sic) [?required] *to fund, I felt compelled to demand payment of the loan amount and bring this application for failure to pay*'.

[5] Khayelitsha Cookies, one Adri Williams and Thomkwa & Jabez Holding applied to be admitted as respondents in the matter so that they could oppose the application. Adri Williams is the managing director of Khayelitsha Cookies. Khayelitsha Cookies is currently in occupation of the corporation's property at Beacon Way Park, purportedly in terms of the forementioned lease agreement. It is alleged that Williams and Khayelitsha Cookies stood surety for the purchaser's obligations under the forementioned sale of property agreement. The intervention application was initially contested, but the applicant subsequently agreed to an order admitting the three interveners to the proceedings as the second to fourth respondents, respectively. It was also agreed that the supporting affidavits

in the intervention application would stand as the intervening respondents' opposing affidavits in the winding-up proceedings.

[6] The intervening respondents contend that the winding-up application has been brought by the applicant in bad faith as a device to pre-empt the corporation's exposure in the pending litigation and to defeat the second and fourth respondents' contractual claims against the corporation. The prejudice that they allege that they will suffer if the corporation is wound up was described in the following terms in the principal affidavit made by Thomas Williams, who is the father of the forementioned Adri Williams and a director of Thomkwa & Jabez Holding:

> 'Should this liquidation proceed, and the [corporation] be wound up, the [fourth respondent] stands to lose not only a lucrative property, with a tenant already in the property and the revenue therefrom, but it also stands to bear the costs of penalty fees for the non-registration of the bond. This would be an untenable situation to be in, to have to repay penalties and other charges and be without the benefit of the rental income and the asset. Likewise, the [second and third respondents] also stand to make losses, as they stand surety for the sale.'

[7] The intervening respondents also disputed the applicant's standing as a creditor of the corporation as well as his allegation that the corporation was unable to meet its financial obligations. They pointed out - and it does not appear to be disputed - that the corporation currently enjoys a rental income of over R90 000 per month in respect of the units at Beacon Way Park and added that the second and third respondents also pay the municipal accounts rendered to the corporation in respect of the properties. They subjected the information in the copy of the corporation's annual financial statements attached to the founding affidavit to detailed critical analysis and sought to make something of the

applicant's failure to have attached or provided substantiating documentary evidence to vouch the correctness of the corporation's reported expenses.

[8] They also took issue with the applicant's allegation that the sale of property agreement between Thomkwa & Jabez Holding and the corporation has lapsed. They contended that the applicant was '*using the liquidation in order to dispose of the asset* [i.e. the fixed property] *below market value to his own benefit, as he will be able to purchase the building in his private capacity or by utilizing another entity for a reduced price in the event of an auction*'. They implied that the applicant was the guiding mind of the corporation and that he was responsible for the corporation's failure to obtain an occupation certificate in respect of the rehabilitated property so that transfer to the fourth respondent purchaser could proceed. An application to compel the corporation to comply with that obligation is reportedly part of the pending litigation mentioned earlier.

[9] The applicant claims that it would cost the corporation at least a million rand to qualify the premises for an occupation certificate. That allegation was contested by the intervening respondents, who put in a 'high level estimate' dated 28 March 2022 obtained from Nolte Engineers in the amount of R552 869,23 in respect of the required work.[1] The fourth respondent has indicated that it would be willing to pay for the necessary work in return for a reduction pro tanto in the purchase price.

