



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

Case No: 18501/2022

In the matter between:

DAVID NEIL MCMURRAY	First
Applicant	
STEPHEN EDWARD DAVISON	Second
Applicant	
DAVID NEIL MCMURRAY N.O.	Third
Applicant	
STEPHEN EDWARD DAVISON N.O.	Fourth
Applicant	

vs

HEAT PUMP INTERNATIONAL (PTY) LTD	First Respondent
GERDA MARYKE VAN TONDER N.O.	Second
Respondent	
JOHANNES ABRAHAM COETSEE	Third
Respondent	
MASTER OF THE HIGH COURT (WC)	Fifth Respondent
JOHANNES ABRAHAM BENJAMIN	Sixth
Respondent	
MAGISTRATE SEWPERSAD	Seventh
Respondent	

JUDGMENT DELIVERED ON 26 MAY 2023

MANTAME J

Introduction

[1] The applicants (*“the Trust”*) made an application to this Court seeking a declaratory order that the settlement agreement concluded between the third applicant, the fourth applicant, the first respondent and the fourth respondent, which was made an order of the Regional Court for the Regional Division of the Western Cape, Cape Town (*“the Regional Court”*) under Case No. RCC:CT 35/2022 on 1 March 2022 is valid and binding; that consequent to this order being granted; the existing dispute between the third applicant, the fourth applicant, the first respondent and the sixth respondent regarding the third and the fourth applicants’ entitlement to immediate payment of the sale proceeds received from the sale on auction of certain movable property of the fourth respondent and which is currently being held in trust by the applicants’ attorneys of record, is resolved, the applicants’ legal representatives are directed to make payment thereof to the third and the fourth applicants’ nominated account within forty eight (48) hours of the granting of the order; and last, setting aside the “Witness Summonses” issued at the instance of the sixth respondent requiring the attendance and examination of the first applicant, the second applicant and the applicants’ attorney of record at the commission of enquiry convened by the fifth respondent in terms of sections 417 and 418 of the Companies Act No 61 of 1973 (as amended) (*“the 1973 Act”*) read with item 9 of schedule 5 to the Companies Act 71 of 2008 (*“the 2008 Act”*).

[2] This application was opposed by the first, the second and the third respondents (*“the respondents and/or the liquidators”*) on the basis that the prayers sought by the applicants’ amount to an effort on the part of the Trust to appropriate the proceeds from the sale on auction of the first respondent’s assets. The fourth to the seventh respondents did not oppose this application.

Facts

[3] On 11 March 2021, the Trust and the first respondent who was represented by its sole director at the time, the fourth respondent (*“Mr Coetsee”*) concluded a written lease agreement in terms of which the Trust let erf 154622, Cape Town situated at No. 46 Manhattan Street, Airport Industria Cape Town, (*“the premises”*) to the first respondent for twelve (12) months. The first respondent utilized the premises as its principal place of business. According to the information contained in the first respondent’s letterhead, it is a company of engineers and manufacturing agents, machinery and equipment for air conditioning, electrical engineering, automation, energy conservation and industrial processing.¹

[4] The fourth respondent stood surety for the first respondent’s obligations in the lease. As time progressed, it then transpired that the first respondent failed to meet its obligations as they fell due. This was not only in respect of its lease obligations with the Trust, but with some other entities. As a result thereof, on 4 June 2021 EMB-PAPST South Africa (Pty) Ltd instituted an application for the winding up of the first respondent under Case No: 9507/2021. A provisional order was granted by this Court on 3 August 2021 and a final order was granted on 15 September 2021 respectively.

[5] Pursuant to the winding up of the first respondent, the second and the third respondents were provisionally appointed by the Master of this Court on 25 August 2021 and finally appointed as joint liquidators on 6 January 2022 respectively.

¹ Record page 306

[6] On 17 January 2022, the Trust proceeded to issue summons against the first and the fourth respondents in which an automatic rent interdict was included out of the Regional Court under Case No. RCC: CT 35/2022. At that time the Trust alleges that it was unaware that the first respondent was granted a final winding-up order on 15 September 2021. In these proceedings, the fourth respondent purported to be an authorised representative of the first respondent. In his interactions with the Trust, and in his attempt to settle these proceedings, he did not disclose the winding-up of the first respondent.

