REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

Reportable: Yes
Of interest to other judges: Yes
22 February 2021 Vally J

Case number: 35508/20

In the application of:

LITHA MVELISO NYHONYHA	**1st APPLICANT**
MAGDELINE SEKGOPI NYHONYHA N.O	**2nd APPLICANT**
(in her capacity as trustee of the Nyhonyha Family Trust IT 11919/96)	
MAGANDHERAN PILLAY	**3rd APPLICANT**
MAGANDHERAN PILLAY N.O.	**4TH APPLICANT**
INDHERAN PILLAY N.O.	**5TH APPLICANT**
(in their capacities as trustees of the Pillay Family Trust IT 9190/03)	
CORAL LAGOON INVESTMENTS 194 (PTY) LTD	**6TH APPLICANT**
ASH BROOK INVESTMENTS 15 (PTY) LTD	**7TH APPLICANT**
K2019495062 (SOUTH AFRICA) (PTY) LTD	**8TH APPLICANT**
REGIMENTS FUND MANAGERS (PTY) LTD	**9TH APPLICANT**
MARCYTOUCH (PTY) LTD	**10TH APPLICANT**
ERGOLD PROPERTIES NO 8 CC	**11TH APPLICANT**

and

WILLEM JACOBUS VENTER N.O.	**1ST RESPONDENT**
KAGISO SURPRISE DINAKA N.O.	**2ND RESPONDENT**
(in their capacities as co-provisional liquidators of Regiments Capital (Pty) Ltd)	

ERIC ANTONY WOOD	**3RD RESPONDENT**
TRUSTEGIC (PTY) LTD N.O.	**4TH RESPONDENT**
(in their capacities as trustees of the Zara Share 1 Trust IT 01484/06)	
NEDBANK LIMITED	**5TH RESPONDENT**
CAPITAL 48 (PTY) LTD	**6TH RESPONDENT**
PROGRACE INVESTMENTS CC	**7TH RESPONDENT**
TRANSNET SOC LTD	**8TH RESPONDENT**
VANTAGE MEZZANINE FUND II	**9TH RESPONDENT**
FINASCEND (PTY) LTD	**10TH RESPONDENT**
GDM SOLUTIONS (PTY) LTD	**11TH RESPONDENT**
SETH CONSULTING T/A THUNI SYSTEMS (PTY) LTD	**12TH RESPONDENT**
CYBER SLEUTH FORENSICS	**13TH RESPONDENT**
CMS RM PARTNERS INC	**14TH RESPONDENT**
REGIMENTS TELECOMMUNICATIONS (PTY) LTD	**15TH RESPONDENT**
OMNIMETA	**16TH RESPONDENT**
PETASCAN INVESTMENT HOLDINGS (PTY) LTD	**17TH RESPONDENT**
DUALITY SYSTEMS (PTY) LTD	**18TH RESPONDENT**
MAJESTIC SILVER TRADING 157 (PTY) LTD	**19TH RESPONDENT**
REGIMENTS SHARED SERVICES 191 (PTY) LTD	**20TH RESPONDENT**
THE COMMISSIONER FOR THE SOUTH AFRICAN REVENUE SERVICE	**21ST RESPONDENT**

JUDGMENT

Vally J

Introduction

[1] Exercising the powers granted in terms of s 354 of the Companies Act 61 of 1973 (the Companies Act), this court placed Regiments Capital (Pty) Ltd (Regiments) under a final winding-up on 16 September 2020. The winding-up order was sought by the ninth respondent, Vantage Fund Mezzanine Fund II (Vantage) which is one of its creditors. The applicants applied for the winding-up order to be set aside. The application was brought on urgent basis on 10 November 2020. The

application had two parts to it. The first part (part A) asked for a *rule nisi,* coupled with an interim order allowing for the winding-up to be temporarily uplifted (the interim order) so that a previous court order (which for convenience sake I will refer to as the TSDBF order), also issued by myself in another matter involving Regiments, could be given effect to. The second part (part B) was for the issuance of a *rule nisi* setting a date and time for a hearing concentrating on whether a final order setting aside the winding-up order should be made. The first and second respondents (the provisional liquidators) opposed the application as a whole – the prayer for both interim and final relief. At that hearing of part A the Commissioner of the South African Revenue Service (SARS) brought an application to intervene in the proceedings. The intervention application was opposed by the applicants but supported by the provisional liquidators. SARS is the 21st respondent. Apart from seeking to intervene in the matter, SARS also opposed the application as a whole. On that day I issued a *rule nisi* calling on all the respondents to show cause why the winding-up should not be finally set aside. Coupled with the *rule nisi* I issued the interim order sought by the applicants as well as an order allowing SARS to intervene in the proceedings. The relevant portions of the interim order read:

> '4 In the interim:
>
> 4.1 The unbundling transaction concluded *inter alia* between Regiments Capital and the sixth to eighth applicants, as described and referred to in the founding affidavit, shall be implemented and conducted under the supervision of an independent attorney ("the independent attorney") appointed by this Honourable Court, namely Brett Tate of Tabacks Attorneys;
>
> 4.2 The first and third applicants, in their capacity as the directors of parties to the unbundling, are authorised to take all steps necessary to give effect to the unbundling transaction by no later than 11 November 2020, including those described in Annexure "X" to this order, being the steps that the Applicants warrant are necessary to implement and give effect to the unbundling transaction;

4.3 The funds generated and due to Regiments from the implementation of the unbundling transaction shall be collected and paid into an interest bearing trust account under the control of the independent attorney pending the return date of the *rule nisi*;

4.4 The independent attorney shall prepare and submit a written report and accounting to this Honourable Court copied to the parties hereto, to the creditors of Regiments and to interested parties 10 days prior to the return date of the interim order, being 26 January 2021, concerning all aspects of the implementation of the unbundling transaction in accordance with this order;

4.5 The independent attorney shall not deal with the funds held in such account in any manner pending the return date of the *rule nisi*; and

4.6 The first and third applicants, in their capacity as the directors of Regiments, shall not make any distributions to shareholders or remove, encumber, dispose of, deal with, diminish the value of, forego or reduce control over any of the assets of RC, or acquiesce in any such steps being taken pending the return date of the *rule nisi*, save to pay legal and professional fees incurred in the ordinary course of business.'