[10] To make out a case for a provisional winding-up order, the applicant had to make out a prima facie case in the sense explained in *Kalil v Decotex (Pty) Ltd and Another* 1988 (1) SA 943 (A) at 976-979. In my judgment, the applicant has established on a balance of probabilities on the papers that he has a substantial claim against the corporation in respect

[1] The applicant attached a 'high level estimate', also dated 28/03/2022, from Nolte Engineers to his replying affidavit purporting to show the cost as R1 529 050,73. The two high level estimates were prepared on the same date by the same engineering firm. On their face, they were both drafted for submission to Khayelitsha Cookies. The difference between the estimate relied upon by the intervening respondents and that attached to the applicant's replying affidavit is not explained on the papers.

of monies loaned and advanced to it. The existence of the outstanding balance owed to him, albeit in varying amounts, has been vouched in the corporation's financial statements and confirmed in a 'factual findings report' by the corporation's accounting officer. The applicant has explained the variation over time of the amount of the outstanding balance.[2] The bases upon which the intervening respondents challenged the claim were argumentative, rather than factual – not surprisingly, considering their positions as strangers to the corporation's internal affairs. That there may indeed be some basis to question the accuracy of the claim's computation is neither here nor there. The existence of the loan and that there is an outstanding balance owing in a substantial amount have been established on the papers as a matter of probability.

[11] The intervening respondents assumed that the demand for payment that the applicant alleged he had made on the corporation had been directed in terms of s 345(1)(a) of the Companies Act 61 of 1973 or its equivalent in s 69 of the Close Corporations Act. They contended that the applicant had not established that the alleged demand had been made in strict compliance with the prescribed requirements in those provisions. The applicant did not provide any particularity in respect of how the alleged demand had been made, and in reply contented himself with stating that the founding papers served as a demand. It seems improbable that the applicant did make a formal demand for payment prior to instituting the application. In view of the strong indications on the papers that he was the controller and guiding mind of the corporation – the respondents described it as his 'alter ego' and he called himself its 'corporate controller' – making a formal demand for payment would have been somewhat farcical, because making it would have entailed the applicant talking to himself.

[2] Neither the applicant nor the corporation's accounting officer have, however, explained how the applicant's loan account was credited with amounts totalling R1 453 693 in respect of interest during the corporation's 2016 and 2017 financial years. As mentioned, the financial statements describe the loan as bearing no interest.

[12] As the applicant in fact did not rely on the deeming provisions of either s 345(1)(a) of the 1973 Companies Act or s 69(1)(a) of the Close Corporations Act, it is unnecessary to make any finding on the respondents' contention.[3] The object of a demand for payment in the context of a loan where no time has been fixed for repayment is merely to inform the debtor that he must pay (cf. *Fluxman v Brittain* 1941 AD 273 at 295-6). Unless reliance is sought to be made on the forementioned statutory deeming provisions, it is not incumbent on a creditor that applies for a winding-up order on the grounds of the respondent entity's alleged inability to pay its debts to prove that a demand for payment was made before the application was instituted (unless, of course, an applicable contractual or other regulatory provision requires otherwise).

[13] That said, however, whilst it is correct that a loan with no fixed date for repayment falls due for repayment when payment is requested, the law appears to recognise that immediate payment nevertheless will not be enforced if the circumstances are such that a reasonable time for payment to be made should be permitted. The question was examined in some depth in *Fluxman v Brittain* supra.

[14] Whilst it is not required of the creditor in such a situation to fix a reasonable time for repayment, a debtor who has been sued for repayment of a loan without fixed terms of repayment is entitled to seek a delay if the circumstances make that reasonable. In *Fluxman v Brittain* at p.294, Tindall JA provided the following review of the common law:

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[3] The intervening respondents' counsel relied on the judgment of Coetzee J in *Phase Electric Co (Pty) Ltd v Zinman's Electrical Sales (Pty) Ltd* 1973 (3) SA 914 (W) concerning the peremptory requirements of s 112(a) of the 1926 Companies Act to support his clients' contention. *Phase Electric* was endorsed, in respect of the application of s 345(1)(a)(i) of the Companies Act 61 of 1973, in an obiter dictum of the full court (per Margo J, Botha J and Philips AJ concurring) in *BP & JM Investments (Pty) Ltd v Hardroad (Pty) Ltd* 1978 (2) SA 481 (T) at 486-7 and also in a passing remark by Van Reenen J in *Ter Beek v United Resources CC and Another* 1997 (3) SA 315 (C) at 332B. Had it been necessary to decide the point, I would, however, have preferred the interpretive approach evinced in the judgment of Van Dijkhorst J in *Nathaniël & Efthymakis Properties v Hartebeestspruit Landgoed CC* [1996] 2 All SA 317 (T).