[7] The fourth respondent, notwithstanding concluded a settlement agreement between the Trust, himself and the first respondent. This settlement agreement was made an order of court on 1 March 2022. The relevant terms of the agreement were:

“1... that the First and / or Second Defendants pay, the one paying the other being absolved, to the Plaintiffs, the amount of R535 137.08 (hereinafter referred to as the “Settlement Amount”) ...

2. The Settlement Agreement shall be payable as follows:

2.1 The First and / or Second Defendants shall appoint Michael James (“the “Auction House”), to attend to the auction of movable currently on the premises, which auction shall take place on the first available date between 27th of February 2022 to the 10th March 2022.²”

[8] On 22 February 2022, and in compliance with this settlement agreement, the fourth respondent dispatched a correspondence to Michael James Auction House

² Record page 179

stating that the first respondent has authorised him to sell selected movable items on auction that is planned for 8 March 2022 on site at 46 Manhattan Road, Airport Industria.³ In counter-action to these allegations, the Trust stated that the fourth respondent has consistently maintained that he was the rightful owner of the items to be sold on auction. The first to third respondents disputed this allegation and stated that the assets had been attached on the premises which had been leased to and were in the possession of the first respondent. This fact was brought to the attention of the Trust's attorneys shortly before the auction commenced on 8 March 2022. In addition, the first to third respondents' attorneys advised the Trust attorneys that the first respondent was placed in liquidation and demanded that the auction be cancelled as the assets identified for auction belonged to the first respondent. Initially, the first to third respondents did not agree to that sale taking place. The attorneys, after their conversation agreed pragmatically that the auction proceeds be retained in the applicant's attorney's trust account, pending the resolution of dispute on which party is entitled thereto. The sale proceeds are currently held in the applicant's attorney's trust account.

Issues

[9] This Court is called upon to determine whether the Trust is entitled to the relief sought given the first to third respondents' defences in this regard.

Submissions

³ Record page 306

[10] The Trust submitted that this Court should grant a declaratory order that the settlement agreement entered into between the Trust, the first and the fourth respondent is valid and binding as against the fourth respondent. Counsel for the Trust conceded during the hearing that no relief is sought on behalf of the first respondent and that should this Court grant the first relief, the Trust sought an order declaring that the existing “dispute” between the Trust and the second and the third respondents and/or the liquidators’ alleged entitlement to the immediate payment of the proceeds received from the sale of certain movable property of the fourth respondent which is currently held in trust by the Trust’s attorneys of record is resolved, and the Trust’s legal representatives be directed to make payment of the auction proceeds to the Trust’s nominated bank account within forty-eight hours of the granting of this order. The third relief regarding the “Witness Summons” was not pursued at the hearing of this matter.

[11] The first to third respondent submitted that the relief sought by the Trust is incompetent and a nullity since the first respondent was already in liquidation when the Regional Court made the settlement agreement an order of Court. The settlement agreement viewed holistically, it is an overall settlement between the Trust as landlord and the first respondent as a tenant and the fourth respondent as surety for the first respondents’ obligations under the lease.

[12] Further, it was the first to third respondents’ assertion that the assets that were attached in terms of the automatic rent interdict belonged to the first respondent. It is unassailable that the Trust could have placed the fourth respondent’s assets under attachment in perfection of their hypothec to secure the first respondent’s rental obligations. In support of this contention, this Court was referred to *Kerr’s, The Law of*

Sale and Lease,⁴ where it was confirmed that the property that is subject to the landlord's hypothec is "*all movable property belonging to the lessee which is brought onto the premises ...*" and that property belonging to another will only be subject to the hypothec if it is brought onto the premises with the knowledge and consent of the owner thereof with the intention that it remains there indefinitely for the use of the tenant and the owner fails to give notice to his ownership to the landlord despite being in a position to do so and the landlord is unaware that the goods do not belong to the tenant. ("*emphasis added*")