[2] Essentially, the interim order allowed for an attorney, Mr Brett Tate, not related to any of the parties, to undertake and oversee the implementation of the unbundling transaction and to report on the financial status of Regiments. Mr Tate has filed a report indicating that he has complied with the order.

[3] The present judgment deals with part B of the application. It is essentially concerned with the question: when should a court withdraw the hand of the law from the estate of a company?

The applicants' case

[4] The applicants' case is that Regiments is factually solvent. The dispute between Regiments and Vantage, which led to the winding-up of Regiments can be resolved once the winding-up is uplifted. Regiments experienced a temporary

liquidity difficulty which resulted in its inability to timeously satisfy the claim of Vantage. However, as soon as the winding-up is set aside, it would be able to release sufficient funds to meet the claim of Vantage and all other creditors in the amount of 100 cents in the rand. The applicants' contention is that Regiments has various assets residing in its subsidiary companies which can be liquidated to meet all the liabilities of Regiments. Some of the subsidiaries are the sixth to eleventh applicants. The most important of these is the sixth applicant, Coral Lagoon Investments 194 (Pty) Ltd (Coral).

[5] Regiments together with the tenth applicant, Marcytouch Pty Ltd (Marcytouch), and the eleventh applicant, Ergold Properties No 8 CC (Ergold) own 100% of the shares in the seventh applicant, Ash Brook Investments 15 (Pty) Ltd (Ash Brook). Regiments owns 72.2% of Ash Brook. Ash Brook in turn owns 100% of the shares of Coral.

[6] Regiments has concluded a restructuring or unbundling transaction (unbundling transaction) with the sixth to eighth applicants – Coral, Ash Brook and K2019495062 (South Africa) (Pty) Ltd (K2019) - the key element of which involves liquidating the assets held in Coral. Coral holds shares in Capitec Ltd which are of substantial value. It is intended that these will be sold and the proceeds paid to Regiments and of course to Ergold and Marcytouch.

[7] In consequence of the unbundling transaction, Regiments will, according to the applicants, be able to meet all its debts. According to Mr Litha Nyhonyha (Mr Nyhonyha) Regiments has always planned to pay [its] debts, and had engaged in

the restructuring transaction to bring about the unwinding of its shareholding in Coral so that it would possess sufficient liquid assets in the form of cash and shares to meet the claims of its creditors.

[8] The fifth to twentieth respondents are the known creditors of Regiments, according to the deponent to the founding affidavit, Mr Nyhonyha. Of these the fifth to fourteenth creditors are parties external to Regiments. The fifteenth to twentieth respondents are related to Regiments. There are three other creditors that are related to Regiments. They are Mr Nyhonyha, the third applicant Mr Magantheran Pillay (Mr Pillay) and the ninth applicant, Regiments Fund Managers (Pty) Ltd. The creditors external to Regiments – the fifth to fourteenth respondents – are collectively owed R278 011 795. The creditors related to Regiments are collectively owed R113 920 106. The list of creditors and the amounts owed to each of them is:

Table A

Creditors not related to Regiments	
NedBank Ltd	R 5 314 705
Capital 48 (Pty) Ltd	R 6 168 892
ProGrace Investments CC	R 9 381 752
Transnet SOC Ltd	R180 000 000
Vantage Mezzanine Fund II (Vantage)	R 75 000 000
FinAscend (Pty) Ltd	R 1 194 485
GDM Solutions (Pty) Ltd	R 79 878
Seth Consulting T/A Thuni Systems (Pty) Ltd	R 45 516
Cyber Sleuth Forensics	R 255 294
CMS RM Partners Inc	R 571 263
Total	R278 011 795

All these creditors either support the application or abide the decision of the court. It must be noted that the claim of Vantage excludes the interest that is due to it.

Table B

Creditors related to Regiments	
Regiments Telecommunications (Pty) Ltd	R 7 314 296
Regiments Fund Managers (Pty) Ltd	R 31 581 606
Omnimeta	R 523 340
Pretascan Investments Holding (Pty) Ltd	R 573 107
Duality Systems (Pty) Ltd	R 383 176
Majestic Silver Trading 157 (Pty) Ltd	R 2 804 291
Regiments Shared Services	R 47 532 216
Management Fee – Mr Nyhonyha	R 11 619 412
Management Fee – Mr Pillay	R 11 588 162
Total	R113 920 106

All these creditors agree to subordinate their claims to the claims listed in Table A.

Table C

Total amount owed to creditors	
Table A creditors	R278 011 795
Table B creditors	R113 920 106
Total owed to creditors	R391 931 901

[9] The applicants undertake to ensure that all creditors not related to Regiments, - listed in Table A - are paid in full before the creditors related to Regiments – listed in Table B - are paid any sums owed to them. The creditors listed in Table B have given an undertaking that they will not seek payment of the sums owed to them until all those listed in Table A are paid in full. In sum, the

applicants' case is that the creditors identified in Table A would be the main beneficiaries if the winding-up order is set aside. It is further contended by the applicants that a failure to set aside the winding-up order would cause irreparable harm to the creditors listed in Table A. This contention rests on the undisputed fact that the fees of the provisional liquidators would be at least 10% of Regiment's assets. Payment of this amount, they say, is unnecessary and would result in creditors listed in Table A having to accept less than what is due to them. Additionally, it must be remembered that if Regiments remain in winding-up the claims of creditors listed in Table B would share equal status with those unsecured creditors listed in Table A. Hence, those unsecured creditors would be significantly prejudiced if the winding-up order is not set aside.

