# SARIPA Insolvency Law Update 9 of 2014 dated 5 June

**The views expressed in this update are those of the writer, Martinus (Tienie) Cronje**

## HEADLINES

### Schedule to National Credit Amendment Act 19 of 2014

It is not an act of insolvency when a debtor applies for a debt review.

Read more

### Janse van Rensburg NO and another v Griffiths

“Ordinary course of business”, in the context of section 29(1) of the Insolvency Act, means a "lawful" disposition made in the ordinary course of a "lawful" business.

Read more

### NUMSA obo 4 Members v Motheo Steel Engineering CC

The *moratorium* placed on legal proceedings against a company under business rescue proceedings in terms of section 133 of the Companies Act, does not prevent a Bargaining Council from arbitrating a dispute over which it would otherwise have jurisdiction.

Read more

### Firstrand Bank Limited v Wayrail Investments (Pty) Limited

For the purposes Part G (which includes section 81) of the Companies Act 71 of 2008 a company has to be solvent in both senses of the word, it is both factually and commercially solvent.

Read more

## Schedule to National Credit Amendment Act 19 of 2014

[2014] JOL 31536 (GSJ)

**It is not an act of insolvency when a debtor applies for a debt review.**

The Schedule provides as follows (to come into operation on a date fixed by the President by proclamation in the Gazette):

> The Insolvency Act is hereby amended by the insertion after section 8 of the following section:
>
> "Debt review
>
> **8A.** A debtor who has applied for a debt review must not be regarded as having committed an Act of insolvency.".

**Background**

**Firstrand Bank Ltd v Evans** [2011] JOL 26941 (KZD) par [13] held on the facts of the case that the debtor who informed his creditor that he had applied for, or was under, debt review was necessarily informing the creditor that he was over-indebted and unable to pay his debts. The **Evans** judgment is not authority for the general proposition that the mere fact of an application for debt review in terms of the National Credit Act (NCA) constitutes compliance with the provisions of section 8(g) of the Insolvency Act. **(First Rand Bank Ltd v Janse van Rensburg** [2012] JOL 28499 (ECP) [16].) The applicant cannot rely on a profile report issued by the credit bureau reflecting that the respondents made application for debt review in terms of the NCA as this report was not issued by or on behalf of the debtor. (**First Rand Bank Ltd v Janse van Rensburg** [2012] JOL 28499 (ECP) [34].)

Back to the top

## Janse van Rensburg NO and another v Griffiths

[2014] JOL 31711 (ECP)

**“Ordinary course of business”, in the context of section 29(1) of the Insolvency Act, means a "lawful" disposition made in the ordinary course of a "lawful" business.**

Prior to its sequestration the business was illegal. The business can be described in the briefest of terms as an investment scheme of the variety commonly referred to as a pyramid scheme. (Par [1])

A witness demonstrated unequivocally that if regard be had to the length of time that the two capital payments made by defendant to Usapho Trust had been available for use by the latter, the amount of R12 000 paid by Usapho Trust to defendant on 27 March 2000 represented a return on investment of 42.1% *per annum*, and the amount of R12 000 paid by Usapho Trust to defendant on 3 June 2000 represented a return on investment of 74.2% *per annum*. He explained the mechanism by which he was able to represent the returns on defendant's investments in this way, as well as to explain his concluding opinion that defendant had indeed been preferred above other creditors. (Par [8])

In the context of the enquiry into what constitutes the ordinary course of business in the present matter, it is important to note what the Supreme Court of Appeal has had to say about pyramid schemes. In *Fourie NO and others v Edeling NO and others*, [2005] 4 All SA 393 (SCA) [also reported at [2005] JOL 15163 (SCA) Conradie JA commenced the judgment of the Full Court in the following manner:

> "[1] The audacity of its perpetrators and the credudity [*sic*] of its participants combined to produce a gargantuan fraud notoriously known as the Krion Pyramid Investment Scheme. ... Typically an investor would invest an amount in the scheme having been promised a return of 10% per month, capital and profit repayable within three months. Until the collapse of the scheme investors received payment of their capital and their profit when due. ...."

The paragraph which follows concludes with the sentence:

> "It is anomalous to speak of investors in a scheme that was illegal from beginning to end but everyone else has done so and I shall do so too."