[13] The first to third respondents referred this Court to *Pride Milling Company (Pty) Ltd v Bekker NO and Another*,⁵ where Irfan who was placed under final liquidation on 14 September 2017 made four payments to Pride Milling on 8 August 2017 in the total amount of R295 000.00. The liquidators asserted that these payments were liable to be set aside as they were made after the effective date of the winding up application. The liquidators instituted proceedings seeking the repayment of R295 000.00 by Pride Milling. The SCA held that section 341(2) of the Companies Act 61 of 1973 stated that every disposition by a company of its property after commencement of winding up is *void ab initio*. Further, it was held that ... "*the effect of s341(2), a party approaching and seeking that the court order otherwise would logically need to establish its entitlement to the relief sought. Thus, in that sense such a party bears the onus to persuade the court with clear evidence as to why a court should depart from the statutory ordained default position and 'otherwise order'*".⁶ Clearly, the Trust was mistaken in their contention that the first to third respondents, have not formally challenged the fourth respondent's alleged ownership of the assets. If the Trust

⁴ 3rd Edition, page 392 - 394

⁵ 2022(2) SA 410 SCA

⁶ Ibid at para [36]

claimed that they are entitled to the immediate payment of the proceeds of the auction. It was incumbent upon them to prove that the fourth respondent who stood surety for the first respondent was the lawful owner of the movable property that was auctioned.

[14] The Trust contended that the movable goods that were sold on auction were subject to its tacit hypothec and liable to attachment, belonged to the fourth respondent. In support of this allegation, this Court was referred to an Appellate Division's decision of *Bloemfontein Municipality v Jackson's Ltd.*⁷

[15] The Trust argued that it is incorrect to suggest that upon the commencement of the *concursum creditorium*, the landlord's hypothec cannot be perfected. In their understanding, the general rule under common law is that the hypothec is created at the moment when rent become overdue, and that nothing additional (such as attachment) is necessary as long as the movable remain on the leased premises.⁸

[16] However, it is necessary that once the movable have been identified, they have to be perfected. Without perfection they can be removed from the property, and the hypothec will no longer cover such movables. For the movables to be secured, the landlord can either attach them and / or issue and serve a summons that contains an automatic rent interdict. As argued, the hypothec comes into existence when the rent falls in arrears, and not only once the hypothec is perfected. Perfection does not create the hypothec, but simply renders it effective against third parties, so said the Trust.

⁷ 1929 AD 266

⁸ In re Stilwell Scheuble and Van den Burg v Durham (1831) 1 Menz 537; Dommissie v Theart (1885-1886) 4 SC 92:94; Alexander v Burger 1905 TS 80:82; Webster v Ellison 1911 AD 73; Oliver and Havenga v Moyes 1916 DPD 40:44; Reddy v Johnson (1923) 44 NPD 190:194; Columbia Furnishing Co v Goldblatt 1929 AD 27; Kleinsakeontwikkelingskorporasie Bpk v Santambank Bpk 1988 (3) SA 266 (C) 270

[17] Further reference was made to *Holderness NO v Maxwell*,⁹ where ownership of a certain herd of cattle was disputed. It was not clear whether they belonged to the insolvent estate or to the Trust, but both parties agreed to the sale of the herd. The landlord sought an order directing the attachment of the herd and other movable property to secure some claims against the insolvent estate on the basis that he had a landlord's tacit hypothec over the said goods.

Discussion

[18] At the hearing of this application, the Trust acknowledged that the first respondent could not be bound by the settlement agreement that was entered into between the Trust and the fourth respondent. The Trust sought relief only against the fourth respondent. Perhaps, this was a further acceptance that the first respondent was under liquidation. The fourth respondent as he stood surety for the first respondent, he was liable for the rental amount owed. This Court has no qualms with the liability of the fourth respondent as surety in this regard. However, it is important to analyse and / or interpret the meaning of the settlement agreement, before a declaration is issued by this Court.