[10] The applicants claim that upon implementing the unbundling transaction Regiments would have liquid assets of R359.3m. They arrive at this figure by valuing Coral's holding of Capitec shares at R1 140 per share. This was the price of the share in November 2020 when part A of the application was considered. At the time of the hearing of part B the share price had increased to R1 442, 13 per share. If the latter price is taken into account the value to be realised from the unbundling transaction would be significantly higher than that provided for by the applicants in part A. In any event their case as at November 2020 was that liquid assets to the value of R359.3m is sufficient to immediately settle all the debts listed in Table A in [8] above.

The position of the provisional liquidators during the hearing of part A

[11] They pointed out that SARS is a known creditor – although the actual amount owed to SARS remains unknown – and no accommodation for this debt is made in the plan set up by the applicants to pay all creditors known to them. They point out further that the directors of Regiments, which includes the first and third applicants, have not filed the compulsory CM100 form[1]. That form requires them to identify a complete list of all creditors together with the amounts owed to each creditor. There may well be other creditors not listed in Table A, and there is doubt as to whether the creditors listed in Table B are truly creditors. For this contention they rely on the fact that no meeting of creditors has been held. Should other creditors come forward then the payment to the creditors listed in Table A may well be an unlawful disposition. But, in any event, the applicants have failed to identify SARS as a creditor. Now that SARS has intervened, claiming that it has a substantial claim against Regiments which is yet to be made as its assessment has not been finalised, it cannot be said that Regiments is solvent.

[12] They went further and brought a conditional counter application in which they asked that they, instead of an independent attorney, be allowed to implement the transaction that was the particular focus of part A of the application. That part of their counter application was refused. They also asked that Mssrs Nyhonyha and Pillay be ordered to file a statement on a prescribed CM100 form outlining the financial affairs of Regiments. They further alerted the court to the fact that Mssrs Nyhonyha and Pillay had not been candid with them. In this regard they placed the following detailed factual information before the court. They were appointed on 1

[1] The Form is to comply with the provisions of sub-section 363(4) of the Companies Act and is to certified and filed with the Master.

October 2020. On 2 October 2020 one of them, Mr Willem Venter (Mr Venter), was invited to a meeting at the offices of the attorneys of Regiments, Smith, Sewgoolun Inc (Smith Sewgoolun) who are also the attorneys of the applicants. He attended the meeting. Mr Nyhonyha and Mr Pillay were present in their capacities as directors of Regiments as well as their attorneys from Smith Sewgoolun. Mr Venter delivered the CM100 form and asked Mr Nyhonyha and Mr Pillay to complete it within 14 days. They were aware that they were obliged in terms of s 363 of the Companies Act to complete the form and submit it to the Master. On 5 October 2020 he again furnished them with a copy of the form together with a letter alerting them to their legal duty to complete the form. In response Smith Sewgoolun addressed a letter to Mr Venter informing him that Regiments was engaged in litigation which consumed their time and that of their client, Regiments. He was informed that Regiments was engaged in litigation in the Western Cape High Court and in the Pietermaritzburg High Court. At the same time he was informed that the assets of Regiments were placed in the hands of a curator as a result of a preservation order the National Director of Public Prosecutions (NDPP) had secured *ex parte* in terms of the Prevention of Organised Crime Act (POCA) against, *inter alia*, Mssrs Nyhonyha and Pillay and Regiments. Smith Sewgoolun annexed a copy of the Regiment's draft balance sheet for the year to date 31 August 2020 to the letter. Over the next few days the provisional liquidators received voluminous papers of the various court proceedings that Regiments was a party to. The documents totalled 18000 pages.

[13] The draft balance sheet provided the following telescopic view of the assets and liabilities of Regiments as at 31 August 2020:

Total Non-Current Assets	R566 108 042	Total Equity	(R60 801 993)
Total Current Assets	R 15 188 141	Total Non-Current Liabilities	R195 859 585
		Total Current Liabilities	R446 238 591
		Total Liabilities	R642 098 176
Total Assets	R581 296 183	Total Equity + Total Liabilities	R581 296 183

[14] Placing the non-current assets item under a microscope we learn that it constitutes: (i) Investments in subsidiaries R22 096 746 (this, *ex facie* the supporting documents, appears to be in Kgoro); (ii) Loans to Group companies R224 263 152 – although the document that lists these loans show that they total R 234 843 493, ie R10 580 341 is not accounted for; (iii) other financial assets R319 151 973, which is an investment in Ash Brook Investments and which is calculated at a share price of R835 per share. For present purposes it bears noting that the investment in Kgoro is reflected as being worth R22 096 746 only.

[15] Doing the same with current assets we learn that it consist, *inter alia*, of loans to group companies in the amount of R9 750 581. But when we look at the supporting list where this amount is particularised we learn that the amount loaned to group companies is actually R234 013 733. This is so substantially different from that reflected in the telescopic presentation that it raises a question as to the accuracy of either or both the figures. Of great importance too is where these loans are located. According to the accompanying particularised list they are in 16 companies. Some of the important ones, and the amounts owed by them to Regiments, are:

Cedar Park Properties 39 (Cedar)	R86 835 118
Regiments Healthcare	R10 316 913
Regiments Engineering	R 2 161 335
Kgoro Consortium (Kgoro)	R 2 389 452
Little River Trading 191	R29 190 250
Regiments Securities	R38 775 191
Ash Brook	R 79 979
Pretavax	R25 912 114
Pretarex	R24 400 928
MCare OpCo	R12 915 498

