

SOUTH AFRICA / JUDGMENT

KS Machinery and Equipment FZCO v Murry N.O. and Others (2020/002686) [2021] ZAGPJHC 746 (29 November 2021) [2021] ZAGPJHC 746

COURT

South Gauteng High Court, Johannesburg

BEFORE

Turner AJ

CASE / FILE NUMBER

2020/002686

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REPUBLIC

OF SOUTH AFRICA

IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

DIVISION, JOHANNESBURG

CASE

NO: 2020/002686

REPORTABLE: NO
OF
INTEREST TO OTHER JUDGES: NO

REVISED: NO

Date: 29 November 2021
KS
MACHINERY & EQUIPMENT FZCO
Applicant
and
CLOETE
MURRY
N.O.
First Respondent
RALPH
FERRAL LUTCHMAN N.O.
Second Respondent
SIYABONGA
SAMUEL MOHLOMI N.O.

Third Respondent
DIMAKATSO
ARNOLD MICHAEL MOHASOA N.O.
Fourth Respondent
(First
to Fourth respondents in their capacities as Provincial
Liquidators
of Diesel Power Open Cast Mining (Pty) Ltd)
EQUIPMENT
SALES & RENTAL (PTY) LTD
(Registration
Number: 1990/006582/07)
Fifth Respondent
ANGLO
AMERICAN INYOSI COAL (PTY) LTD
(Registration
Number: 2005/016701/07)
Sixth Respondent
NEDBANK
LIMITED
First Intervening Party
ABSA
BANK
LTD
Second Intervening Party
STANDARD
BANK OF SOUTH AFRICA LTD
Third Intervening Party
WEST
ROAD SOUTH NO 12 GP012 (PTY) LTD
Fourth Intervening Party

JUDGMENT

TURNER AJ :

- [1] The applicant launched an urgent application in January 2020 seeking inter alia the following relief: in “Claim A”, interim relief which would authorise the Sheriff to attach and remove four Komatsu Rigid Dump Trucks (bearing serial numbers N10422; N10421; N10437 and N10487 respectively) from Zibulo Colliery, and to secure those trucks at a yard in Delmas pending the outcome of its application for final relief, in “Claim B”; in “Claim B”, final relief to be placed in physical possession of the four trucks, which would enable the applicant to export the trucks to Dubai.

[2] The respondents cited in the application were: the four appointed liquidators of Diesel Power Opencast Mining (Pty) Ltd (“Diesel Power”), a mining contractor that had been placed in liquidation in October 2019; Equipment Sales and Rental (Pty) Ltd (“fifth respondent”), the firm from whom the applicant alleged it had acquired the trucks; and Anglo American Inyosi Coal (Pty) Ltd, the mining company in control of the Zibulo Colliery, where the four trucks were located at the time the urgent application was launched.

[3] The liquidators delivered an answering affidavit to the urgent interim relief application but adopted an unusual position. They denied that the applicant’s allegation that it had become the owner of the trucks and pointed out that the applicant’s founding papers did not establish that the applicant had taken delivery of the trucks. At the same time, however, the liquidators asserted that they and Diesel Power had no interest in the outcome of

the application and sought punitive costs from the applicant for forcing them to have to participate in the litigation.

[4] Shortly before the interim application was to be heard, Nedbank Limited, Absa Bank Limited, Standard Bank of South Africa Limited and West Road South No. 12 GPO12 (Pty) Ltd (“the lenders”)

applied for leave to intervene. The lenders asserted that they were major creditors in Diesel Power and held a Special Notarial Bond over certain trucks that had belonged to Diesel Power. The lenders alleged that the four trucks had belonged to Diesel Power and sought inter alia delivery to them of one of the Komatsu trucks referred to in the applicant’s founding papers (“Truck N10241”) as well as four other trucks which the applicant was alleged to have received, to the extent that such trucks were still in the Republic of South Africa.

