JOSEPH SIBANDA
and
WEDGEWALL INVESTMENTS (PRIVATE) LIMITED
versus
MAKONDE INDUSTRIES (PRIVATE) LIMITED (In Liquidation)
and
GLEN MOOR TRADING (PRIVATE) LIMITED
and
NATIONAL SOCIAL SECURITY AUTHORITY OF ZIMBABWE
and
ZIMBABWE REVENUE AUTHORITY
and
MARTIN DRIVE (PRIVATE) LIMITED
and
MASTER OF THE HIGH COURT

HIGH COURT OF ZIMBABWE
CHIGUMBA J
HARARE, 5 March 2015, 25 March 2015

Opposed Application

T. Mpofu, for the applicant
F. Girach, for the 1st respondent
E. Matinenga, for the 2nd respondent
D. Ochieng, for the 5th Respondent
Non Apperance, for the 3rd respondent
Non Apperance, for the 4th Respondent

CHIGUMBA J: This is an application for the setting aside of an order for the liquidation of the first respondent, which was provisionally granted by this court on 20 March 2013, and confirmed on 8 May 2013. The applicants seek to have the liquidator of the first respondent discharged from office, for all the acts done by the liquidator pursuant to the order of liquidation to be set aside, and for the party who opposes this application to bear the costs of the application.

On 20 December 2013 this application was filed by Mr. Joseph Sibanda, a shareholder and director of the second applicant, on his own behalf and on behalf of the second applicant. He deposed to the founding affidavit, in which he averred that the first respondent is in liquidation as a result of a final liquidation order granted on 20 March 2013, in which Mrs. Teresa Grimmel was appointed liquidator. The second respondent is a trading company registered in Guernsey. The third respondent is the National Social Security Authority (NSSA). The fourth respondent is Zimbabwe Revenue Authority (ZIMRA). The fifth respondent is a private limited company. The sixth respondent is the Master of the High Court of Zimbabwe, at Harare.

The basis of the application to set aside the order for liquidation is that there was no legal basis for the grant of the provisional order, or for its confirmation, and that consequently both orders are a nullity. The orders were sought and obtained by the second respondent. The first respondent is indebted to the first applicant in the sum of USD$486 818-48 and to the second applicant in the sum of USD$241 616-61. The second applicant is the alter ego of the first applicant who then becomes the first respondent's biggest creditor. The first applicant has a 54% shareholding in the first respondent. The background to the matter is that the first respondent was advanced a sum of USD$200 000-00 by the second respondent. After difficulties in servicing the loan, an agreement was reached on 12 September 2009 in which the first and the second respondents agreed that if the first respondent failed to re-pay the loaned sum, the second respondent would take 25% shareholding in it. It was agreed that one of the shareholders would have to make over 25% equity to the second respondent.

The first respondent failed to re-pay the loan in terms of the agreement between the parties. Dr. Mombeshora, a shareholder in the first respondent made over his 25% equity in the first respondent to the second respondent. The second respondent then ceased to be a creditor and became a shareholder in the first respondent. On 9 October 2012, the first and the second respondent entered into an agreement for the restructuring of the first respondent. A company was to be formed in which the second respondent and other creditors would acquire shares in the new company in proportion to the amounts owed to them by the first respondent. This company would trade in the first respondent to allow the first respondent to extricate itself from its

problems. The agreement failed to take off, and in order to rescue it, the first applicant took over the amount owed to BancABC by the first respondent.

The first respondent is into manufacturing, and it has a plant from which it conducts its operations. The second respondent's security for the loan was registered over that plant. 1st respondent's landlord instituted eviction proceedings against it for non- payment of rentals. When it obtained judgment it attached the plant. By this time the second respondent was a shareholder in the first respondent in terms of the agreement between the parties. The second respondent brought liquidation proceedings against the second respondent, in response to the landlord's action for arrear rentals. The first respondent sought to resist the liquidation proceedings but withdrew its opposing papers on the basis of wrong legal advice. Liquidation was granted without any objection. The first respondent has not yet been dissolved and the creditor's meetings are still ongoing. It was averred on behalf of the applicants that the order granting the order for liquidation was erroneously sought and that, this court, upon good and sufficient cause can set aside the liquidation order in terms of the law. It was averred further, that the liquidation order is void *ab origine* and must for that reason not stand.