> '*Digest* (50.17.14) states a rule in general terms that in all obligations in which time of payment is not inserted the debt is due immediately. But, as pointed out in *Mackay v Naylor* (1917 TPD 533), the rule is subject to a qualification. *Voet* (45.1.19) states that the rule must be accepted with some moderation of the time for performance, and in regard to the contract of *mutuum* he states in the passage already quoted (12.1.19) that the loan must be repaid after a reasonable time, remarking that, although it is true that in all obligations in which the time for fulfilment is not fixed, the debt is presently due, yet it should not be presumed that for that reason the humanity and even the discretion of the Judge are taken away, so that a reasonable, delay may be given ("must be given" - according to the translation in the *Aanhangzel tot het Hollandsch Rechtsgeleerdheid Woordenboek, s.v. Mutuum*) by the lender or the Judge to the borrower who is sued, as the nature of the case requires. *Pothier (Mutuum, Oeuvres*, vol. 5, sec. 48), dealing with contracts of loan in which no term is mentioned for repayment states that the lender ought to grant a time more or less long according to the circumstances, in the discretion of the Judge, for the restitution of the sum lent, and that the borrower has against the demand of the lender, if he sues him before this time, an exception by which he ought to obtain from the judge a delay for the payment.'

Compare also *Nel v Cloete* 1972 (2) SA 150 (A) at 164B-F; *Alfred McAlpine & Son (Pty) Ltd v Transvaal Provincial Administration* 1974 (3) SA 506 (A) at 534*fin*-535E.

[15] It would be for the corporation to raise the issue of whether it was reasonable that it be required to make repayment immediately in the circumstances. It is hardly surprising in the current case, in which the applicant is the both the sole member and the loan-creditor demanding payment, that it has not done so.

[16] The circumstantial indications suggest that the loan was advanced to capitalise the business of the corporation. In the context of the intervening respondents' allegation that the application for the corporation's liquidation on the grounds that it is unable to pay its debts has not been brought bona fide with a view to the establishment of a *concursus creditorum* but rather for some ulterior purpose, I consider that the applicant's calling up of

the loan and demand for immediate payment at a time when, objectively, that would be inimical to the corporation's interests are factors to which the court may regard in assessing the cogency of the respondents' allegation.

[17] Furthermore, the applicant's position as lender in the circumstances is distinguishable from that of an outsider lending money to the corporation. As a member, he stands in a fiduciary relationship to the corporation[4] and therefore cannot conduct his own affairs in a way that conflicts with the best interests of the corporation. His averment in reply that '[t]*he entity is not entitled to time. The entity is not entitled to first attempt to realise assets. The entity must be in a position to pay when called upon to do so by a creditor. Clearly, on the facts* [the corporation] *is not in a position to pay*' expresses the position too glibly, especially in a case where the intervening respondents contend that he is actuated by ulterior motives and the application was not instituted in good faith.

[18] Ex hypothesi, and assuming it was represented by someone without a conflict of interest, I expect that the corporation would be entitled in the circumstances obtaining in the current case to ask for time to dispose of its immovable property to redeem its indebtedness to the applicant. The evidence suggests that given that opportunity it would be able to settle its loan debt and be left with some residual cash with which to continue in business or pay a dividend for the ultimate benefit, one presumes, of the trust (the Batman Trust) on whose behalf the applicant holds the registered members interest. A dispassionate consideration of the evidence suggests that the only reason this course is not being followed is because, for reasons that he has not been candid enough to disclose, the applicant is pursuing his own interests in a manner at odds with those of the corporation. The court would in any event be entitled to have regard to the fact that an operating corporation which is unable to

[4] See s 42 of the Close Corporations Act 89 of 1984.

immediately settle its debts has assets which in value exceed its liabilities – in this respect I am guided by the balance sheets included in the corporation's 2021 and 2022 financial statements - as a factor relevant to the possible exercise of its discretion to refuse a winding-up order; cf. *Orestisolve (Pty) Ltd t/a Essa Investments v NDFT Investments Holdings (Pty) Ltd and Anothe*r [2015] ZAWCHC 71 (28 May 2015); 2015 (4) SA 449 (WCC) at para 14.