[5] The interim relief application and the lenders’ right to intervene were heard on 12 February 2020 by Campbell AJ. After some debate over its terms, an interim order was granted, as follows: the lenders were permitted to intervene as respondents; pending the outcome of Claim B; an interim order was granted “authorising, directing and mandating the sheriff (or his/her deputy of this Court) to remove” the four Komatsu Rigid Dump Trucks bearing serial numbers N10422, N10421, N10437 and N10487 from Zibulo Colliery and to store them in safekeeping at the liquidators’ storage yard in Ogies pending the outcome of Claim B. The Court also ordered:

“3. The first to fourth respondents shall not dispose of the Truck or any part thereof, or remove any part of the Trucks pending the final determination of Claim B, and to be released as directed by the Court

4. The costs of Claim A are reserved for determination in claim B, including the costs of transportation of the Trucks to the storage location and the sheriffs costs which will in the interim be paid by the applicant.”

- [6] On 18 March 2020, the applicant delivered an affidavit answering the lender's counter-application and replying to the lenders' answering affidavit. In this affidavit, the applicant tendered Truck N10421 to the lenders.
- [7] On 22 June 2020, in contrast to the position taken by them in the February affidavit, the liquidators delivered a further affidavit in opposition to the applicant's claim B relief along with a notice of motion recording their intention to make application for leave to file this further affidavit. In this affidavit, the liquidators explained the reasons for the delay in delivering the further affidavit and raised various points in opposition to the final relief claimed in Claim B, including evidence obtained during an insolvency inquiry into the affairs of Diesel Power which had been convened after the February hearing. The liquidators proposed that the disputes between the parties should not be decided on the affidavits, but rather be decided at a trial.
- [8] On 12 August 2020, the applicant delivered an answering affidavit opposing the admission of the liquidators' further affidavit. The main thrust of the applicant's opposition was directed at the admissibility of the evidence on which the liquidators intended to rely and the apparent *volte face* in the liquidators' interest in the trucks, when compared to the position adopted in answering Claim A.
- [9] On 16 March 2021, the liquidators then delivered a replying affidavit (in their application to introduce the further affidavit). This reply set out *inter alia* further information gathered during the insolvency inquiry after June 2020, which the liquidators relied on to motivate the referral of the matter to trial.
- [10] On 12 August 2020, the liquidators instituted action proceedings against various parties, including the applicant and the fifth respondent, for the recovery of various assets of Diesel Power. The particulars of claim seek to challenge *inter alia* the validity of the agreements relied on by the applicant in claim B in the current proceedings for their alleged rights to possession of the four trucks. If successful in the action proceedings, the liquidators will set aside the underlying agreements on which the applicant relies for its rights and they will establish that ownership in the trucks (and other assets) was retained by Diesel Power and never transferred. The fact that the action proceedings cover similar ground to the current proceedings is confirmed by the applicant in its plea to the liquidator's claim, where it has raised the defence of *lis pendens*, alleging that the current application deals with the matters raised in the trial action.
- [11] When the matter came before me on 9 June 2021, the papers exceeded 1600 pages. In the joint practice note filed by the parties, the following issues were identified as requiring determination:

11.1 It was agreed that the only remaining interest which the lenders have in the litigation, is for costs. The lenders contend they are entitled to payment of their costs in respect of the urgent hearing in respect of Claim A or in respect of their counter application, and that such costs should be paid by the applicant, or by the applicant and the fifth respondent jointly and severally. The applicant and fifth respondent resist this claim and contend that the lenders should pay their respective costs.

11.2 As between the applicant and the liquidators, the first question relates to whether the liquidators' further affidavit and the liquidators' replying affidavit (in its interlocutory application for leave to file a further affidavit) should be allowed. The applicant also sought an order striking out various paragraphs in the replying affidavit.