Investments in the pyramid scheme were found by Conradie JA at para [13] to be "illegal and therefore void". (Par [20])

The test as to whether a disposition is made in the ordinary course of business is an objective test. It amounts to a consideration of whether having regard to the terms of a transaction and the circumstances under which it was entered into, the conclusion can be reached that the transaction was one which would normally have been entered into by solvent business persons. Furthermore, the test is a wide one, in which regard must be had to all the circumstances under which the disposition under scrutiny took place. (Par [16])

A consideration of the legal principles which find expression in the authorities leads irresistibly to the conclusion that a disposition made in the ordinary course of business of a business in the context of section 29(1) of the Insolvency Act, means a "lawful" disposition made in the ordinary course of a "lawful" business. (Par [23])

The judgment in *Gazit Properties v Botha and others NNO* 2012 (2) SA 306 (SCA) [also reported at [2012] JOL 28313 (SCA)] does not demonstrate a departure from the principles expressed hitherto in the judgments of the Supreme Court of Appeal. (Par [27]) The *ratio* of the decision in *Gazit Properties* must be limited to a finding that on the agreed facts of that case, and the narrow contentions relied upon, the disposition in question was one in the ordinary course of business. (Par [30])

**Extracts**

[1] Plaintiffs join in this action as the duly appointed trustees of an insolvent trust established in terms of the Trust Property Control Act 57 of 1988, known as Usapho Trust. Usapho Trust was sequestrated on 14 September 2000. It had largely been the brainchild of one Maureen Clifford and prior to its sequestration its business was illegal. The business can be described in the briefest of terms as an investment scheme of the variety commonly referred to as a pyramid scheme. The illegality gave rise to criminal charges of fraud and theft being brought against Maureen Clifford, and others, resulting in a protracted criminal trial before Kroon *S v Maureen Clifford and others* Case No CC62 / 04J. Convictions and appropriate sentences were the further results.

[2] Defendant is an adult male businessman of Port Elizabeth. On two occasions defendant made payment of a substantial amount of capital to Usapho Trust, thereby becoming not only one of its investors but, concomitantly, one of its creditors. Annexed to the particulars of claim marked "A" is a schedule of four payments made by Usapho Trust to defendant, with a total value of R224 000. The particulars of

claim seek payment of each of the four amounts reflected in schedule "A", alternatively payment of each of the four amounts reflected in schedule "A" which was paid by or on behalf of Usapho Trust to defendant within the six-month period prior to the sequestration of Usapho Trust, together with interest on each of the amounts *a tempore morae* and costs of suit.

*The initial onus of proof*

[4] As things stood on the first day of trial, plaintiffs concentrated on the alternative claim based on section 29 of the Insolvency Act. Mr *Rorke* and Mr *Ronaasen*, who appeared on behalf of plaintiffs, correctly identified that in order to have a disposition set aside as being a voidable preference in terms of section 29, plaintiffs must first prove:

4.1 a disposition, as defined in section 2 of the Insolvency Act, of his property by the debtor;

4.2 within six months before the sequestration of his estate;

4.3 to the defendant;

4.4 which has had the effect of preferring the defendant above any other creditor of the debtor; and

4.5 that immediately after the making of the disposition, the debtor's liabilities exceed the value of his assets.

[5] Once plaintiffs have established the five factors referred to in the preceding paragraph, the Court may set aside the disposition unless the defendant proves:

5.1 that the disposition was made in the ordinary course of business; and

5.2 that it was not intended thereby to prefer one creditor above another.

In this exercise, it is defendant who bears the *onus* of proof.

[7] Accordingly, of the five issues set out in paragraph [4], *supra*, on which plaintiffs bear the *onus* of proof, only one issue remains in dispute, namely, that referred to in sub-paragraph 4.4: whether or not the admitted dispositions had the effect of preferring defendant above other creditors of Usapho Trust.

[8] To address the outstanding issue in respect of which they bore the *onus* of proof, plaintiffs called Mr Wessel Greeff, on whose behalf notices in terms of rules 36(9)(a) and 36(9)(b) of the Uniform Rules of Court had been served and filed. This witness presented the eleventh liquidation and distribution account of Usapho Trust in a way that demonstrated unequivocally that if regard be had to the length of time that the two capital payments made by defendant to Usapho Trust had been available for use by the latter, the amount of R12 000 paid by Usapho Trust to defendant on 27 March 2000 represented a return on investment of 42.1% *per annum*, and the amount of R12 000 paid by Usapho Trust to defendant on 3 June 2000 represented a return on investment of 74.2% *per annum*. He analysed and explained the schedule of claims against the insolvent estate of Usapho Trust in order to explain the mechanism by which he was able to represent the returns on defendant's investments in this way, as well as to explain his concluding opinion that defendant had indeed been preferred above other creditors of Usapho Trust. For reasons which shall become plain immediately hereafter, it is not necessary to set out the evidence of Mr Wessel Greeff in any greater detail.