[16] Subjecting the Equities and Liabilities reflected in the Balance Sheet to the same – not very detailed – scrutiny we learn that the Equities consist of a share capital of R100, reserves of R247 661 931, which is the value of Regiment's holding in Ash Brook Investments calculated at the price of R835 per share, and there is an accumulated loss of R308 464 024. As there is no accompanying Income and Expenditure Statement it is impossible to know how this loss came to be. There is no allowance for, or reflection of, any other holdings of Regiments in this Balance Sheet. This is strange given that Regiment's version is that it has at least 16 companies in its stable, to which it has loaned substantial sums, and 9 companies in its stable which have loaned it substantial sums. According to the Balance Sheet the non-current and current liabilities consist of loans from these 9 group companies in the amount of R160 681 292. The accompanying list particularises this amount as follows:

Regiments Telecommunication	(R7 314 296)
Regiments Fund Managers	(31 581 606)
Yellowood Advisors	(R 50)
Coral Lagoon	(R65 573 148)

Omnimeta	(R 523 240)
Pretascan	(R 573 107)
Duality	(R 383 176)
Majestic Silver Trading 157	(R 7 199 854)
Regiments Shared Services	(R47 532 716)

[17] The same item of non-current liabilities reflects a provision for deferred taxation in the amount of R71 490 042. According to the drafter of this Balance Sheet this tax liability is a result of financial benefit received by Regiments from a scrip loan contract that Regiments concluded with another party. At the same time the current liabilities reflect that current tax (as at 31 August 2020) payable is R38 193 997. There is no explanation as to how this amount is calculated or during which period this tax liability arose.

[18] On 15 October 2020 Mr Venter addressed an email to Smith Sewgoolun stating that the legal status of the subsidiaries of Regiments needs to be determined as he has learnt that some of them are in business rescue. He asked for a meeting with Mssrs Nyhonyha and Pillay so that they could explain to him their position as erstwhile directors, provide him with answers to a standard questionnaire (which he had already provided to them previously), provide him with a completed CM100 form, give him details of all the litigation that Regiments was involved in and furnish him with all the books and records of Regiments, including its financial statements and management accounts. Mr Tiaan Jonker (Mr Jonker) of Smith Sewgoolun responded saying that he would arrange a meeting between Mssrs Nyhonyha and Pillay and Mr Venter. On the next day, Mr Venter sent another email to Mr Jonker informing him that he was still required to take control of the documentation of Regiments and that Mr Jonker should comply with a request from the State Capture

Commission to provide them with copies of certain documents. Mr Jonker replied stating that the documents were on a server in the office of Smith Sewgoolun. Mr Venter also advised Mr Jonker to deal directly with Mssrs Nyhonyha and Mr Pillay, and that if those two gentleman wanted the documents they could approach his office. On 19 October 2020 Mr Venter received an email from Mr Jonker informing him that Mr Nyhonyha needed to meet with him to discuss the unbundling transaction and other operational issues regarding Regiments. Mr Venter in reply correctly pointed out to Mr Jonker that himself and Mr Dinaka were now in control of the affairs of Regiments. If Mr Jonker represented the directors he had no objection thereto, but that Mr Jonker could not be representing Regiments as he could not justify employing an attorney to communicate with the erstwhile directors. In addition, he reminded Mr Jonker that he required the CM100 form to be completed. On 20 October he received an email from Mr Nyhonyha setting out an agenda for a meeting later that day. The meeting was held virtually. The main focus of the meeting was the unbundling transaction. Thereafter much correspondence was exchanged between Smith Sewgoolun and Mr Venter and the provisional liquidators' attorney (Mr Rabie). Some virtual meetings were held where they were all present. Then on 31 October 2020 Mr Rabie wrote to Mr Jonker and Ms Chantelle van der Schyff (Ms van der Schyff) of Smith Sewgoolun and asked them to provide an affidavit from Mssrs Nyhonyha and Pillay detailing the names, contact details and amounts owed to all the creditors of Regiments. He reminded them that they promised such an affidavit a week ago. This information was important in that it allowed the provisional liquidators to canvass the opinions of the creditors regarding the unbundling transaction. Mr Jonker replied that such information was already furnished. No such affidavit was ever produced.

[19] The experience left the provisional liquidators, especially Mr Venter, frustrated. They came to the conclusion that Regiments remains factually insolvent and that setting aside the winding-up order would be detrimental to the body of creditors. They complained vehemently about the conduct of Mssrs Nyhonyha and Pillay. They point out that Mssrs Nyhonyha and Pillay, together with Smith Sewgoolun, were evasive on key issues relating to the business affairs of Regiments. The refusal of Mssrs Nyhonyha and Pillay to complete a CM100 form, and the refusal of Smith Sewgoolun to release the records of Regiments, are two issues that particularly frustrated them. They also questioned the candour of Mssrs Nyhonyha and Pillay as well as Smith Sewgoolun. On this evidence they contended that Mssrs Nyhonyha and Pillay had conducted and were conducting themselves in a manner inconsistent with their fiduciary duties and their duties to the creditors of Regiments. Hence, their opposition to the application.

<u>The position of the provisional liquidators at the hearing of Part B</u>

[20] At the hearing they changed their attitude. The change was orally announced by their counsel, Mr PG Cilliers SC. He stated that as a result of an agreement concluded between the provisional liquidators and the applicants, the provisional liquidators (i) no longer opposed the application, (ii) do not pursue the allegation of improper and immoral conduct against Mssrs Nyhonyha and Pillay contained in their answering affidavits, (iii) abandoned their counter application and (iv) abided the decision of the court.