In support of the contention that good and sufficient cause exists, the applicants averred that the second respondent could not have sought the liquidation of the first respondent unless it was a creditor. The agreement of 12 September 2009 changed the relationship between the parties. The first respondent ceased to owe money to the second respondent when its shares were made over to the second respondent; it was no longer a creditor of the second respondent and did not have the requisite *locus standi in judicio* to seek its liquidation. Once the shares were given, there was no debt to speak of. In the absence of a debt there can be no liquidation because there will be no proof of inability to pay. The liquidation order is therefore void as it is clear that one cannot place something on nothing.

The first respondent filed a notice to oppose this application on 22 January 2014. Theresa Grimmel, in her capacity as the liquidator, placed certain facts on record. She averred that she did not believe that there was no basis for placing the first respondent into liquidation at the time that the provisional liquidation order was granted. According to the claims lodged at the creditors meeting, the first respondent owes the first applicant the sum of USD$86 818-48, and it owes the

second applicant the sum of USD$241 616-61, the second respondent is owed the sum of USD$323 112-03. The first applicant has a 50% share in the first respondent, not 54% as averred. The change in shareholding which is alleged by the applicants is not reflected anywhere in the books of the company. The first respondent has two shareholders, Casper Mombeshora and Joseph Sibanda. The second respondent has proved a claim against the first respondent in the sum of USD$323 112-03 and has been accepted as a creditor. BancABC is still a creditor of the first respondent, it is owed USD$230 000-00. The plant which belonged to the first respondent has been sold. All the statutory creditors meetings have been held and all that is left is for the final account to be approved by the master so that paying of creditors can start.

Mr. Gary Richard Booth deposed to the opposing affidavit on behalf of the second respondent and averred that it is correct that the Master of the High Court approved a claim by the second respondent as a creditor of the first respondent on 26 June 2013. He emphatically denied that there was no legal basis for the granting of the provisional and final liquidation orders and that the orders were a nullity at law. He admitted that the second respondent loaned and advanced the sum of USD$200 000-00 to the first respondent in 2009. The 12 September 2009 agreement was prepared by him but rejected by the second respondent and so two formal loan agreements were entered into on 14 September 2009 and 5 October 2009, each agreement recording the loan by the second respondent to the first respondent of the principal sum of USD$100 000-00. It was understood that the loan agreements superseded the initial agreement of 12 September 2009. It was submitted that the applicants had failed to attach to the founding affidavit the share certificates and share transfer forms because at no stage have any shares in the first respondent been transferred to the second respondent.

It was reiterated that, as at 9 October 2012, the second respondent was still a creditor of the first respondent despite the averment to the contrary, in para 2.4 of the applicants' founding affidavit. The liquidator has already sold the extrusion and blending plant owned by the first respondent to a third party which in turn has entered into a lease agreement with the fifth respondent. All that remains is for the liquidator to prepare a Liquidation and Distribution Account for approval by the sixth respondent. It was disputed that the provisional and final liquidation orders were erroneously sought, or void. It was denied that any good and sufficient

cause exists for this court to set aside these orders, because the second respondent has been and has remained a creditor of the first respondent from 2009 to date, and because the agreements of 14 September 2009 and 5 October 2009 superseded the initial agreement between the parties. No shares in the first respondent were transferred to the second respondent at any stage.

On 23 January 2014, the fifth respondent filed its opposing affidavit through Ms. Helen White, who averred that the relief sought by the applicants was opposed on the basis that the application for the liquidation of the first respondent had not lacked merit. The alleged shareholding of the second respondent in the first respondent had not been verified by the production of a share certificate. No share certificate is attached to the application, and there is consequently no evidence that the first respondent's creditors agreed to any plan for their payment. No detail or evidence has been given to show which creditor agreed to what. The truth is that the creditors rejected the proposed 'restructuring' of the first respondent's debts. Finally, it was averred that there is no evidence that the first respondent can show an ability to pay its debts if the liquidation order were set aside. In the answering affidavit, filed of record on 15 April 2014, the first applicant insisted that, despite the sworn statement of the liquidator, his shareholding is actually 54% and not 50% as alleged. He denied that BancABC was owed anything. He insisted that there was a transfer of shares in the first respondent to the second respondent. The share certificates are being held by the second respondent, which was a 'mistake' He alleged that the sale of the plant was illegal. Finally, the first applicant insisted that the second respondent was not a creditor of the first respondent at the time that he applied for its provisional liquidation.