[9] After the evidence-in-chief had been led from Mr Wessel Greeff, the Court took a short adjournment. On resumption of proceedings, Mr *Rorke* informed the Court that Mr *Beyleveld*, who appeared on behalf of defendant, had indicated that having heard the evidence-in-chief of Mr Wessel Greeff, defendant was in agreement with all evidential aspects of plaintiffs' case. In the result, it was proposed that a further conference be held that afternoon in accordance with the provisions of rule 37 of the Uniform Rules of Court, enabling the parties to place before the Court a minute recording further agreement on outstanding issues. Mr *Rorke* informed the Court further that agreement had also been reached during the adjournment on a further aspect of the case, namely, that important portions of the evidence in *S v Maureen Clifford & others* Case No CC62/04 as recorded before Kroon J had been agreed as reflecting accurately the *modus operandi* of those running the pyramid scheme through or in the name of Usapho Trust.

[13] In my view, the evidence of Mr Wessel Greeff, taken in conjunction with the admissions made on behalf of defendant in the pleadings, and in both minutes prepared pursuant to conferences being held by the parties in terms of rule 37 of the Uniform Rules of Court, demonstrates that all four of the dispositions set out in schedule "A" annexed to the particulars of plaintiffs' claims were in fact made by or on behalf of Usapho Trust to defendant.

[14] It follows that plaintiffs have discharged the initial *onus* of proof.

*Subsequent onus of proof*

[15] The effect of the further agreements which resulted from the resumption of the conference in terms of rule 37 of the Uniform Rules of Court on the afternoon of 12 August 2013 was to leave only one issue outstanding for determination by this Court, namely, whether the dispositions were made in the ordinary course of business. The parties are agreed that this is an issue on which defendant bears the *onus* of proof.

*Relevant legal principles*

[16] The test as to whether a disposition is made in the ordinary course of business is an objective test. It amounts to a consideration of whether having regard to the terms of a transaction and the circumstances under which it was entered into, the conclusion can be reached that the transaction was one which would normally have been entered into by solvent business persons. Furthermore, the test is a wide one, in which regard must be had to all the circumstances under which the disposition under scrutiny took place. This approach has a long history within this Division, evident as it is in the approach adopted by Hattingh AJP in his analysis of the evidence placed before the Court in *Featherstone's Estate v Elliot Brothers* 1922 EDL 233 at 242–4.

[17] Judgments emanating from the Supreme Court of Appeal demonstrate consistency in the approach since the establishment of the principle almost 100 years ago, when the Court was known as the Appellate Division, that the test is a wide one.

[20] In the context of the enquiry into what constitutes the ordinary course of business in the present matter, it is important to note what the Supreme Court of Appeal has had to say about pyramid schemes. In *Fourie NO and others v Edeling NO and others*, [2005] 4 All SA 393 (SCA) [also reported at [2005] JOL 15163 (SCA) – Ed] Conradie JA commenced the judgment of the Full Court in the following manner:

> "[1] The audacity of its perpetrators and the credudity [*sic*] of its participants combined to produce a gargantuan fraud notoriously known as the Krion Pyramid Investment Scheme. It was operated from the beginning of 1998 and, as all these schemes do, collapsed when the inflow of funds could no longer sustain the outflow of extravagant returns to participants. Each participant on average 'invested' in the scheme three times. Its turnover was some R1 5 billion. In order to throw regulatory authorities off the trial it was at one time or another conducted by entities called MPF Finance Consultants CC, Madicor Twintig (Pty) Ltd., Martburt Financial Services Ltd., M & B Koöperasie Bpk. & Krion Financial Services Ltd. The way in which the scheme was conducted made it attractive for investors to invest for periods as short as three months. When the loan capital with 'interest' was repaid at the end of the agreed investment period, the investor would more often than not reinvest the capital and interest. The advantage for the investor of doing business in this way was of course that his already enormous interest was compounded. Typically an investor would invest an amount in the scheme having been promised a return of 10% per month, capital and profit repayable within three months. Until the collapse of the scheme investors received payment of their capital and their profit when due. Sometimes an investor would leave the capital and/or the profit in the scheme and this would then have been reflected by means of a book entry as a payment and a new investment. Other investors would take their capital and profit on the due date, some of whom returned after a while to reinvest a similar amount."

The paragraph which follows concludes with the sentence:

> "It is anomalous to speak of investors in a scheme that was illegal from beginning to end but everyone else has done so and I shall do so too."

Investments in the pyramid scheme were found by Conradie JA to be "illegal and therefore void" (At para [13].)

[23] In my view, a consideration of the legal principles which find expression in the authorities cited up to this point leads irresistibly to the conclusion that a disposition made in the ordinary course of business of a business such as that run by Usapho Trust, in the context of section 29(1) of the Insolvency Act, means a "lawful" disposition made in the ordinary course of a "lawful" business (*Klerck NO v Kaye* 1989 (3) SA 669 (C) at 676C).