<u>The basis of SARS' opposition</u>

[21] SARS takes issue with the unbundling transaction as a whole, and in particular wish to claim payment from Coral for Capital Gains Tax (CGT) it became liable for as a result of implementing the phase of the transaction that was authorized by my TSDBF order. At this point it is important to record that Regiments has received two opinions from two different senior counsels, indicating that Coral would not be liable for the CGT if it implemented that phase of the unbundling transaction by a particular time and in a particular way. SARS takes issue with the opinions and intends to impose a CGT levy on Coral. It intends to audit the unbundling transaction in its entirety. To this end, it takes particular issue with the contention of Regiments that the phases of the unbundling transaction, which involved *inter alia* the compliance with my order regarding the reimbursement of TDSBF, does not attract any CGT. According to SARS this aspect of the unbundling transaction may have already ready resulted in a tax liability of R273m for Coral. However, it does not at this stage wish to make a definitive call on this as it requires certain documents from Coral, which it hopes to receive given it has issued a Notice of Audit on Coral. Thus, presently Coral is under audit. Despite the incompletion of the audit on Coral, SARS anticipates that Coral carries a tax liability of approximately R60m which it intends to claim. If the winding-up order is set aside and the unbundling transaction is fully implemented, SARS may not be able to recover this claim from Coral.

[22] SARS points out that Regiments has not filed income tax returns for all the years from 2016 to 2019. It has therefore not paid the taxes lawfully due to it. SARS has issued a Notice of Audit on Regiments. SARS acknowledges that Mssrs Nyhonyha and Mr Pillay have shown a willingness to co-operate fully with it during

the audit. Mssrs Nyhonyha and Pillay have claimed that they had encountered an insurmountable obstacle in providing some of the annual financial statement for the 2016 to 2019 years, as the consultants appointed to draft these have not been paid and are therefore unwilling to release them. Mssrs Nyhonyha and Pillay made numerous unsuccessful appeals to the curator, who controlled the assets of Regiments prior to them being placed in the hands of the provisional liquidators, to pay the consultants. They also appealed to the provisional liquidators to do the same, but once again were not successful.[2] In any event the important point is that Mssrs Nyhonyha and Pillay were not deliberately stifling SARS in carrying out the audit.

[23] During the hearing of part A of the application SARS indicated that it expected to issue an assessment of tax liability on Regiments for income tax and VAT in the amounts of R162 378 865 and R81 189 432.50 respectively. Prior to the hearing, on the return day, SARS filed a supplementary affidavit where it repeated the claim, though the figures were revised as by then SARS had completed the audit on Regiments' financial affairs. It must be noted, however, that the applicants deny that Regiments is indebted to SARS for income tax and VAT for the 2016 to 2019 financial years. To this end Mr Nyhonyha put up evidence of Notices of Assessments that Regiments had received from SARS, which indicated that SARS was indebted to Regiments in the sums of R6 894 657.57 for overpayment of income tax[3] and R26 352 561.65 for a VAT refund.

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[2] The provisional liquidators in my view should not be criticised for this. They believed it was necessary for them to exercise extreme caution before paying any creditor of Regiments. The prudence and reasonableness of that view is understandable.
[3] Mr Nyhonyha claims that the amount is actually R11.3m but the document he attached to his affidavit only reflected an amount of R6 894 657. 57

[24] SARS says further that the setting aside of the winding-up order would be set against 'commercial morality' and would therefore not be in the public interest.

The Tate report

[25] Mr Tate informs that (i) the unbundling transaction was implemented as per the interim order (ii) an amount of R36 348 950 resulting from the implementation has been invested into his firm's trust account, and (iii) Smith Sewgoolun has informed him that Regiments now holds liquid assets of R328.5m. The amount of R328.5m is made up of cash on hand of R40.8m and 252,370 Capitec shares calculated at a price of R1140 per share. However, as at the date of his report the share price of Capitec was R1442.13 per share. If the latter share price was used to calculate the value of the assets belonging to Regiments then Regiments would be holding liquid assets in the amount of R404 750 348.10. The difference is a substantial amount of R76 250 348.10. In any event it is clear that the unbundling transaction has produced a substantial benefit to Regiments.

The provisional liquidator's position post the Tate report

[26] Until the Tate report was filed, the provisional liquidators were convinced in their view that Regiments was factually and commercially insolvent. At the hearing their counsel informed me that they had concluded an agreement with the applicants, the gist of which was that (i) they would no longer be persisting with the allegation that the conduct of Regiments as well as those of Mssrs Nyhonyha and Pillay was highly irregular and in breach of the latter two's fiduciary duties to Regiments and to the creditors of Regiments, (ii) they would no longer be persisting with the contention that Regiments remained insolvent, but would be standing by

their observation that the report filed by Mr Tate is particularly unenlightening, (iii) they would abide the decision of the court, (iii) the applicants would pay all their costs incurred in this matter. Needless to say, SARS was taken aback by this change of stance by the provisional liquidators.

SARS' position post the Tate report

[27] After the Tate report was filed, SARS filed a supplementary affidavit wherein it criticised Mr Tate for providing very little information about how the unbundling transaction was undertaken, how financial affairs of Regiments are structured, exactly how much assets Regiments has and exactly how much liabilities it carries. Mr Tate has done no more than accept the word of Smith Sewgoolun, the applicants' attorneys, as to the amount of shares in Capitec held by Regiments. He has not independently verified any of the information supplied to him by Smith Sewgoolun. SARS agreed with the provisional liquidators that the Tate report has not been of any assistance to this court in its consideration of whether Regiments is factually solvent or not.