[19] It appears that historically the corporation has conducted business as a property-holding entity.[5] The applicant's loan account appears to relate to funds advanced by him in respect of the corporation's acquisition of fixed property. The corporation has quite recently disposed of some of its immovable property, and Units 1 and 2 B[…] W[…] P[…] are its only remaining holdings. As mentioned earlier, the disposal of some of its property holdings is said to account, in part, for the reduction in the amount currently owed to the applicant by the corporation.

[20] It is evident that notwithstanding the dispute concerning the continued existence of the lease of those properties by Khayelitsha Cookies, the latter has remained in occupation of the premises and been paying the rental and municipal service charges in respect of the properties.[6] Reference to the corporation's financial statements suggests that the rental income generated from the ongoing occupation of the property by Khayelitsha Cookies is more than sufficient to cover its operating expenses. (The corporation's financial statements for the year ended February 2022 show that it made a profit.) The benefit of any income accruing to the corporation falls to be seen in the context of its significant accumulated loss for tax purposes. The latest financials reflect that the corporation currently enjoys an assessed tax loss of over R3 million, against which future taxable

[5] The applicant averred that the corporation also carries on business upholstering sofas. The income, if any, generated by that enterprise is not readily discernible in the corporation's income statements.

[6] There is some argument about whether the rental currently falls to be determined in the amount of approximately R90 000 per month or, as contended by the applicant, about R97 000.

income from sofa upholstery or any other enterprise the applicant might choose to use it for[7] could be offset. That is a valuable benefit that would be forfeited were the corporation to be wound-up.

[21] It is impossible on the papers in the current application to express a properly informed opinion on the merits of the pending litigation between the second and fourth respondents and the corporation. It is difficult to conceive, however, and the applicant has not explained, what advantage there could be for the corporation in pressing a case that its lease agreement with Khayelitsha Cookies has been cancelled. The only problem identified on the papers is the absence of a certificate of occupancy for the premises. That is making life difficult for the tenant because its occupation of the premises is consequently unlawful, a situation that appears to have attracted the attention of the local authority. The applicant alleges that it was incumbent upon the lessee to obtain the certificate, but he has not identified any provision in the lease that would support his contention. It seems to me on the face of matters that the corporation could not lawfully let out the building without such a certificate being had; see s 14 of the National Building Regulations and Building Standards Act 103 of 1977. If the intention had been to place the obligation to obtain such certificate on the intended lessee, I would have expected to find that provided for in the lease – it wasn't.

[22] The absence of an occupancy certificate also appears to be the problem underlying the dispute in which the corporation is involved concerning the sale of its remaining properties to Thomkwa & Jabez Holding. The allegation that Khayelitsha Cookies has stood suretyship for at least some of the purchaser's obligations in relation to the contract of

[7] It is evident that the applicant is something of an entrepreneur. He referred in his evidence to 'his other entities'. He did this when explaining the erroneous averment in his supporting affidavit that the corporation had no employees. When the incorrectness of the averment was exposed, the applicant stated that he had been under the mistaken impression that the employees in question had been moved to his other entities.

sale suggests that that the two companies are connected in some way. Clause 19 of the deed of sale required the seller to provide a certificate of occupancy in respect of the premises. As mentioned, Thomkwa & Jabez Holding has indicated a willingness to pay for the work necessary to qualify the building for an occupancy certificate in return for a compensating adjustment in the purchase price.