[25] On behalf of defendant, Mr *Beyleveld* submits that the applicable legal principles are not so clearly expressed as may be suggested by the preceding analysis. He submits that the Supreme Court of Appeal has itself revisited recently the legal principles applicable to a determination of whether a disposition is, or is not, made within the ordinary course of business, in its judgment in *Gazit Properties v Botha and others NNO*. 2012 (2) SA 306 (SCA) [also reported at [2012] JOL 28313 (SCA) – Ed] ...

[26] In the appeal judgment relied upon by Mr *Beyleveld*, this reasoning was criticised by Majiedt JA, who delivered the judgment on behalf of the Full Court, stating:

> "The underlying premise, which is to focus on the nature of the insolvent's general business practices, is in my judgment misplaced and concentrating on the 'tainted' nature of Malokiba's general business model is to misapply the provisions of s29(1). What it requires is a close scrutiny of the dispositions itself (*sic*), viewed against the background of its (*sic*) *causa*." (*Gazit Properties v Botha and others NNO*

2012 (2) SA 306 (SCA) [also reported at [2012] JOL 28313 (SCA) – Ed] at para [7])

[27] I am unable to agree with the submission by Mr *Beyleveld* that the judgment in *Gazit Properties v Botha and others NNO* 2012 (2) SA 306 (SCA) [also reported at [2012] JOL 28313 (SCA) – Ed] demonstrates a departure from the principles expressed hitherto in the judgments of the Supreme Court of Appeal to which I have referred. The primary perspective from which I arrive at this conclusion is that the basis of the enquiry was much narrower than had previously been demonstrated by the various sets of facts as being necessary before the Supreme Court of Appeal. ...

[29] It follows further that I am of the respectful opinion that if I am wrong in discerning the intention of the Supreme Court of Appeal, and if by saying that what is required "is a close scrutiny of the dispositions itself (*sic*), viewed against the background of its (*sic*) *causa*" the Supreme Court of Appeal indeed intended to restate what the principle of law is to be applied in the approach to the question of whether a disposition falls within the ordinary course of business, then, with respect, it erred.

[30] I am of the respectful opinion that the explanation for the apparent contradiction is more prosaic. In my view, and for the reasons expressed in this judgment, the *ratio* of the decision in *Gazit Properties v Botha and others NNO* 2012 (2) SA 306 (SCA) [also reported at [2012] JOL 28313 (SCA) – Ed]must be limited to a finding that on the agreed facts of that case, and the narrow contentions relied upon, the disposition in question was one in the ordinary course of business. If this is correct, the decision is innocent of the effect claimed by Mr *Beyleveld* on behalf of defendant in this matter, namely, a departure from the well-entrenched application of the broad approach maintained in the earlier judgments of the Supreme Court of Appeal identified in this judgment. In my view, that is as it should be. I find the well-established principle of the broad approach to remain intact and to be applicable in this matter.

*Application of legal principles to the facts in this matter*

[31] In light of the professional analysis of the nature of the two capital investments made by defendant to Usapho Trust contained in the evidence of Mr Wessel Greeff, with which defendant agreed after hearing the evidence, the nature and extent of both agreements reached by the parties in terms of the provisions of rule 37 of the Uniform Rules of Court to which reference has been made in this judgment, including the agreement that the dispositions had the effect of preferring defendant over the creditors of the insolvent estate of Usapho Trust, and the fraudulent nature of the manner in which those capital investments were obtained which is evident from the portions of the judgment of Kroon J in *S v Maureen Clifford and others*, Case No CC62 / 04 and upon application of the principle of a broad approach, I am readily persuaded that the dispositions made to defendant in this matter cannot be said to have been made in the ordinary course of business by or on behalf of Usapho Trust. The illegality of the business operations, the manner in which participation therein was secured and the exorbitant returns on "investment" alone are features which militate against a different conclusion. Taken together with the other factors, these features make the decision that the dispositions were made other than in the ordinary course of business of Usapho Trust, irresistible.

[32] It follows that defendant is liable to pay to plaintiffs, in their capacities as the duly appointed trustees of the insolvent estate of Usapho Trust, the four payments referred to in schedule "A" to the particulars of claim in the total amount of R224 000.

*Liability for interest*

[33] Section 32(3) of the Insolvency Act provides as follows:

> "When the Court sets aside any disposition of property under any of the said sections, it shall declare the trustee entitled to recover any property alienated under the said disposition or in default of such property the value thereof at the date of the disposition or the date on which the disposition is set aside, whichever is the higher."