Applicants filed their heads of argument on 30 June 2014. They identified the issue for determination, correctly in my view, as being whether the second respondent was a creditor of the first respondent who could seek its liquidation, at the time that the application for a provisional and final liquidation order was made. It was submitted that this issue is one of fact and of law, and that, if it is resolved in the applicants' favor, the relief sought must be granted because something cannot be placed on nothing. The court was referred to the famous dicta in the case of **McFoy** v **United Africa Co Ltd**[1], where it was held that:

[1] [1961] 3 All ER 1169 (PC) @ 11721

> "If an act is void, then it is in law a nullity. It is not bad, but incurably bad. There is no need for an order of the court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse".

The court was also referred to s 227 of the ***Companies Act* [*Chapter 24: 03*]** which provides as follows:

> "**227 Court may stay or set aside winding up**
> The court may at any time after the making of an order for winding up, on the application of the liquidator or of any creditor or contributory and on proof to the satisfaction of the court that all proceedings in relation to the winding up ought to be stayed or set aside, make an order staying or setting aside the proceedings on such terms and conditions as the court deems fit".

It was submitted on behalf of the applicants that s 227 of the Companies Act imbues the court with the power to set aside an order of winding up, provided that the court is satisfied that it is the right thing to do. In *Herbst* v *Hessels* [2]**,** the applicant, who was the holder of the issued share capital of A (Pty) Ltd, which had been finally liquidated in terms of an order of Court, applied in terms of the Companies Act for an order for the setting aside of the liquidation order. The grounds of the application were that A (Pty) ltd, did not owe any amount to FJH Bellengings (Pty) Ltd as alleged by the provisional liquidator of FJH in the application for liquidation, that the applicant was actually solvent at the time of the application, that the provisional liquidator of FJH did not have authority to bring the application for liquidation. The applicant had not taken any steps to oppose the application for liquidation as he had been advised by his attorney that there was nothing which could be done to stop the application and as his own mental state was depressed by the disadvantageous state of his personal fortunes. It was held that although the court was prepared to accept that the relevant provision of the Companies Act was wide enough to cover the application, that, where a person wants to use the section to obtain the rescission of what is practically a default judgment on the grounds that, if he had opposed it, the application would perhaps have failed, he was subject to the judicial limits which have generally been laid down in respect of such an application. The common law approach to a claim for rescission of judgment was relevant to the application as it was hardly thinkable that less could be expected of

[2] 1978 (2) SA 105 (T) @ 109

an applicant who acts in terms of the Companies Act than a litigant in other circumstances. In regards to the facts, it was held that the applicant had not adduced sufficient proof to entitle him to relief. The application was dismissed.

This case should be compared with ***Abdurahman* v *Estate Abdurahman***[3] where the court found that it is not necessary to adhere to the normal rules of procedure to an applicant for relief from insolvency. It was held that the court had the requisite discretion to decide whether it would be 'inequitable and not desirable' to confine the applicant to the normal rules of procedure. The wide discretion that reposes in a court faced with an application in terms of section 227 of the Companies Act was discussed in the case of **Re Clifton Place Garage Ltd**[4], where the court said that:

> "That is an extremely jejune direction to the Court, and it is not surprising that the cases do not seem to give much help. The only one I can get any assistance from at all for this purpose is ***Re Steane's (Bournemouth) Ltd (1950) 1 All ER 21.*** That was a considered judgment of VAISEY J, who admitted that he was not given any great assistance and must do the best he could. The head note states:
> 'Held: the Legislature, having omitted to indicate any particular principles which should govern the exercise of discretion vested in this court by section 227, must be deemed to have left such exercise entirely at large and controlled only by those general principles which apply to every kind of judicial discretion; ***in exercising its discretion the court must decide what would be just and fair in the circumstances of each case, having special regard to the question of the good faith and honest intention of the person concerned,*** and, as the applicant had acted throughout in good faith, his object being merely to enable the company to fulfill its contracts, the Court would make the order asked for". (the emphasis is mine)

According to the applicant's own submissions, based on the statutory provisions and case law which the Court was referred to: the following basic tenets must guide the court in an application of this nature. The Court is imbued with such discretion in applications of this nature, that it is at large. In exercising its discretion, the court must decide what would be just and fair in the circumstances of each case, having regard to the applicant's good faith and honest intention. The applicant must adduce sufficient evidence to be entitled to the relief sought. The ordinary rules that govern applications for rescission of judgment apply. ***Order 9 Rule 63 of the Rules of the High Court 1971*** provides that such an application must be made within one month of acquisition of knowledge of the judgment. This application was filed in December 2013. The