11.3 The following issues were also identified:

“10.2.3 Whether the applicant should be placed in possession of the three trucks consisting of those listed in paragraphs 8.16.7, 8.16.9, 8.16.10 above;

10.2.5 Whether the applicant's matter should be referred to trial ...”

[12] In clause 10.2.6 of the joint minute, the applicant recorded its intention to argue the matter and that it did not intend to seek a referral of the matter to trial upfront at the commencement of the hearing. During argument, it became clear however that the applicant pursued final relief in relation to possession of the trucks only on the basis that the liquidator's further affidavits were not admitted. In his reply, Mr Sawma SC, who appeared for the applicant with Mr Bouwer, confirmed that if I decided to allow the liquidators' further affidavit, the applicant accepted that the matter should be referred to trial.

[13] I shall proceed now to address each of the matters that have arisen and require determination. I note at the outset that items 10.2.3 and 10.2.5 of the joint minute are mutually exclusive. Although the applicant's right to possession of the trucks (item 10.2.3) took up a large part of the papers and of the applicant's argument, that issue is only relevant if the further affidavit is excluded. If the further affidavit is allowed, then the parties are *ad idem* that the competing rights to possession of the three remaining trucks should be determined at trial and should not be decided on the papers.

Costs for the Claim A proceedings

[14] Liability for the costs of the applicant's urgent interim relief application is dealt with in paragraph 4 of the order given by Campbell AJ on 12 February 2020, where the learned Judge reserved those costs for determination when claim B is finally determined. As appears below, I have not determined the merits of claim B and so liability for the costs of claim A, as between the applicant and the liquidators, remains reserved for determination when claim B is finally determined.

The lenders' claim for costs

[15] The costs associated with the lenders' application to intervene and its counter-application were not reserved for determination by Campbell AJ and, given that the lis between the lenders and the applicant is now resolved, I consider it appropriate to deal with liability for those costs now, exercising my discretion on the facts on these papers.

[16] It has been established and conceded by the applicant that the lenders had a direct interest in Truck N10421 - the lenders holding a special notarial bond in respect of that truck. Prima facie therefore, where the applicants included Truck N10421 in the relief it sought, the intervenors were justified in launching their

application to intervene in February 2020 to protect their interest in Truck N10421.

[17] In order to avoid liability for costs and in support of its argument that the lenders should not have intervened and should therefore pay the applicant's costs, the applicant raises various arguments. The applicant's primary contention is that it had already conceded, prior to the filing of the intervention application by the lenders, that it (the applicant) was not entitled to delivery of Truck N10421. As such, it says there was no need for the lenders to protect any interest in Truck N10421. The applicant also contends that it was substantially successful in part A of the application, that the lenders could not pursue the relief claimed in respect of the six trucks which had already been exported by February 2020 (four

of which were subject to special notarial bonds), and that, by focussing only on Truck N10421, the lenders had abandoned their

opposition to the relief sought by the applicant vis-à-vis the remaining three trucks.

[18] In addition, the applicant contends that it did not know about the lenders' interest in Truck 10421 before launching the urgent application. The applicant did not seriously dispute that its attorney, Mr Martini, had the requisite knowledge about the lenders and their special notarial bond before the application was launched, but it argues that such knowledge that Mr Martini may have acquired while acting for another client, ought not to be imputed to the applicant. As such, the applicant argues that it cannot be held to have had such knowledge, and so blame cannot be attributed to it for acting despite such knowledge.

[19] The applicant also argues that the lenders should be mulcted in costs for having interfered with its attempt to secure possession of the three remaining trucks in which the liquidators, in February 2020, had disavowed any interest. The applicant contends that the lenders interference in the matter at that stage, precluding them from taking possession of the three trucks, was illegitimate as the lenders had no interest in those three trucks.