[34] In *Janse van Rensburg NO and others v Steyn* 2012 (3) SA 72 (SCA) the Supreme Court of Appeal has held that section 32(3) of the Act, quoted in the preceding paragraph, only allows this Court to award a judgment creditor who has obtained an order setting aside an impeachable disposition (such as the dispositions under consideration in the present matter) *mora* interest from the date of judgment. I do not consider that authority to be distinguishable on its facts from the circumstances which are under consideration in this matter. Accordingly, that decision is binding on this Court.

[Back to top]

## NUMSA obo 4 Members v Motheo Steel Engineering CC

(METS3334) [2014] Metal and Engineering Industries Bargaining Council Centre For Dispute Resolution, Pretoria (5 May 2014)

**The *moratorium* placed on legal proceedings against a company under business rescue proceedings in terms of section 133 of the Companies Act, does not prevent a Bargaining Council from arbitrating a dispute over which it would otherwise have jurisdiction.**

Section 210(1) of the Labour Relations Act 66 of 1965 (LRA) provides as follows:

> ***Application of Act when in conflict with other laws*** – If any conflict, relating to the matters dealt with in this Act, arise between this Act and the provisions of any other law save the Constitution or any Act expressly amending this Act, the provisions of this Act will prevail.

Section 133 of the Companies Act 71 of 2008 provides as follows:

> **General moratorium on legal proceedings against company**
>
> (1) During business rescue proceedings, no legal proceeding, including enforcement action, against the company, or in relation to any property belonging to the company, or lawfully in its

possession, may be commenced or proceeded with in any forum, except-

(a) with the written consent of the practitioner;

(b) with the leave of the court and in accordance with any terms the court considers suitable; ...

Section 133 of the Companies Act does not expressly amend the provisions of the LRA and the Union is therefore not barred from referring a dispute to the bargaining Council. (Par 4.1)

The Respondent's business rescue practitioner should have been cited as a party in these proceedings. The practitioner has a substantial interest in the subject matter of the proceedings and it is a necessary requirement that she should be joined. (Par 4.2)

**Extracts**

3.7 The moratorium granted by Section 133 is designed to provide the Company with a breathing space while the BR practitioner attempts to rescue the Company by designing and implementing a BR Plan. This is a crucial element of any corporate rescue mechanism, as it allows a company sufficient breathing space to be able to find a solution to the financial problems it is experiencing at the time – *See: Henochsberg on the Companies Act, 1 of 2008, Issue 6, Vol 1, page 478(2).*

3.8 Section 136 of the Companies Act gives the BR practitioner the power to suspend any obligation of the company or to apply to court for the cancellation of agreements, but the BR practitioner or the court may not suspend or cancel any provision of a contract of employment. This provision does not apply to the present case, because there is no indication that the employment contracts of the individual Applicants were suspended by the BR practitioner or terminated with the leave of the court. The notices of termination in paragraph 3.1 above, were issued by the Respondent's HR manager, after the BR practitioner was appointed.

3.9 The Respondent submitted that the arbitration proceedings should be stayed because the Respondent is subject to BR proceedings, alternatively because the BR practitioner has not consented to the action instituted by the Union or further alternatively because the Union has failed to add the BR practitioner to the arbitration proceedings. There is no evidence before me that the BR practitioner has either consented or has been joined as a party to the proceedings.

4.1 I respectfully concur with the judgment of the Labour Court in *National Union of Metal Workers of South Africa obo Members and Motheo Steel Engineering CC,*

case J271/2014 referred to in paragraph 3.10 above, that section 133 of the Companies Act does not expressly amend the provisions of the LRA and that the Union is therefore not barred from referring the dispute to the Council.

4.2 The Respondent's BR practitioner should have been cited as a party in these proceedings. The BR practitioner has a substantial interest in the subject matter of the proceedings and it is a necessary requirement that she should be joined.

4.3 The jurisdictional point raised by the Respondent, only relates to section 133 of the Companies Act. There is no evidence before me to indicate that the Council otherwise lacks jurisdiction to arbitrate the dispute.

4.4 By virtue of Rule 18 (3) of the Rules that apply to arbitrations before the Council, I have the power to join a party to proceedings out of my own accord. I deem it fair and equitable that the BR practitioner should be so joined and that she should be furnished with copies of all documents previously filed in this matter.

5 **RULING:**

5.1 The *moratorium* placed on legal proceedings against a company under BR proceedings in terms of s.133 of the Companies Act, does not prevent the Council from arbitrating a dispute over which it would otherwise have jurisdiction. The jurisdictional point raised by the Respondent, is accordingly rejected.

5.2 The Respondents BR practitioner, Ms Lizanne Chantal Muller, is hereby joined as 2nd Respondent in terms of the Council's Rule 18(3).