[3] 1959 (1) SA 872 (K) 873
[4] 1 All ER 353 @ 356D-F

judgment or order that is sought to be set aside, the final liquidation order is dated May 2013. No explanation was given for the delay in bringing this application in terms of the rules of this court, and no application for condonation was placed before the court. It is my view that, s 295 of the Companies Act does not assist the applicants because it expressly relates to dissolution of a Company, not the granting of a final liquidation order, which is only the first step towards dissolution. It follows that the two year time period allowed in terms of s 295 does not apply to the applicants, it being common cause that the first respondent has not yet been dissolved. Section 295 of the Companies Act provides that:

> "**295 Power of court to declare dissolution of company void**
> When a company has been dissolved the court may, at any time within two years of the date of the dissolution, on an application by the liquidator of the company or by any other person who appears to the court to be interested, make an order, upon such terms as the court thinks fit, declaring the dissolution to have been void and thereupon such proceedings may be taken as might have been taken if the company had not been dissolved".

The dissolution of a company is done in terms of s 236(1) of the Companies Act, which provides that when the affairs of a company have been completely wound up, the court shall, upon the application of the mater, make an order that the company be dissolved from the date of the order. It is common cause that in this case, the first respondent has been wound up, but that, as yet, no formal order of dissolution has been sought, or obtained. Dissolution is separate and distinct from winding up. The court is not persuaded by the dicta in the case of *Abdurahman* v *Estate Abdurahman supra,* being of the view that it is distinguishable on the basis that it was decided on the vagaries of the Insolvency Act, and not in terms of the Companies Act, as in the case of *Herbst* v *Hessels supra,* which the court found to be of persuasive authority, the facts being more similar to the circumstances before the court. In case my conclusion that the applicants are not properly before the court because of the contravention of Order 9, Rule 63 of the rules of this court, I will now turn to the merits of the matter.

The Court must decide whether sufficient evidence has been adduced by the applicants, to enable the Court to exercise its wide discretion in the applicants' favor, when it considers what would be just and fair in the circumstances of this case, regard being had to the applicants' good faith and honest intention. It was submitted on behalf of the applicants that the second respondent, who moved for the liquidation order was not the first respondent's creditor in terms

of the agreement between the parties of 12 September 2009. It was submitted that for this reason, the second respondent was not entitled to pursue creditor's rights as against the first respondent. The applicants denied that the first agreement was superseded and insists that the agreement of 12 September 2009 was consummated and executed by the parties. Dr. Mombeshora is alleged to have handed over his shares to the second respondent in the aftermath of breach as contemplated by the September 2009 agreement. There was no protest, and the silence must be taken to amount to acceptance of the handover of the shares. See ***Sun Radio & Furnishers* v *Republic Timber & Hardware (Pty) Ltd*[5],** and ***McWilliams* v *First Consolidated Holdings (Pty) Ltd*[6],** where it was accepted that:

> "…quiescence is not necessarily acquiescence…such party's silence and inaction, unless satisfactorily explained, may be taken to constitute an admission by him of the truth of the assertion, or at least would be an important factor telling against him in the final assessment of the probabilities in the final determination of the dispute. And an adverse inference will more readily be drawn when the unchallenged assertion had been preceded by correspondence or negotiations between the parties to the subject matter of the assertion".

Applicants submitted that the second respondent's assertion that the two agreements were concluded to provide security is not supported by the terms of the agreements which do not provide any security, therefore the two agreements were not meant to be binding. The two agreements were simulations and devoid of legal effect. A court will accord a simulation no operation because it is always concerned with the true nature of the transaction. See ***McAdams* v *Fiandlers Trustee & Bell N.O.***[7] where it was held that 'the question in cases of this kind always is what is the true nature of the transaction and this is not necessarily determined by what the party may conceive the contract, which he enters into, to be'. See also ***Zandberg* v *Van Zyl***[8] where it was held that:

> "…the parties to a transaction endeavor to conceal its real character. They call it by a name or give it a shape, intended not to express but to disguise its true nature. And when a court is asked to decide any rights under such an agreement, it can only do so by giving effect to what the