[19] The relevant portions of the settlement agreement read as follows:

“NOW THEREFORE THE PARTIES AGREE AS FOLLOWS:

⁹ (6518/11) [2012} ZAKZPHC 49 (31 July 2012)

1. *The parties have agreed to settle the matter instituted under case number RCC: CT 35/2022 in the abovenamed honourable Court, on the basis that the First and / or Second Defendants pay, the one paying the other being absolved, to the Plaintiffs, the amount of R535 137.08 (hereafter referred to as the “Settlement Amount”).*
2. *The Settlement Amount shall be payable as follows:*
 - 2.1 *The First and / or Second Defendants shall appoint Michael James (the “Auction House”) to attend to the auction of movable currently on the premises, which auction shall take place on the first available date between the 27th of February 2022 to the 10th of March 2022.*
 - 2.2 *The proceeds of the auction, to a value of the Settlement Amount, shall be paid by directly (sic) from the Auction House into the trust account of the Plaintiff’s Attorneys, Spencer Pitman Incorporated ...*
 - 2.3 *The First and / or Second Defendants shall be liable for the costs of the auction.”¹⁰*

[20] Simply interpreted, “the plaintiff” herein refers to “the Trust” and “the first” and “the second defendants” refers to “the first” and the “fourth respondents” respectively. At the heart of this application is the settlement agreement that was made an order of Court on 1 March 2022. What could be gleaned herein is that the fourth respondent signed this settlement agreement on 22 February 2022 only on his behalf. The portion that was meant to be signed by or on behalf of the first respondent was left blank. It makes more sense that no relief is sought against the first respondent in this regard.

¹⁰ Record page 179

The fourth respondent's only signature meant that he signed the settlement agreement in his capacity as a surety.

[21] On 22 February 2022, and on the same day he signed the settlement agreement, Mr J A Coetsee who is the fourth respondent in these proceedings, forwarded a correspondence to the Auction House on the first respondent's letterheads which read as follows:

"To whom it may Concern:

RE: MOVABLES AUCTION WITH MICHAEL JAMES ORGANISATION

Dear Sir/Madam

Heat Pump International hereby authorises JA Coetsee, ID No: ..., to sell selected movable items on auction to be facilitated by Michael James Organisation.

Said auction is planned for the 8th of March 2022.

Auction will be onsite at 46 Manhattan rd, Airport Industries (sic).

Best Regards

JA Coetsee"

[22] This correspondence in effect stated that the first respondent has authorised the fourth respondent to give instructions to the Auction House to facilitate the sale of the identified assets at its business premises. The fourth respondent caused this correspondence to be dispatched to the Auction House after the Sheriff: Goodwood, F Van Greunen issued a "*Notice of Attachment in Execution*" dated 19 January 2022 under Case No: RCC: CT 35/2022, Between *David N McMurray, Stephen E Davison NO (Plaintiffs), And Heat Pump International (Pty) Ltd (Defendant): To Heat Pump*

International (Pty) Ltd (Judgment Debtor) pursuant to the issue and service of summons in which an automatic rent interdict was included. The movable assets that were under judicial attachment were itemised in an inventory which was made at the first respondent's business premises at Airport Industria.¹¹ There is no mention of the fourth respondent as the defendant, judgment debtor and / or as surety in the "*Notice of Attachment in Execution*". The allegations that the attached movable assets belonged to the fourth respondent are unsupported and deceptive to say the least.