[Back to top]

## Firstrand Bank Limited v Wayrail Investments (Pty) Limited

[2014] JOL 31803 (KZD)

**For the purposes Part G (which includes section 81) of the Companies Act 71 of 2008 a company has to be solvent in both senses of the word, it is both factually and commercially solvent.**

This decision was referred to in **Boschpoort Ondernemings (Pty) Ltd v Absa Bank Ltd** (936/12) [2013] SCA 173 (28 November 2013); [2014] JOL 31202 (SCA) where the Supreme Court of Appeal dealt in detail with the meaning of "insolvent" in the Companies Act 71 of 2008 and the Companies Act 61 of 1973. It found that insolvency includes factual insolvency (where a company's liabilities exceed its assets) and commercial insolvency (a position in which a company is in such a state of illiquidity that it is unable to pay its debts, even

though its assets may exceed its liabilities). This decision was discussed in Insolvency Update 3 December 2013.

**Extracts**

[3] That left the only real issue in the case, which related to whether the respondent was *solvent* within the meaning of that term as it is employed in item 9(2) in Schedule 5 to the Companies Act 71 of 2008 and in section 81 of that Act.

[4] That issue brought into sharp focus the concepts of *solvent*, *insolvent*, *commercially insolvent* and *inability to pay debts* as they have come to be known and employed in our law when considering whether a company is insolvent and liable to be wound up.

[5] It is common cause in this matter that the respondent's assets, fairly valued, exceed its liabilities. It is also common cause, or not seriously in dispute, that the respondent cannot make payment of its ongoing obligations because it does not have sufficient cash resources (or readily available resources) with which to do so.

[6] In what follows, unless the context indicates otherwise, I shall refer to the Companies Act 71 of 2008 as "the 2008 Act" and to the Companies Act 61 of 1973 as "the previous Act". The 2008 Act repealed, in its entirety, the previous Act, but, in certain transitional arrangements, retained its applicability in certain given circumstances. The winding-up of *insolvent* companies is one such circumstance.

[7] The present application is based, in the main, on the respondent's inability to pay its debts and its winding-up is sought in terms of the provisions of the previous Act read with item 9 of Schedule 5 of the 2008 Act.

[10] Relying principally on the authority in this division of *Business Partners v Yellow Star Properties 1061* (*Pty*) *Ltd*, an unreported decision of *Radebe* J in case number 7188/2011 KZND delivered on 13 July 2012 and *HBT Construction & Plant Hire CC v Uniplant Hire CC* [2011] ZAFSHC 216, Mr *Harpur SC*, who appeared for the respondent, argued that *solvent*, where it appeared in both in section 81 and in item 9 of Schedule 5 of the 2008 Act, meant and referred to factual or actual solvency. In other words, it did not include commercial insolvency. Thus, he continued, the applicant's reliance on the previous Act was not competent because the respondent was *solvent* and if the applicant wanted to secure its winding-up, it had to bring itself within the confines of section 81 of the 2008 Act.

[11] After I had reserved judgment in the matter Mr *Harcourt* drew attention to the decision of King AJ in *Standard Bank of SA Ltd v R-Bay Logistics CC* [2012] ZAKZDHC 69 which had been handed down in this Division on 31 October 2012.

[12] In *R-Bay Logistics*, King AJ held, on the identical issue, that *solvent*, for the purposes of item 9 of Schedule 5 of the 2008 Act, meant, at the very least, commercial solvency. In other words, a company with an excess of assets over liabilities but which could not discharge its debts as and when they arose in the ordinary course of business was one properly liable to be wound up in terms of item 9 of Schedule 5 of the 2008 Act. ...

[13] After *R-Bay Logistics* was drawn to his attention, Mr *Harpur* sought an opportunity to deliver additional written submissions and these were received in due course. In contending that *R-Bay Logistics* was wrongly decided Mr *Harpur* sought to draw a distinction between the concept of inability to pay debts as a requirement for winding-up under the previous Act and the concepts of *solvency* and *insolvency*

under the 2008 Act. He argued that the shift in the 2008 Act to the "new" concepts of *solvency* (*or insolvency*) and *liquidity* meant that in the 2008 Act *solvent* could only mean that provided for in section 4(1)(a) of the 2008 Act; ie the *solvency* portion of the *solvency and liquidity test*.

[14] In emphasising that distinction he focussed his argument on section 4 (the solvency and liquidity test) and the definition of *financially distressed*, both in the 2008 Act.

[15] Before dealing with that argument it is necessary to place in context the terms *solvency* (*or solvent*) and *insolvency* (*or insolvent*) as they have come to be treated judicially over time. I can do no better that repeat what King AJ said in that regard in *R-Bay Logistics*: ...