- [20] In my view, the critical factual enquiry for purposes of determining liability for the costs associated with the lenders' application involves determining whether the lenders were justified in bringing the application when they did. This turns on whether the applicant had knowledge of the lenders and their interest in Truck N10421, and whether there was a concession by the applicant of the lenders' right to Truck N10421 prior to the launch of the intervention application.
- [21] Insofar as knowledge is concerned, it is clear that Mr Martini did have knowledge of the lenders and their interest in Truck N10421 before he launched the applicant's application. (Mr Martini's reference, as attorney of record, appears on the notice of motion.) While it is correct that he acquired his knowledge when acting for another of his clients, it appears that he did use that knowledge for the benefit of the applicant prior to issuing the proceedings. Mr

Martini corresponded with the fifth respondent during January 2020, before the urgent application was launched, in an attempt to secure cancellation of the sale of Truck N10421 and a refund of the contract price for that truck. In sending that correspondence, he could only have been acting as a representative of the claimants (as they were the buyers of that truck) and, in the absence of an explanation from the Mr Martini, it seems clear that the reason for his attempt to cancel arose from his knowledge of the lenders' prior and superior right to the Truck N10421. As he had the knowledge and used it in the interests of the applicant when attempting to cancel the sale in respect of Truck N10421, Mr Martini's knowledge should be attributed to the applicant and the applicant should be deemed to have known about the lenders and their interest in Truck N10421 prior to launching the urgent application.

- [22] The applicant alleges that its letter of 7 February 2020, delivered after the urgent application was launched, recorded its confirmation that it would leave Truck N10421 at Zibulo Colliery. It says that this should be read as a concession that it was not pursuing recovery of that truck. For that reason, and because the lenders did not have a legitimate interest in any other trucks, it contends that the lenders were not justified in launching the intervention application.
- [23] However, the correspondence exchanged at the time does not reflect any tender by the applicant to the lenders in terms of which the applicant gave up all rights in Truck N10421. Moreover, in paragraph 45 of its replying affidavit directed at the liquidators, which was delivered on 10 February 2020 (after the 7 February correspondence), the applicant expressly denied the lenders' "purported right to the one truck" which is a reference to the rights asserted by the lenders over Truck N10421. Further, at the end of the replying affidavit, the applicant persisted in its application for relief "in terms of the notice of motion" without distinguishing its interest in Truck N10421 from the other trucks. The fact that Campbell AJ's order deals with all four trucks, including Truck N10421, also shows that by 12 February 2020, the applicants had not conceded the lenders' rights in Truck N10421.

- [24] Given the applicant's attitude at the time, I consider that the lenders were justified in bringing the intervention application. It was only when the applicant delivered its answering affidavit to the lenders' application in March 2020 that a clear tender of Truck N10421 was made. Until it had received the unequivocal tender set out in the applicant's answering affidavit, the lenders were justified in maintaining their position, resisting the relief claimed by the applicant and pursuing the counter application. In the circumstances, I consider that the applicant should be held liable to the lenders to pay the lenders' costs of intervention and the costs of their counter-application.
- [25] The lenders have also sought an order for costs against the fifth respondent who, the lenders assert, are responsible for the underlying events which have given rise to this litigation. Whether the allegation that the fifth respondent is responsible for the underlying events or not is a matter to be determined when Claim B is finally decided. That is not a factual finding which I make in this judgment and consequently, it cannot constitute a reason for me imposing costs on the fifth respondent in respect of the lenders' application.
- [26] The fifth respondent did deliver an answering affidavit to the lenders' application, in which it resisted liability for costs and sought an order that the lenders be held liable for its costs. The fifth respondent did not, however, provide any assistance to the Court in relation to the facts on the underlying dispute, preferring instead to defer dealing with those allegations to the trial action which was contemplated (and has subsequently been instituted). In my view, even though the fifth respondent successfully resisted the prayer for costs claimed by the lenders, the fifth respondent should not be awarded costs and so I find that the fifth respondent should bear its own costs in respect of the lenders' application.