[5] 1969 (4) SA 378(T) @382
[6] 1982 (2) SA 1 (A)
[7] 1919 AD 207
[88] 1910 AD 302 @ 309

> transaction really is, not what it in form purports to be….the court must be satisfied that there is a real intention, definitely ascertainable, which differs from the simulated intention…"

Applicants submitted that the operative agreement is the first agreement in terms of which the second respondent ceased to be a creditor of the first respondent, upon default, and could not therefore seek the first respondent's liquidation. On the question of whether these changes in shareholding had been registered with the Companies office, it was curiously submitted on behalf of the applicants that 'the absence of evidence is not evidence of absence'. Sections 205 and 206 of the Companies Act, provides that:

> "**205 When company deemed unable to pay its debts**
> A company shall be deemed to be unable to pay its debts—
> *(a)* if a creditor, by cession or otherwise, to whom the company is indebted in a sum exceeding one hundred United States dollars then due, has served on the company a demand requiring it to pay the sum so due by leaving the demand at its registered office and if the company has for three weeks thereafter neglected to pay the sum or to secure or compound for it to the reasonable satisfaction of the creditor; or
> *(b)* if the execution or other process issued, on a judgment, decree or order of any competent court in favor of a creditor, against the company is returned by the Sheriff or messenger with the endorsement that no assets could be found to satisfy the debt or that the assets found were insufficient to do so; or
> *(c)* if it is proved to the satisfaction of the court that the company is unable to pay its debts and, in determining whether a company is unable to pay its debts, the court shall take into account the contingent and prospective liabilities of the company".
>
> *Winding Up by the Court*
> **206 Circumstances in which company may be wound up by court**
> A company may be wound up by the court—
> (*a*) …
> (*b*)…
> (*c*) …
> (*d*)…
> (*e*) …
> (*f*) if the company is unable to pay its debts;
> (*g*) if the court is of opinion that it is just and equitable that the company should be wound up".

A 'creditor' is defined in ***Black's Law Dictionary***[9], as:

> "One to whom a debt is owed; one who gives credit for money or goods-also termed Debtee. 2. A person or entity with a definite claim against another, esp. a claim that is capable of adjustment and liquidation. 3. Bankruptcy. A person or entity having a claim against the debtor

[9] 2004-8th edition

> predating the order for relief concerning the debtor...One to whom any obligation is owed, whether contractual or otherwise".

It was submitted on behalf of the applicants, that, for a company to be liquidated under these circumstances it ought to fail to pay its debts as provided by s 206(f) and (g), as read with s 205 of the Companies Act. If there is no creditor the jurisdictional and substantive requirements set out by the law cannot be met. The court was referred to the following cases as authority for this proposition; ***Manning* v *Manning*[10], *and Mkhize* v *Swemmer & Ors*[11],** where it was held that:

> 'that judicial decisions will ordinarily stand until set aside by way of appeal or review, but to that rule there are certain exceptions, one of them being that, where a decision is given without jurisdiction, it may be disregarded without the necessity of a formal order setting it aside'.

The use of the imperative 'shall' in section 205 of the Companies Act leaves the court with no discretion as to the definition or classification of those companies that are unable to pay their debts. See ***Bhebhe & Ors* v *Chairman ZEC & Ors*[12],** where it was held that the

> '…language of a predominantly imperative nature is generally taken to be indicative of peremptoriness. The verb shall is one such word. However, to determine whether a particular provision is peremptory or directory, the court must construe the language of the concerned provision in the context, scope and object of the Act…'. See also ***Chirosva Minerals (Pvt Ltd* v *Minister of Mines & Ors*** [13]where it was held that:

> '…it is a fundamental principle of our law that a thing done contrary to the direct prohibition of the law is void and of no force or effect. The disregard of a peremptory provision in a statute is fatal to the validity of the proceedings affected…ultimately the court must determine the intention of the Legislature…', See also ***Shumba & Anor* v *ZEC & Anor*** [14]***Mudzumwe & Ors* v *MDC & Anor*** [15] **.**

In the case of ***Funding Initiatives International (Pvt) Ltd* v *Mabaudi***[16], it was held that:

> "The established principle of our law is that anything done contrary to a direct statutory prohibition is generally void and of no legal effect. The mere prohibition operates to nullify the