[16] I revert to Mr *Harpur*'s argument as foreshadowed in paragraphs [13]–[14] above, and will consider, firstly, his reference to *financially distressed*, and thereafter, his reliance on section 4.

[17] The term *financially distressed* is employed in Chapter 6 of the 2008 Act, which deals with the concepts of Business Rescue and Compromises with Creditors. Section 128 contains the definitions applicable only to Chapter 6 and therein the term is described thus:

> "(f) '*financially distressed*', in reference to a particular company at any particular time, means that–
>
> (i) it appears to be reasonably unlikely that the company will be able to pay all of its debts as they become due and payable within the immediately ensuing six months; or
>
> (ii) it appears to be reasonably likely that the company will become insolvent within the immediately ensuing six months; . . ."

[18] The first observation that I make is that that definition is applicable only for the purposes of Chapter 6. In other words, it has been ring-fenced for application only in Chapter 6.

[19] The second, and perhaps more important observation is that the definition includes a prospective assessment. Apart from possibly being presently unable to pay its debts, it has to be *likely* that in the six months immediately following the date the assessment is made the company *will* be unable to pay all of its debts as they become due and payable. That is something far different from a situation where a company *is currently* or *is presently* unable to pay its debts within the ordinary course of business. ...

[21] Like the concept of *financially distressed*, section 4 also includes a prospective assessment. To satisfy the "solvency" portion of the test a company must be and must *appear* that *it will*, for a period of 12 months after the date on which the test is applied, be able to pay its debts as they become due in the ordinary course of business. To repeat myself: That is something far different from a situation where a company *is currently* or *is presently* unable to pay its debts within the ordinary course of business.

[22] Section 4 of the 2008 Act also importantly designs a solvency *and* liquidity test (my emphasis). The two concepts of *solvency* and *liquidity* are conjoined and, for the purposes of the section, and of the other provisions of the Act which employ the section, are to be considered as a set of circumstances, and not individually. In

paragraph [17] of *R-Bay Logistics*, King AJ did not consider it necessary to examine the section in any detail. I, however do.

[23] I begin with the observation that, as best as I can tell, nowhere does the 2008 Act call for or provide for a separate *solvency test* or a separate *liquidity test*. As I have indicated above, the section 4 test is always employed as a joint investigation.

[34] As best as I can make out, the sections of the 2008 Act that refer to and call for the application of the solvency and liquidity test set out in section 4, are those dealt with in paragraphs [24]–[33] above. To my mind, the solvency and liquidity test, as described in section 4, is a device or tool for the purposes of implementing the provisions or satisfying the restrictions imposed in or by those sections.

[35] Significantly, neither section 81 (or for that matter the whole of Part G) nor item 9 of Schedule 5 of the 2008 Act refers to the solvency and liquidity test. It refers simply to a *solvent* company.

[36] Like King AJ, I too find it regrettable that the 2008 Act does not define the terms *solvent* and *insolvent*. However, going further than he did, I find that there is sufficient to conclude that the word *solvent*, where it appears in Part G and in item 9 of Schedule 5 of the 2008 Act, means both factual or actual solvency *AND* commercial solvency in the sense that a company must currently or presently be able to discharge its liabilities as and when they fall due in the ordinary course of business. To my mind, and in grateful acknowledgement, I find King AJ's reasoning to be unassailable. I adopt it here in support of my view.

[37] To my mind, that conclusion is supported additionally by the fact that item 9(2) of Schedule 5 of the 2008 Act retains, in so far as *solvent* companies are concerned, the applicability of section 345 of the previous Act. In addition to the consideration given to this aspect by King AJ, I am of the view that the deeming provisions of the previous Act were retained so as to enable creditors, who by and large have no access to the financial records of a company, to have access to a device that would entitle an otherwise *solvent* company, to be regarded as being *insolvent* (at the very least commercially) for the purposes of being wound-up in terms of the provisions of item 9 of Schedule 5 of the 2008 Act.

[38] If I hold, as I do, that for the purposes Part G (which includes section 81) of the 2008 Act a company has to be solvent in both senses of the word, ie both factually and commercially solvent, the question that arises is why then does section 81 also include, as a ground for winding-up a solvent company, the situation catered for in section 81(1)(b)?

[45] Yet another answer, regrettable as it may be, but one which I nevertheless prefer, is to conclude that unfortunate (or perhaps bad or clumsy) drafting has led to the inadvertent inclusion of the provision in section 81(1)(b). Insufficient attention has been given as to how the various sections and Schedules of the 2008 Act harmonise and interact. The problem is therefore one for the Legislature to fix.