[23] In a letter dated 13 April 2022 from the Trust attorneys to first and third respondents' attorney, the following could be deduced:

"We are instructed to record as follows:

- 1. Our client has a claim against Heat Pump International (Pty) Ltd in regards to arrear rental pursuant to the agreement of lease signed on 25 March 2021.*
- 2. Our client's landlord's hypothec in the amount of R535 137.08, as proved in the court order dated 1 March 2022 is preferential and was perfected by attachment of movables on the leased premises on 19 January 2022.*
- 3. Our client is therefore a preferent creditor of Heat Pump International (Pty) Ltd."*¹²

[24] In this correspondence, the Trust was unwavering that its claim was against the first respondent and the attached goods was for the perfection of the landlord's hypothec. The Trust argued that this Court should not concern itself about the ownership of the movable assets that were sold on auction as this is not the point for determination in these proceedings. The Trust's submission in this regard is

¹¹ Record page 175 - 176

¹² Record page 192

indecorous and/or inapt with the greatest of respect, as this Court cannot interpret the settlement agreement in isolation or exclusion of the ownership of the movable assets which appears to be a sweltering issue. The proceeds that are currently disputed were derived from these movable assets. The evidence on record points out to the fact that the attached movable assets on 19 January 2022 belonged to the first respondent, and so its proceeds. The fact that the fourth respondent appended his signature in a settlement agreement, committing assets that had nothing to do with him, obviously his actions in that regard have no legal effect. Plainly, the fourth respondent did not have authority to bind the first respondent in that agreement. He perfectly knew that the first respondent was wound up at that time. If by any chance, by signing the settlement agreement, he meant to bind and commit his personal property, that is not supported by the terms of the agreement and or evidence for that matter.

[25] In *Natal Joint Municipal Pension Fund v Endumeni Municipality*,¹³ Wallis JA stated:

“[T]he present state of the law can be expressed as follows:

Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument or contract, having regard to the context provided by reading the particular provision or provisions in light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to

¹³ [2012] ZASCA 13; 2012(4) SA 593 at para 18

which it is directed and the material known to those responsible for its production ... The process is objective not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document ... The “inevitable point of departure is the language of the provision itself,” read in context and having regard to the purpose of the provision and the background to the preparation and production of the document.” (Citations omitted)

[26] Put simply, the circumstances attended upon the settlement agreement coming into existence are the summons issued by the Trust on 17 January 2022 against the first and the fourth respondents which included an automatic rent interdict out of the Regional Court. On 19 January 2022, the first respondent’s movable items as evidenced in the Notice of Attachment in Execution were placed under judicial attachment. On 22 February 2022, the fourth respondent caused a correspondence to be dispatched to the Auction House stating that he was authorised by the first respondent to sell the selected items on auction. On the same day (22 February 2022), the fourth respondent concluded a settlement agreement on his behalf, the terms of which Michael James was to be appointed to attend to the sale on auction of movable assets currently in the premises. The fourth respondent, on that same significant day, knew that those assets did not belong to him.

[27] The Trust contended that the **terms** of the settlement agreement are binding in as far as the fourth respondent is concerned. The fourth respondent stood surety for the first respondent when the lease agreement was concluded, and it is not binding on the first respondent. The Court is constrained to carelessly agree to these submissions

without some level of discernment. It appears that the interpretation process as alluded to in *Endumeni (supra)* is key. As stated in this judgment, “*The “inevitable point of departure is the language of the provision itself” (terms of the settlement agreement in this instance), read in context and having regard to the purpose of the provision and the background of the preparation to the document*”. The undisputed fact is that when the settlement agreement was entered into, the Trust was unaware that the first respondent was wound up. In all earnest, it was to settle the dispute between the tenant and the landlord, hence the purpose and the **terms** of the settlement agreement and the background of the preparation of this document can only be attributed to the first respondent and the Trust and no one else.

[28] I turn to agree with the respondents that the settlement agreement is a nullity as the fourth respondent did not have assets at the premises nor was authorised to enter into an agreement to sell movable assets belonging to the first respondent.

[29] I repeat, since the Trust alleged that at the time, it did not know or was unaware that the first respondent was liquidated, it then follows that they concluded a settlement agreement with the fourth respondent in the erroneous belief that he was authorised to conclude a settlement agreement on behalf of himself and the first respondent who was a principal debtor and owner of the assets under judicial attachment, hence the Trust claimed that it is a preferent creditor of the first respondent. Nowhere in these proceedings did the fourth respondent maintain that he, personally was the rightful owner of the attached movable assets, it is merely the say-so of the Trust that this Court was asked to accept.