[28] On the basis of the Tate report SARS contended that Coral has been rendered an empty shell, save for the fact that it allegedly holds R50m in cash. This amount is inadequate to meet the tax liability of R60m it presently owes SARS. Furthermore, it informed the court that the unbundling transaction would have to be carefully audited in order to establish if it fell foul of the general anti-avoidance rule set out in Part IIA of the Income Tax Act 58 of 1962. If this is found to be the case, SARS would be pursuing a claim against, *inter alia*, Regiments for its involvement in the scheme to avoid a tax liability. In addition, SARS persisted with the claim that

Regiments would - once the audit of its 2016 to 2019 financial years are completed – be liable to it for unpaid taxes, including interest and penalties.

[29] Relying on the contentions set out in [28] and [29] above, SARS submitted that it would be in the interests of justice to discharge the *rule nisi*. This is so because confirming it would produce consequences that are undesirable and contrary to the public interests.

[30] In addition, SARS contended that despite the unbundling, Regiments remains factually insolvent. SARS says that as at the time the supplementary affidavit was deposed to, the income tax and VAT liability of Regiments was calculated at R217 578 411.92 and R61 765 421.56 respectively, which totals R279 343 833.48. An assessment to this effect is soon to be issued, it being delayed by bureaucratic processes only. Thus, SARS accepts – without conceding the correctness thereof – the *ipse dixit* of Mr Tate that Regiments would hold liquid assets to the value of R328,5m, but contends that this amount is insufficient to meet the debts of Regiments anyway. Even it the amount is increased to R404 750 348.10 - based on the Capitec share price being R1 442.13 per share - Regiments would, nevertheless, remain factually insolvent. This is because the sale of those shares at whatever price would attract a brokerage fee and a Capital Gains Tax liability, both of which would substantially eat into the proceeds that would ultimately be received by Regiments.[4] Regardless of what price is relied upon to determine the value of Regiments, SARS claims that Regiment's liabilities of

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[4] The reliance on a share price of R1 442, 13 is of course based on the trading price on a particular day and is an unreliable measure given that the price fluctuates on a daily basis. Normally, a seven-day average price or in some circumstances a ninety-day average price is regarded as a more accurate reflection of the price of the share.

R391 931 901 - Table C in [8] above - plus the soon to be announced claim of SARS for R279 343 833.48, demonstrates beyond doubt that the proceeds of the unbundling transaction is wholly inadequate to pay these debts. In other words, bearing in mind that at best for Regiments it has liquid assets to the value of R404 750 348.10 less brokerage fee – which though not quantified is expected to be substantial- SARS says that Regiments will not be able to meet all its debts from the proceeds of the unbundling transaction.

<u>The applicants' case post the Tate Report and the supplementary affidavit of SARS</u>

[31] The applicants' case has shifted. In the founding papers they relied solely on the proceeds they expected from the unbundling transaction to settle all the debts with the creditors listed in Table A in [8] above. After the Tate report and SARS' supplementary affidavit were filed they relied on the value of other assets owned by Regiments. In particular they relied on Regiment's shareholding in Kgoro and in Little River. This the applicants did by way of submissions only. They did not file an affidavit in response to the SARS supplementary affidavit. Instead, they relied on information that was already before court in their replying papers during the urgent application. They submitted that Regiment's shareholdings in Kgoro and Little River need to be taken into account when determining whether Regiments would be able to pay all its debts, including those of SARS (which only awaits the issuing of an assessment). These holdings have been valued by the curator – who was appointed to take control of the assets in terms of the POCA order – at R513m and R32m respectively. The valuation of R513m for Kgoro is significantly different from that reflected in the Balance Sheet of 31 August 2020. There Regiments investment

in Kgoro is reflected as being worth R22 096 746 only.[5] I am inclined to the view that the figure reflected in the Balance Sheet is incorrect and that of the independent curator is more in line with the true value of Kgoro. There are too many discrepancies and unexplained figures in the Balance Sheet for it to be accepted as a reliable reflection of the financial health of Regiments.

[32] Assuming that these figures are correct, Regiments would be able to meet all the debts referred to in Table C as well as the SARS claim of R279 343 833.48. But, they say only the debts referred to in Table A need be settled, as the debts in Table B will, in terms of the undertaking by those creditors, only be paid after all creditors including SARS have been fully paid. On this calculation they say that the valuation of Regiment's total assets less total liabilities would be:

Table D

Assets	
Description	Amount
Cash on hand	R 36 348 950.00
Capitec shares in Coral	R350 000 000,00
Receivables from Nedbank	R 4 500 000,00
Shareholding in Kgoro	R513 000 000,00
Shareholding in Little River	R 32 000 000.00
Total Assets	R935 848 950.00
Liabilities	
Liabilities listed in Table A	R278 011 795.00
Liabilities listed in Table B	R113 920 106.00
Potential liability to SARS	R279 343 833.48
Total Liabilities	R671 275 734.48
SURPLUS	**R264 573 215.52**

[5] See [14] above

The law

[33] Section 354 of the Companies Act 61 of 1973, (the Companies Act) provides:

> '354. A Court may stay or set aside winding-up.
> (1) The Court may at any time after the commencement of a winding-up, on the application of any liquidator, creditor or member, 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 or for the continuance of any voluntary winding-up on such terms and conditions as the Court may deem fit.
> (2) The Court may, as to all matters relating to a winding-up, have regard to the wishes of the creditors or members as proved to it by any sufficient evidence.'