[23] The agreed selling price of R8 400 000 in the transaction between the corporation and Thomkwa & Jabez Holding would be more than sufficient to redeem the corporation's indebtedness to the applicant.

[24] Mr *Cutler*, who appeared for the applicant, was constrained to concede that there was no demonstrable advantage to his client in seeking the repayment of his loan claim by means of liquidation proceedings. On the contrary, absent information that is not apparent on the papers, a forced sale of the property without an existing tenant, would, as a matter of inherent probability, redound to the applicant's potential prejudice. So why then has he followed the course he has taken? It is a counterintuitive thing for anyone to do; let alone someone who holds his members interest in his capacity as a trustee of a trust.

[25] The applicant's counsel pointed out that it would be for the liquidator to determine whether to recognize and adopt the lease and sale agreements and that a winding-up order would not leave the intervening respondents without a remedy in damages if they had valid contracts with the corporation and the liquidator terminated them. All of that is correct, bearing in mind, of course, that the liquidator is likely to be guided in his decision-making by the wishes of the applicant as the biggest creditor. It still leaves me at a loss to understand why the applicant should wish to liquidate the corporation rather than just allowing the disputed sale to the fourth respondent to proceed at the reduced price that the respondent has offered to pay against releasing the corporation from the obligation to obtain

an occupancy certificate. The proceeds would be sufficient to settle the applicant's claim and the other debts of the corporation, and he would not need to incur further expenditure financing the litigation. The applicant has not offered a plausible explanation. I consider that an explanation was called for in the face of the intervening respondents' complaint that the application has been made for an undisclosed ulterior purpose and is an abuse of process.

[26] Mr *Cutler* was also constrained by these objective considerations to allow that there was a valid basis to infer that the applicant was actuated to a material degree by ulterior motives. He contended, however, that it was apparent that the corporation was reliant on funding by the applicant to conduct the litigation in which it is involved with the second and fourth respondents and there was no reason why he should be bound to provide such funding in circumstances in which he had made out proper grounds for a winding-up order to be granted. The difficulty with that argument is that, for the reasons already discussed, it is by no means apparent why the corporation would wish to resist the second respondent's insistence that its five-year renewable lease is extant or the fourth respondent's enforcement of the sale of property agreement. What is to be done in regard to the litigation concerning those questions if the corporation is wound up? It is improbable that the liquidator would continue with it without an indemnity for the costs from the creditors, and the applicant would be the major creditor. It seems to me, as a matter of probability, that if the liquidator were to continue with the litigation it would only be with funding provided by the applicant. In all the circumstances, it is evident that the course that the liquidator would probably follow is to terminate the contracts that the intervening respondents contend are still in place.

[27] The applicant's counsel called in aid the observations of Margo J in *Wackrill v Sandton International Removals (Pty) Ltd and Others* 1984 (1) SA 282 (W) at 293A-F to

support his argument that a provisional winding-up order should be made notwithstanding the indications that applicant was actuated by ulterior motives. In *Wackrill*, at the place cited, the learned judge said the following:

> '…it is suggested by the respondent and the intervening parties that the applicant's motives in seeking the winding-up of the respondent are not to achieve a distribution of its assets in liquidation, but to oust it from the market and from its position of advantage vis à vis the applicant's company, Sandton Transport, and further to take over the respondent's premises.
>
> In the case of sequestration proceedings the principle is clearly established that the Court has a discretion to refuse a sequestration order if the application is not made for the bona fide purpose of bringing about a *concursus creditorum* and a distribution of the respondent's assets by a trustee in insolvency, but is made mala fide and with an ulterior and improper motive. Such a mala fide application is an abuse of the process of the Court. See *Berman v Brimacombe* 1925 TPD 548; *Amod v Khan* 1947 (1) SA 150 (N) at 152 and on appeal in 1947 (2) SA 432 (N) at 439; and *Millward v Glaser* 1950 (3) SA 547 (W) at 551. In my view, there is no reason for not adopting the same rule in the case of proceedings for a winding-up order, if only for the reason that a mala fide application made with an ulterior and improper motive is an abuse of the process of the Court. See *Tucker's Land and Development Corporation (Pty) Ltd v Soja (Pty) Ltd* 1980 (3) SA 253 (W) at 257H.
>
> However, where proper grounds for a winding-up are established, the Court ought not to exercise its discretion against the applicant unless it appears that the improper and ulterior motive is at least the predominant motive actuating the applicant. See *Millward v Glaser* (supra loc cit).'