Liquidators' further affidavit

- [27] In the original notice of motion, the applicant first invites the respondents who intended opposing claim A to deliver an answering affidavit to claim A on the expedited timetable (by 7 February 2020). After setting out the relief claimed in claim B, the applicant extends a further invitation to any respondent intent on opposing claim B to deliver an answering affidavit to claim B.
- [28] The liquidators' first answering affidavit, to Claim A, was delivered on or about 6 February 2020. Their second affidavit (the "further affidavit") was delivered on 22 June 2020, approximately four months after the order handed down by Campbell AJ. As it was out of time, it was accompanied by an application for condonation, and the affidavit contained an explanation for the delay. In that affidavit, the liquidators also set out a detailed opposition to the relief claimed by the applicants in Claim B. A large portion of the evidence introduced by the liquidators was evidence of what had been uncovered during the insolvency inquiry into Diesel Power held between February and June 2020. In particular, the liquidators pointed to and relied on evidence given by erstwhile directors of Diesel Power at the inquiry.

[29] The thrust of the liquidators' contentions, relying on the documents and evidence of these directors obtained at the inquiry, is that the right relied on by the applicant is highly questionable and needs to be tested at trial. The basis for this contention rests on the following:

29.1 In essence, there is no dispute that: the ten trucks allegedly bought by the applicants from Polkadot (including the four trucks listed in Claim A) were all owned by Diesel Power at the beginning of 2019; five of these trucks were subject to a Special Notarial Bond held by the lenders; Diesel Power was in significant financial difficulty during 2019; Diesel Power was placed in voluntary winding up by special resolution on 17 October 2019 and the transaction on which the applicant relies to contend that it acquired the trucks took place on 30 September 2019, just weeks before the liquidation.

29.2 The applicant contends that it acquired the trucks from the fifth respondent who obtained the trucks from Polkadot, which apparently acquired the trucks from Diesel Power through an agreement signed in April 2019.

29.3 The liquidators point out that there is no clarity on the mechanism through which the fifth respondent obtained ownership from Polkadot or, at the very least, the right to sell the trucks. They also raise significant doubt over the legitimacy of the sale agreement from Diesel Power to Polkadot, which is alleged to have been concluded in April 2019 but may have been signed much later and backdated to avoid the consequences of liquidation.

29.4 In this regard, the liquidators also highlight the fact that the directors of Diesel Power were also directors of Polkadot and the fifth respondent and so, these sales which divested the company of its assets were undertaken between closely related parties.

[30] Prima facie, the further affidavit introduced a number of material challenges to the existence, validity and enforceability of the right relied on by the applicant for its final relief.

[31] The applicants opposed that condonation application and so resisted the admission of the further affidavit. However, the objection raised by the applicants was not that the answer was delivered too late but rather that the content of the further affidavit was of such a nature that the affidavit should not be permitted. The applicant's resistance to the admission of the further affidavit persisted in argument before me and was the crucial lynchpin in the matter. As explained above, the primary relief sought by the applicant, namely that the remaining three trucks should be delivered to it, could only

be granted if the further affidavit was excluded. If the further affidavit were to be admitted, the applicant accepted that the matter should be referred to trial.

[32] Mr Sawma SC made various arguments to support the applicant's contention that the affidavit should be excluded.

[33] The applicant contends that the liquidators had abandoned their interest in the trucks when they delivered their answering affidavit to Claim A and so, were precluded from challenging the relief in Claim B. Although the liquidators did adopt an unsatisfactory approach and tone in their answer to the urgent application, they did oppose the applicant's claim to ownership of the trucks. Further, when filing the further affidavit, the liquidators explained why they had taken the original position when they had little information about the trucks or the company, they also explained how the evidence uncovered in their investigations had led them to change their position. While this may have implications for the liquidators' ability to recover costs related to the urgent application, it does not prevent them from resisting the applicant's claim for final

relief.

[34] I note that if the liquidators had abided the interim relief claimed in Claim A, there would have been nothing preventing them from delivering an affidavit opposing Claim B in due course. In my view, the content of the liquidator's first affidavit does not preclude the delivery of the further affidavit where the liquidator has provided the necessary explanation for the change in its position.

[35] The applicant also contended that all disputes in relation to the three trucks was settled through correspondence when the liquidators disavowed any interest in the trucks, the lenders laid claim to only one truck and there was no opposition to the applicants removing the three trucks from Zibulo Colliery. The applicant contends that this too precluded the liquidators from re-opening the disputed matters in the further affidavit. I do not see any merit in this argument. As set out above, the liquidators rejected the applicant's claim to ownership and therefore possession pursuant to such ownership.