[34] The powers conferred on this court are wide. They certainly allow, if not require, the court to have regard to events subsequent to the winding-up of the company.[6] The applicant seeking to set aside the winding-up order,

> '… must not only show that there are special or exceptional circumstances which justify the setting aside of the winding-up order; he or she is ordinarily required to furnish, in addition, a satisfactory explanation for not having opposed the granting of a final order or appealed against the order. Other relevant considerations would include the delay in bringing the application and extent to which the winding-up had progressed.[7]

[35] The court is bound to scrutinise the facts very carefully and to exercise its discretion in a manner that at the very least does not disadvantage any creditor. The interests of the creditors weigh heavily with the court for after all, once the company has been provisional wound-up, a *concursus creditorum* comes to be and no transaction, whether by one or some of the creditors, can be entered into to the

[6] *Ward and Another v Smit and Others: In re Gurr v Zambia Airways Corporation Ltd* 1998 (3) SA 175 (SCA) at 180G-H
[7] Id at 181C-D (citations therein excluded)

prejudice of the general body of creditors.[8] But it is not only the interests of the creditors that is to be taken into account:

> 'It is bound to regard not merely the interests of the creditors. It has a duty with regard to the commercial morality of the country.'[9]

[36] A cynic may say that term 'commercial morality' is not only undefinable but is actually an oxymoron. Whether there is or is not any merit in that view is not a matter for consideration or detailed comment here, but what can be said is that payment of taxes that are due, and conducting ones business in full compliance with the law, would certainly qualify as 'commercially ethical' or 'commercially moral' practices.

[37] A detailed historical as well as analytical account of s 354 of the Companies Act by Gautschi AJ can be found in *Storti*.[10] The exploration of the authorities led the learned Acting-Judge to conclude as follows:

> 'The principles to be gleaned from the authorities, often not harmonious, are in my view the following:
> (1) The Court's discretionary power conferred by this section is not limited to rescission on common law grounds.
> (2) Unusual or special or exceptional circumstances must exist to justify such relief.
> (3) The section cannot be invoked to obtain a rehearing of the merits of the sequestration proceedings.
> (4) Where it is alleged that the order should not have been granted the facts should at least support a cause of action for common law rescission.
> (5) Where reliance is placed on supervening events, it should for some reason involve unnecessary hardship to be confined to the ordinary rehabilitation machinery, or the circumstances should be very exceptional.
> (6) A Court will not exercise its discretion in favour of such an application if undesirable consequences would follow.

[8] *Walker v Syfret NO* 1911 (AD) 141 at 160 and 166
[9] *Re Telescriptor Syndicate Limited* (1903) 2 CA 174 at 180
[10] *Stori v Nugent and Others* 2001 (3) SA 783 (W)

> In *Ex parte Van der Merwe* certain other general principles are enunciated. The first deals with notice to interested parties. I have not repeated that principle because it is of course fundamental to all applications. The second is that there should be no dispute on the facts. I do not agree with this unqualified statement. If the application involves a rescission of an order which should not have been granted, an application for rescission under the common law need only make out a *prima facie* case (I deal with this more fully below). The effect of the order is interim only, and not final, and therefore factual disputes are ordinarily not a bar to success. If on the other hand the order was correctly made, but is to be set aside (permanently) because of, for instances, a composition with creditors, the order of setting aside is expected to have final effect and factual disputes would then become an obstacle to the applicant.'[11]

[38] Building on the learning in *Storti* Levenberg AJ in *Klaas* reminds us, *inter alia*, that a court should take note of the surrounding circumstances, the wishes of all the parties concerned, including the liquidators, and should never set aside the winding-up order if all the creditors will not be paid from the residue of the estate.[12]

[39] The learnings derived from these two cases are useful and will be applied here.

<u>Analysis</u>

[40] The facts above show that Mssrs Nyhonyha and Pillay have not been frank and transparent with the provisional liquidators. When asked simple facts and when asked to provide details regarding Regiment's business and financial affairs they responded by confounding and obfuscating. They provided the provisional liquidators with a Balance Sheet that raised more questions than it provided answers. They unlawfully refused to hand over the documents of Regiments to the provisional liquidators. They unlawfully refused to complete, sign and deliver the

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[11] Id at 806D-I (citations omitted)

[12] *Klaas v Contract Interiors* 2010 (5) SA 40 (W) at [65]

CM100 form. They were clearly determined to frustrate the provisional liquidators. They owed the provisional liquidators a duty of candour, which they failed to abide by.

[41] Furthermore, they failed to file tax returns of Regiments for the 2016 – 2019 years. They failed to furnish full accounting statements to SARS when asked to do so. The reason provided by them is not persuasive. They say that a third party that prepared these statements would not release them without being paid. Nothing prevented them – given that they have extensive means – to pay the third party on behalf of Regiments and then claim the monies from Regiments later.

[42] The role played by Smith Sewgoolun is also matter of concern. When the provisional liquidators sought the documents of Regiments from Mssrs Nyhonyha and Pillay, Smith Sewgoolun responded indicating that it is in possession of these but would only release them upon instruction from Mssrs Nyhonyha and Pillay. Having learnt that Regiments was now under control of the provisional liquidators they should either have handed the documents to Mssrs Nyhonyha and Pillay or the provisional liquidators. Why they did not do so is never explained. If they had decided to hand them over to Mssrs Nyhonyha and Pillay, they would of course have had to inform the provisional liquidators that that is what they have done. Instead they did neither and got entangled in the unlawful conduct of Mssrs Nyhonyha and Pillay. The provisional liquidators were left with the impression that they were colluding with Mssrs Nyhonyha and Pillay in avoiding their (Mssrs Nyhonyha and Pillay's) legal obligations.

[43] The Tate report too is a matter of concern. It is so devoid of detail as to be of almost no value. It certainly does not assist in determining whether Regiments is solvent. All Mr Tate did was allow Mssrs Nyhonyha and Pillay to finalise the unbundling transaction, receive R36 348 950 into his firm's trust account and accept the word of Smith Sewgoolun that Regiments now held liquid assets to tune of R328.5m. He has not verified this information nor queried whether Regiments hold any illiquid assets and if so, what these are and where are they located. He read the interim order very narrowly and adopted a supine approach in relation to the financial affairs of Regiments. Needless to say his approach and conduct have not been of much assistance to the court. In relation to what is said in [42] above has to be noted that Smith Sewgoolun was still involved in the affairs of Regiments: it is they who informed Mr Tate of the existence of the liquid assets of Regiments and not Mssrs Nyhonyha and Pillay.