[30] If regard is had to these set of circumstances, it is incomprehensible to say the least, how this Court is expected to find that the settlement agreement concluded by the fourth respondent is binding on him. On a proper interpretation of the settlement agreement, it is formulated around the sale on auction of the first respondent's movable property, which is the first respondent's items of equipment, tools of trade and stock in trade that was attached and kept at its principal place of business (the leased premises).

The fourth respondent somehow hoodwinked the Trust by settling the legal proceedings and promised to sell the assets which do not belong to him in order to resolve the dispute.

[31] Snyman J in *Lief NO vs Western Credit (Africa) (Pty) Ltd*¹⁴ bemoaned a possible attempt by a dishonest company, director, or creditors or others to snatch some unfair advantage during the period between the presentation of a petition for a winding-up order and the granting of that order by a Court by, for example, dissipating the assets of the company ... or preferring one creditor above another to the prejudice of the *concursum creditorium*.

[32] In this matter, the undisputed facts are overwhelmingly against the Trust since a final winding up order was already granted when the director (the fourth respondent) and his companies, knowing well that he was indebted to a number of creditors elected to dishonestly dissipate the assets of a liquidated company for the benefit of one creditor and thereby prejudiced a body of creditors. The first to third respondents correctly asserted that Section 341(2) of the Companies Act 61 of 1973 provides that:

¹⁴ 1966(3) SA 344 (W)

‘[e]very 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.’

[33] The respondents indicated that to the extent that the settlement agreement was made an order of Court, and that this Court is now called upon to validate a disposition after the winding up order, clearly this Court has no discretion to do so.

[34] In *Engen Petroleum Ltd v Goudis Carriers (Pty) Ltd* (in liquidation)¹⁵ the Court was requested to interpret the provisions of s341(2) of the Companies Act 61 of 1973. The applicant, Engen Petroleum Ltd (“*Engen*”) supplied fuel to the respondent, Goudis since October 2002. Goudis had a credit account with Engen. On 14 September 2012, a creditor of Goudis filed a winding up application. Engen was ignorant of this occurrence. On 23 October 2012 a final winding up order was granted, establishing *concurso creditorium* on 14 September 2012. Again, Engen continued to ignore this occurrence and supplied fuel to Goudis up until 30 November 2012. During this period, Goudis had made several payments to Engen. Engen learnt of the order on 10 December 2012 and was furnished with proof of the appointment of liquidators on 12 December 2012.

[35] The question for determination by the Court was whether a disposition made by the company Goudis, after the date on which the final winding up order was made was subject to Section 341(2) of the Companies Act. Sutherland J held that the effect of Section 348 of the Act is retrospectively an effective date for establishing a *concurso*

¹⁵ [2015] 1 All SA 324 (GJ)

creditorium. The effect is to convert what were valid and binding dispositions into void dispositions. It was held that the Court is not empowered to convert an unlawful, invalid and unauthorised transaction into a valid one. The disposition had to enjoy the attributes of validity at the moment it occurred. In essence, after the final winding up order a company cannot effect valid transactions precisely because of *concursum creditorium*; from which moment, the control of the company is removed from its office bearers. The Court held further that Section 341(2) confers a power on a court to intervene in respect of dispositions, which a company may lawfully make during the period between the date on which the application for a winding up has been presented and the date on which the final winding-up order is granted. The Court then ordered Engen to repay the payments received from Goudis after 23 October 2013.

[36] The Trust appears to have disregarded the fact that it bears the onus to prove the ownership of the movable property as it insisted that the fourth respondent has consistently maintained that the assets belonged to him. Unfortunately, it missed the point when it shifted the onus to the first to third respondents that they have not 'formally' challenged the fourth respondent's alleged ownership of the assets.