Further, the order granted by Campbell AJ secured the trucks under the control of the Sheriff on the liquidators' premises pending the determination of claim B. If claim B in respect of the three trucks had been settled prior to 12 February 2020, as the applicant now contends, the applicant would have raised the issue then and the interim order by Campbell AJ would have been pursued or granted in respect of the three trucks.

[36] Another ground relied upon to exclude the further affidavit was that the materials contained therein and relied on by the liquidators were inadmissible hearsay. This also formed the basis of the applicant's application to strike out portions of the replying affidavit.

[37] The focus of the hearsay objections was on the reference by the liquidators to evidence procured at the inquiry into the affairs of Diesel Power convened in terms of section 417 of the Companies Act, 1973, particularly the evidence of Mr Pieterse and Ms Miller, erstwhile directors of Diesel Power. The applicant argued that the content of the evidence given by Mr Pieterse and Ms Miller was manifestly hearsay, contradictory and could not be relied upon in these proceedings, for those reasons. Consequently, and also because the liquidators had failed formally to apply for the reception thereof in terms of the Law of Evidence Amendment Act, it argued that the evidence should be excluded.

- [38] In my view, the applicants have misunderstood the primary purpose for which this evidence was introduced and therefore have not recognised that the evidence relevant to the current proceedings is not hearsay.
- [39] The evidence of what was said by Mr Pieterse and Ms Miller was not introduced by the liquidators to prove the truth of what either of them said, or to use their evidence in the inquiry to prove conclusively in this application that Diesel Power (in liquidation) had a better claim to title over the relevant trucks. Instead, the purpose for which the evidence was introduced was to convince the Court to exercise its discretion and refer the matter to trial, where direct evidence could be led on these issues.
- [40] For this purpose, the relevant evidence was that Mr Pieterse and Ms Miller made those statements attributed to them during the inquiry. The fact that they gave the evidence in the inquiry is not hearsay and, in any event, is not disputed. This distinction is neatly explained in *Mdani v Allianz Insurance Ltd* [1990] ZASCA 119; 1991 (1) SA 184 (A) at 189H – 190B. It is the fact that they gave this evidence at the inquiry (not whether it is true or not) which motivates for the referral to trial, as the fact that this evidence was given in the inquiry creates significant doubt over the validity of the agreement of sale on which the applicant relies. The liquidators, by definition, do not have personal knowledge of sale agreements which took place prior to the company being placed in liquidation and consequently, cannot give first-hand evidence of those events. The liquidators' ability to do so cannot preclude the liquidators from requesting that the matter be referred to trial in order for the necessary evidence to be led. (*Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd* 1949 (3) SA 1155 (T) at 1162 -3)
- [41] Mr Sawma SC also argued that even if the further affidavit was ultimately admitted, the applicants' opposition to its admission had been reasonable and justified the applicants being awarded the costs of such opposition. In my view, there is no doubt that the further affidavit should be admitted. I also find that the applicant's opposition to the delivery of the liquidators' further answering affidavit was unreasonable.
- [42] The main reason why I find that the opposition was unreasonable is that the applicant had expressly invited the liquidators to deliver a further affidavit in the event that they opposed claim B. As such, the further affidavit should have been viewed as a legitimate (but late) answering affidavit to claim B and, unless there was a justifiable basis for opposing the lateness of its delivery, it should have been treated as such. If the applicant had recognised it as the answering affidavit which the liquidators had been invited to deliver in opposition to claim B (even if the applicant opposed a referral to trial) the applicant could have delivered a replying affidavit and proceeded with the matter. If the applicant believed that the further affidavit contained objectionable material, it could have taken steps to strike out that material, but it could not

reasonably contend that the entire affidavit should be excluded and ignored. In my view, it was unreasonable for the applicant to invite the liquidators to deliver a separate answer to Claim B and then suggest that its claim for final relief should be determined without the liquidators' answer to Claim B being considered.