That approach has subsequently been endorsed by the courts time and again, most recently in the appeal court's judgment in *Imperial Logistics Advance (Pty) Ltd v Remnant Wealth Holdings (Pty) Ltd* [2022] ZASCA 143 (24 October 2022) in para 34.

[28] In an earlier judgment, *Western Province Rugby Football Union v Western Province Rugby (Pty) Ltd; Ex Parte Van Zyl NO and Another* [2016] ZAWCHC 194 (20 December

2016), I comprehensively reviewed the jurisprudence, including English and Privy Council authority, related to the question of when a court would decline to grant a winding-up order because the institution of the application was an abuse of process. With reference to the expression '*predominate motive*' in *Milward v Glaser* supra, I concluded (at para 12) that '[f]*or the application to be stigmatised as an abuse of process, the 'predominance' of the motive must be such as to practically negate the existence of any genuine interest by the applicant in obtaining a winding-up for the proper purposes of the remedy*.'[8] In *WPRFU v WP Rugby (Pty) Ltd*, for example, the contention by the intervening creditor that opposed the application that the applicant sought by the process to take over the respondent's business shorn of the encumbrance of the latter's contractual obligations to the intervening creditor was upheld, but it was found that a winding-up order should nevertheless be granted because a proper case had been made out for it and the applicant had the '*genuine intention to bring about a concursus in which its claims against the respondent company will be treated rateably with those of all other creditors in its class*'.

[29] A careful consideration of the authorities cited in the passage in *Wackrill* quoted above and those discussed in *WPRFU v WP Rugby (Pty) Ltd* shows that the 'genuine intention to bring about a *concursus creditorum*' that is the common thread enquiry in such matters, viz. cases in which third party respondents allege an abuse of process, was invariably determined with reference to the existence of a demonstrable advantage to the applicant of a type equivalent to that to be derived by other creditors of the same class were such a concursus to be established. The cases show that where such an advantage is demonstrable it does not matter that the applicant may have been actuated by other

[8] Underlining supplied for emphasis.

motivations to seek the liquidation of the respondent company.[9] The application will not be stigmatised as an abuse of process. The rationale implied by the approach would appear to be that it is improbable that anyone would genuinely seek to bring about a situation (viz. a concursus) that would not carry a real and not insubstantial benefit of the sort that that situation is designed to confer.

[30] In the context of his counsel's reasonably made concession that he is probably actuated by an ulterior object, the question then is 'does it appear on the papers that the applicant has shown that he will enjoy an advantage or benefit by the establishment of a *concursus creditorum*?' I do not think that he has. There are too many unresolved enigmas about the application. In the result I have been left unsatisfied as to the applicant's genuine intention in bringing this application to establish a *concursus creditorum*. Consequently, in the exercise of the court's discretion, the application will be refused.

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

1. The application is dismissed.

2. The applicant shall be liable for second to fourth respondents' costs of suit, including the costs reserved in terms of the order made by Ms Justice Fortuin on 6 June 2022 and the postponement granted on 10 November 2022.

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

APPEARANCES

[9] A creditor's winding-up application would also be an abuse of process, even though that did not harm the interests of other creditors, if it was instituted not to recoup the creditor's claim at all but rather entirely for an extraneous purpose.

Applicant's counsel:	**Craig Cutler**
Applicant's attorneys:	**Lucas Dysel Crouse Inc.** **Durbanville** **Broekmanns** **Cape Town**
Second to fourth respondents' counsel:	**André Walters**
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