[37] The Trust's claim that it was exercising the landlord's hypothec gives credence to the first to third respondents' argument that the settlement agreement read properly given its true meaning was predicated on the premise that the Trust was the landlord and the first respondent a tenant. The Trust could not have placed the fourth respondent's assets under attachment in perfection of their hypothec to secure the first respondent's rental obligations. At that point, I repeat it had no inkling that the first respondent was wound up, so it should proceed against the surety. It then follows that

there was no need to first proceed against the surety without satisfying themselves that there were no realisable assets belonging to the first respondent to clear out the arrear rentals. A reference to the movable assets belonging to the fourth respondent was an afterthought as it was patently clear that the said settlement agreement was unenforceable on the first respondent.

[38] The Trust in claiming its entitlement to the first respondent's movable property relied on *Bloemfontein Municipality (supra)*. In this case, the goods belonging to a third person were brought on to the leased premises with the knowledge and consent, express or implied, of the owner of goods, and with the intention that they should remain there indefinitely for the use of the tenant, and the owner, being in a position to give notice of his ownership to the landlord, failed to do so, and the landlord was unaware that the goods did not belong to the tenant, the owner would thereby be taken to have consented to the goods being subject to the landlord's tacit hypothec and liable to attachment. In these proceedings, a surety committed assets of a liquidated company to be sold on auction after he fraudulently misrepresented that he was authorised by the same company to sell the assets. In my view, this authority is completely inappropriate.

[39] The facts in this matter are clearly distinguishable. the Trust self-evidently suggests that the high court winding up order should bow out and make way for the magistrate's order, *albeit* that will conveniently perfect the Trust's hypothec on movable assets that belong to a liquidated company. The Trust conveniently did not address the fact that at the time the summons was served on the first respondent, it did not have

authority to sue or be sued as it was under the management of the liquidators. It follows, therefore that the fourth respondent did not have authority to enter into a settlement agreement binding movable assets which did not belong to him.

[40] After it has been clearly ascertained that the tenant is under liquidation, in my view, the landlord's hypothec claim is not applicable and or in existence as the first respondent lacks judicial authority as an entity to be sued. Whatever claim that the Trust might have had (arrear rental) should have been lodged with the second and third respondents. If this Court would allow parties to claim landlord's hypothec after *concursum creditorium* has been finalised, that would amount to the process of liquidation being undermined and disregarded. The landlord's claim would receive unfair preference over the entire body of the creditors. In essence, after the final winding up order a company cannot effect valid transactions precisely because of *concursum creditorium*;

[41] As an aside, the Trust seem to suggest that the settlement agreement was subsequently made an order of Court and therefore it should be complied with regardless of its worth. Several authorities were referred to in support of this proposition. In my understanding, those authorities do not suggest that a meaningless or thunderbolt order (*brutum fulmen order*) should be complied with. It boggles one's mind as to how the terms of a settlement agreement which is a nullity can be complied with. I strongly disagree with these sentiments. Since the attached movable assets that were sold on auction belonged to the first respondent, it follows then that the proceeds of the sale on auction accordingly should be paid over to the liquidators.

[42] At the hearing of these proceedings, the first to third respondents' Counsel argued that, if this Court finds that the ownership of the movable property does not belong to the fourth respondent, then there is no need for this Court to proceed to determine the issue relating to the 'Witness Summons.' The Trust did not challenge this proposition. As a result thereof, no order would be made in this prayer.

[43] In conclusion, it is this Courts considered view that the terms of the settlement agreement as interpreted are not supported by facts. Consequently, this Court cannot hold that it is valid and binding as against the fourth respondent. The fourth respondent did not have authority from the first respondent to instruct Michael James to facilitate the auction of the first respondent's assets. It then follows that the proceeds received from the sale on auction, currently held in trust by the Trust's attorneys of record should be paid over to the first to third respondents' attorneys within forty-eight (48) hours of the granting of this order.

[44] In the result, I grant the following order:

44.1 The Trust's application is dismissed.

44.2 The Trust is ordered to pay the proceeds received from the auction (together with interest) currently held in trust by the Trust's attorneys of record over to the first to third respondents' of record within forty-eight (48) hours of the granting of this order.

44.3 The Trust is ordered to pay costs of this application.

MANTAME J
WESTERN CAPE HIGH COURT