- [43] Another reason why the applicant was unreasonable is that the applicant should have realised that the evidence which emerged from the section 417 inquiry placed its claim to ownership (and possession) in doubt and justified the liquidator's attitude that the matter should be referred to trial. The liquidators say that the evidence of Mr Pieterse and Ms Miller, and possibly other witnesses, can be led at the trial to establish the true position and show that there was no lawful sale of the trucks from Diesel Power. At the trial, if it wishes to resist the liquidator's claim that Diesel Power retains ownership, the applicant will have the onus to prove the sales from Diesel Power to Polkadot to the fifth respondent and the witnesses led by the applicant can be cross-examined to show that no such sale took place. In my view, the position adopted by the liquidators triggers both scenario (a) and scenario (c) identified by Murray AJP in *Room Hire Co.(Pty) Ltd v Jeppe Street Mansions (Pty) Ltd* 1949 (3) SA 1155 (T) at 1163.
- [44] The applicant's recognition and express confirmation during the hearing that the matter should proceed to trial in the event that the liquidators' further affidavit is admitted, shows that the factual allegations contained in the further affidavit require resolution at trial – with the benefit of discovery and cross-examination.
- [45] Given the manner in which the matter proceeded after June 2020 and the nature of the arguments made before me, it seems clear to me that the applicant continued with the litigation because it wanted to avoid having the matter proceed to trial. Instead of adopting the reasonable path of referring the matter to trial, it pursued the application in the hope that a Court might be persuaded to exclude the further affidavit and determine claim B on the basis of only the liquidators' first affidavit, delivered in respect of claim A. The applicant proceeded on the assumption that, because the liquidator's application for condonation involved a request for an indulgence and would ordinarily attract costs, they could run an opposition at the liquidator's and fall back on a referral to trial, if the affidavits were admitted.
- [46] This strategy increased the costs of the litigation significantly. In my view, having failed to resist the introduction of the further affidavit, the applicant should bear the costs that flow from its decision.
- [47] I had initially planned to set out the facts, details and arguments surrounding the merits of the dispute. However, on reflection, I have not done so as all of these issues will need to be considered by the trial Court. By the end of the trial there may be a different or more complete factual matrix available to the Court and so it would be inappropriate for me to set out or express my views on the merits at this stage.

[48] In the circumstances, I make the following order:

- (1) The applicant is ordered to pay the costs of the intervening parties, on the scale as between party and party.
- (2) The applicant is ordered to pay the liquidators costs incurred after delivery of the liquidators' further affidavit (dated 22 June 2020) on a scale as between party and party. Such costs to include the costs associated with the applicant's answer dated 12 August 2020, the liquidators' reply thereto, and the hearing of this application.
- (3) Claim B of the applicant's application is referred to trial.
 - a. The notice of motion and founding affidavit will stand as a simple summons and the date of service of the founding affidavit on the first to fourth respondents will be regarded as the date of service of the summons.
 - b. The first to fourth defendants' notice of intention to oppose dated 31 January 2020 will stand as the notice of intention to defend.
 - c. The applicant is ordered to deliver its declaration within 20 court days from the date of this order. Dies non shall apply to extend the period available to the applicant.
 - d. The time periods provided for in the Uniform Rules of Court will thereafter apply.
 - e. Save for the costs orders made herein, the remaining costs of the application, including costs reserved in respect of claim A, shall be determined at the trial.

TURNER AJ

Date of hearing: 9 June 2021_

Date of judgment: 29 November 2021

For the applicant: A Sawma SC, RJ Bouwer

Instructed by: Martini-Palansky Attorneys

For the first to fourth respondents: JE Smit

Instructed by: Smit Sewgoolam Inc

For the fifth respondent: C Acker

Instructed by: Pagel Schulenburg Inc

For the intervening parties : NJ Horn

Instructed by : Werksmans Attorneys

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