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[10] 1986 (2) ZLR 1 (SC)
[11] 1967 (1) SA 186 (D) @ 197 C-D
[12] 2011 (2) ZLR 274
[13] 2011 (2) ZLR 403
[14] SC 11-08
[15] HH 232-12
[16] HH 20-07

act, particularly where it is visited with a criminal sanction". See ***Mashangwa* v *McDowell International (Pvt) Ltd*[17], *Metro Western Cape (Pty) Ltd v Ross*[18]**

The heads of argument which were filed on behalf of the first respondent on 11 July 2014, were brief, and to the point. The first respondent neither opposed the application nor supported it. The matters in dispute between the parties were outside the knowledge of the liquidator Ms. Grimmel, who undertook to abide by any decision given by the court. The liquidator prayed that the unsuccessful party be made to pay the liquidator's costs of this application together with the liquidator's fees. The second respondent filed heads of argument on 15 July 2014, and averred that the applicants ought to have anticipated that a serious dispute of fact would arise from the papers, in relation to their contention that the relationship between the first and the second respondent is governed by the first agreement of 12 September 2009, and the second respondent's contention that the second and the third agreements superseded the first agreement, which means that the second respondent was a creditor of the first respondent and entitled to apply for the winding up of the first respondent. The second respondent contended that the court should dismiss this application with costs because:

"…a claimant who elects to precede by motion runs the risk that a dispute of fact may be shown to exist…it is certainly not proper that an applicant should commence proceedings by motion with knowledge of the probability of a protracted enquiry into disputed facts not capable of easy ascertainment…" See ***Room Hire Co. (Pty) Ltd* v *Jeppe Street Mansions (Pty) Ltd*[19], *Masukusa* v *National Foods Ltd & Anor*[20].**

The court did not find this submission persuasive, being of the view that the dispute of fact referred to was not so material or complex as to be incapable of resolution on the papers filed of record. There was sufficient evidence in the affidavits filed of record, and in the terms of the three agreements alluded to by the parties, to assist the court to make a determination of the question of which agreement/s governed the relationship between the parties. It is not every apparent dispute of fact which is incapable of ascertainment.

The definition of 'unable to pay its debts' is set out in clear and peremptory terms, leaving the court with no discretion in any particular circumstances. However, the applicants',

[17] HH43-10
[18] 1986 (3) SA 181 (AD) @ 188-189
[19] 1949 (3) SA 1155 (T) @ 1162
[20] 1983 (1) ZLR 233 (H)

contention is not that the first respondent was able to pay its debts at the time that the provisional liquidation order was applied for. Applicants' contention is that the second respondent could not have brought such an application because it was not owed ant money and was accordingly not a creditor of the first respondent at the material time. Let us examine the veracity of this assertion. The fifth respondent filed its heads of argument on 11 July 2014, and submitted that there was nothing in the papers which detracted from the first respondent's proven inability to pay its debts. The first respondent was properly wound up. The share transfer documents were not attached to the founding papers.

At the hearing of the matter, counsel for the applicants Mr. *T. Mpofu* told the court that the share transfer certificates were in the possession of the second respondent, and accused all the respondents of colluding against the applicants, more particularly, of colluding to sell the plant which was valued at one million dollars. Counsel for the first respondent, Mr. *Girach,* submitted that the relief sought by the applicants was incompetent as it sought to nullify or take away the rights of third parties who were not cited as parties to the proceedings and who were not served with the papers, or the notice of set down. He contended that the order as framed could not be granted, particularly para 3 of the draft order at record p 63. He described p 3 as 'dangerous'. Counsel for the second respondent Mr. *E. Matinenga* contended that, by the applicants' own version of events the application could not succeed. He submitted that the second respondent was and still is a creditor of the first respondent and that, the applicants did not object when the Master of the High court accepted the second respondent's claim as a creditor on 26 June 2013.