[46] To address the issue in any other fashion would lead to even more absurd results. To my mind, any other treatment of the issue would result in a situation that is not reasonable and neither sensible nor businesslike (see *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) [also reported at [2012] JOL 28621 (SCA) – Ed] at paragraphs [17]–[26]).

[47] Treated in that fashion, section 141(2)(a) can also then be given purpose and content. Applying the provisions of sub-item 3 of item 9 of Schedule 5 of the 2008 Act, section 141(2)(a) can be regarded as being sufficient to vest a business rescue

practitioner with standing to apply for the winding-up of an insolvent (including commercially) insolvent company under the provisions of the previous Act.

[48] Like King AJ, I regard, with due respect, *Business Partners* and *HBT Construction* (and similar decisions) to be wrong and they ought not to be followed.

[49] Having reached that conclusion, and notwithstanding my summary of the issues in paragraphs [2]–[3] above, there remains two peripheral issues that I must deal with.

[50] The respondent has disputed the debt due to the applicant and has indicated that, if the point was reached, the matter ought to be referred for the hearing of oral evidence to resolve that dispute. ...

[51] The applicant contends that these debits were agreed to either in terms of the original loan or in terms of the settlement when the earlier winding-up was avoided. As such they can be dismissed on the papers. I agree. In any event, a court does not lightly refer a winding-up application for the hearing of oral evidence.
[52] Finally, there remains the general discretion to refuse a winding-up order. As the cases suggest, the discretion is a very narrow one, and in this matter I decline to exercise it. The respondent has shown no special considerations requiring me to act otherwise (see *Absa Bank Ltd v Rhebokskloof* (*Pty*) *Ltd* 1993 (4) SA 436 (C) at 440J–441J; *Services Trade Supplies v Dasco & Sons* (*Pty*) *Ltd* 1962 (3) SA 424 (T) at 428B–F and *Ebrahim* (*Pty*) *Ltd v Pakistan Bus Services* (*Pty*) *Ltd* 1964 (4) SA 146 (N) at 147E–H). [27] A property is sold voetstoots if it is sold as it appears with all its defects. A voetstoots clause will not protect a defendant who intentionally withholds information from a plaintiff or negligently omits to disclose such information under circumstances that required him to do so (see **Banda and another v Van der Spuy** and another 2013 (4) SA 77 (SCA)).
[28] This represents a convenient moment to examine the case that the appellants had put forward in their papers and evidence at the time when they closed their case. In paragraph 14 of the particulars of claim the appellants make the following allegations:
"14. At the time of entering into the contract, the Defendant was aware that the pool was losing water excessively and that the probable cause thereof was a leak in the pool ('the latent defect').
15. Despite being aware of the latent defect, the Defendant deliberately concealed the latent defect from the Plaintiffs with the intention of inducing the Plaintiffs into purchasing the property at the purchase price as agreed between the parties.
15A The Defendant had a duty to the Plaintiffs to disclose the latent defect at the time of the sale of the property but failed to disclose same.
15B Acting on the Defendant's failure to disclose the latent defect, the Plaintiffs were induced into purchasing the property on the terms that they did.
16. The First and Second Plaintiffs have, therefore, suffered damages in the amount of R 48 159.30 (forty eight thousand one hundred and fifty nine rand and thirty cents), being the cost of repairing the pool. The Defendant was either aware of the leak, alternatively the Defendant knew that should the pool be drained the leak would occur and the Defendant intentionally withheld this information from the First and Second Plaintiffs."
[29] The paragraphs quoted above demonstrate that the appellants have put forward the required allegations necessary to sustain a prima facie case against the respondent. The question that calls for this Court's consideration is whether or not evidence exists to support those allegations constituting the appellants' claim.
[38] Notwithstanding knowledge of the excessive loss of water the respondent went ahead to sell the property to the appellants and deliberately chose to remain quiet about it. It is worth remarking that the excessive loss of water bothered her to the

extent of obtaining an expert opinion. If this worried her to that degree, one cannot but surmise that her silence is bound to be viewed with suspicion.
[39] From this it is not difficult to realise that she did so in order to sell the property at the price that she had set. Her non-disclosure of the defect was designed to discourage the appellants not to negotiate to bring down the purchase price.
[40] The respondent's claim that she told the appellants that the pool had been repaired previously and that there was nothing wrong with it during the time running up to the conclusion of the sale, or on delivery, does not assist her at all. She was aware and she chose to keep quiet when she should not have.
[46] In the premises the appellants have put forward facts which articulate a prima facie case which is supported by evidence to which the respondent should answer. The decision of the court a quo to grant absolution from the instance was unquestionably premature. Moreover there remains certain information which the appellants had been told the respondent will clarify when she takes the stand.
[Back to top]