Black's Law dictionary defines a 'creditor' as "One to whom a debt is owed; One to whom any obligation is owed, whether contractual or otherwise". When the Master accepted the second respondent's claim, it was proof that the second respondent was 'one to whom a debt was owed', by the first respondent. The issue that is exercising the court's mind is whether, the second respondent was indeed a creditor of the first respondent at the time that the application for provisional liquidation was filed. With all due respect to counsel for the applicants, the evidence adduced on the papers filed of record, the submissions of law and of fact, simply do not support the assertion that the agreement of 12 September 2009 was 'superseded' by two subsequent

agreements which were 'simulations' and 'illegal' On the contrary, the evidence before the court supports the second respondent's contentions that there simply is no evidence that shares in the first respondent were ever transferred to the second respondent. The applicants' contention that the share transfer certificates and documents were delivered to the second respondent within 45 days of signing the first agreement is simply not supported by any evidence. The fact that the requisite statutorily provided notifications of change of shareholding structures were not complied with, by the first respondent, leads to the drawing of adverse inferences that shares were not transferred. No reasonable or satisfactory explanation has been given as to why; the second respondent was able to prove a claim against the first respondent as a creditor in the liquidation proceedings. No satisfactory explanation was proffered by the applicants, as to why the first respondent's books do not show any transaction in respect of its shares, between September and October 2009. The liquidator Ms Grimmel deposed to an affidavit that there is no evidence of this transaction in the first respondent's books.

It was submitted on behalf of the applicants that 'the absence of evidence is not evidence of absence'. Regrettably, this pithy turn of phrase does not advance the applicants' case any further. In determining the merits of this matter, the Court must decide whether sufficient evidence has been adduced by the applicants, to enable the Court to exercise its wide discretion in the applicants' favor, when it considers what would be just and fair in the circumstances of this case, regard being had to the applicants' good faith and honest intention. Clearly, when the application for a provisional liquidation order was made, the second respondent was a creditor of the first applicant. The court that was seized with the application perused the papers filed of record and satisfied itself that it was in the interest of justice to grant the order sought. To second guess that court now, in some kind of ghoulish retrospective review process, it must be just and fair to do so, regard being had to the applicants' good faith and honest intention. Let us examine these concepts in the circumstances of this case.

It is common cause that the applicants withdrew their opposition to the granting of the provisional order in March 2013. Are we to assume that, whatever the nature of the legal advice given to the applicants, they allowed the court that was seized with the matter then to labour under a misapprehension that the first respondent was unable to pay its creditors when in reality

it was able to do so. No, the crux of this matter is whether the second respondent itself qualified to be a creditor of the first respondent, which was a pre-requisite to bringing an application for liquidation in terms of s(s) 205 and 206 of the Companies Act. Applicants know full well that there was no formal transfer of shares in the first respondent to the second respondent. If there was such formal transfer, applicants would have been delighted to place evidence of the transaction before the court in support of this application. The applicants are not being candid with the court, they lack *bona fides.* It is my considered view that the applicants' dishonest intention is to put off the evil day when the first respondent is dissolved, which day is imminent, because all the statutorily provided creditors meeting have been held, and the liquidator is preparing the final liquidation account and preparing to pay the first of the respondent's creditors. I am fortified in this view by the paucity of evidence, in the papers filed of record that if the liquidation order is set aside, the first respondent can recover its fortunes.

No evidence was placed before the court to show how or why it would be just or fair, to nullify all the transactions entered into by the liquidator, pursuant to her duties from the date of appointment as liquidator. The implications of such a course of action are wide-ranging and of too wide a scope. The prospect of prejudice to innocent third party purchasers was not addressed by the applicants. In order to make a finding that a certain course of action was void *ab initio,* and that, you cannot put something on nothing and expect it to stand; the court must exercise its discretion cautiously, although the scope of its discretion is theoretically and legally wide. The underlying principle is justice and fairness, tempered with consideration of the applicants' honest intentions and good faith. In the circumstances of this case, there is no evidence on which the court can find 'good and sufficient cause' to set aside the order for the liquidation of the first respondent. The applicant for liquidation, the second respondent was a creditor of the first respondent at the time that the application was filed. The court that granted the order for liquidation did not do so under a misapprehension as to the status of the second respondent a creditor.

The court is of the view that this application was brought about as a desperate attempt to delay the dissolution of the first respondent which is imminent. The court has already found that the applicants acted *mala fide* in bringing this application and that, they were not worthy of the

exercise of the court's discretion in their favor. The court has a certain sanction available to it when it wishes to mark its displeasure with a litigant. That is the reason why on dismissal of the application, the applicants are ordered to pay the costs of this application on a Legal Practitioner and client scale.

Messrs Gill, Godlonton & Gerrans, applicant's legal practitioners
Messrs Coghlan, Welsh & Guest 1st Respondent's legal practitioners
Messrs Atherstone & Cook, 2nd Respondent's legal practitioners