[44] Having received the Tate report the parties, and especially the applicants, were faced with a conundrum. As we know, their case in the founding papers relied exclusively on the proceeds of the unbundling of Regiment's holding in Coral to prove that Regiments could meet all the debts listed in Table A. Table A excludes the liability to SARS which is to be announced soon by way of an assessment. In order to show that, despite this soon to be announced debt, Regiments remains solvent they drew attention to the holdings of Regiments in Kgoro and Little River.

[45] It is now trite that an applicant stands or falls on the facts set out in the founding papers.[13] Relying on this principle, and noting that the applicants' case has shifted from what they relied upon in the founding papers, SARS asked that the application be dismissed on this basis alone. But, there is no debate that Regiments does hold assets in the form of shares in Kgoro and Little River. The information regarding the existence of these assets was already placed before court during the consideration of part A of the application. It was contained in a report compiled by the curator. Taking this undisputed fact into account would not be prejudicial to SARS. The existence of these assets can only be advantageous to all the creditors, especially SARS. I conclude therefore that there is nothing legally objectionable in the applicants' reliance on the existence of these assets to prove the solvency of Regiments.

[46] It is common cause that Regiments opposed Vantages' application for the winding–up of Regiments. Mr Nyhonyha deposed to an affidavit in support of Regiment's opposition. Therein he contended that it was opportune to place Regiments in business rescue rather than to wind it up. He said:

> 'Business Rescue (as opposed to liquidation) is understandably in the best interest of creditors, including TSDBF and Transnet. It is extremely unlikely, for reasons elaborated on below, that TSDBF and Transnet will receive the full value of the settlement reached if Regiments is placed in liquidation. As an innocent, but intrinsically involved individual in the State Capture narrative, I feel morally obliged to see to it that TSDBF and Transnet receive full value of the settlement reached. I plainly also want all creditors of Regiments to be paid in full, which is entirely achievable. I have thus resolved to apply for the business rescue of Regiments.'

[47] Mr Pillay in another application concerning Regiments before the Western

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[13] *KwaZulu-Natal Joint Liaison Committee v MEC for Education, KwaZulu-Natal and Others* 2013 (4) SA 262 (CC).at [147]; *Naude and Another v Fraser* 1998 (4) SA (SCA) 539 at 563C – 564A; Director of Hospital Services v Mistry 1979 (1) SA 626 (A) at 635H – 636A.

Cape High Court echoed these sentiments.

[48] During the hearing their counsel, Mr Maleka SC, repeated Mssrs Nyhonyha and Pillays' commitment and added that the intention of the applicants is to pay SARS in full as soon as SARS identifies what is owed, and SARS grants Regiments the courtesy of a full and fair hearing if Regiments queries the amount claimed. The sentiments are certainly commendable and I accept, without more, that Mssrs Nyhonyha and Pillay wish to do right by all the creditors, including SARS which at present is only a contingent creditor.

[49] More importantly the papers show on a balance of probabilities that Regiments is – in the words of Mr Pillay - 'asset rich but cash poor'. It is, in other words, only commercially insolvent.

[50] It cannot be gainsaid that if all the creditors, including SARS – although it is only a contingent one at this stage - can be paid then there is no advantage to keeping the hand of the law on the estate of Regiments. However, sight cannot be lost of the fact that SARS would be a peferrent creditor if the winding-up order is not set aside. The object of an insolvency order is to ensure 'a due distribution of assets among creditors in the order of their preference.'[14] As such the creditors listed in Table A would have to await full payment to SARS before they received any payments from the estate if the winding-up order is not set aside. Losing this protection is SARS' greatest concern. But the protection can be catered for in the order that follows from this judgment. In such a case the removal of the hand of the

[14] *Walker v Syfret NO,* n 8 at 166

law on the estate would, I hold, result in the integrity of the law being kept intact. The law is only concerned with doing justice by the parties and in serving the public interests. In *casu* this would be achieved if, once the winding-up order is set aside, there are sufficient assets to pay all the creditors, including a contingent one such as SARS. It also does not go unnoticed that the concern of SARS of losing the protection afforded it by insolvency law can be attended to by itself taking proactive action through the rights accorded to it by ss 94(1) and 163 of the Tax Administration Act (TAA).[15] It is still in the process of issuing its assessments for the tax liability on Regiments. It should be placed on terms to issue this assessment speedily, and then be given a short period of time to take the rights accorded to it by ss 94(1) and 163 of the TAA. In addition, if Regiments is interdicted from dissipating any of its interests in Kgoro and Little River until the debt of SARS has been liquidated then SARS' concern would be addressed. This, of course, means that Regiments cannot utilise the assets in Kgoro and Little River to liquidate the debts listed in Table A. As for the creditors listed in Table B they should not be allowed to make any claim until SARS and those creditors listed in Table A are paid in full.

[51] It is to be noted that I say nothing of the debt of Coral to SARS. This is because that debt is of no moment. The outcome of this case has no bearing on Coral's liability to SARS.

[52] Finally, the applicants and SARS take issue with each other on whether

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[15] Section 94(1) reads:

" 94 Jeopardy assessments

(1) SARS may make a jeopardy assessment in advance of the date on which the return is normally due, if the Commissioner is satisfied that it is required to secure the collection of tax that would otherwise be in jeopardy.'

Section 163 allows SARS to obtain a preservation order on an *ex-parte* basis. It is lengthy and therefore not quoted here.

SARS' soon to be announced assessment can for present purposes be treated as a debt. Put differently, the applicants challenge SARS' claim to be a creditor. The applicants rely on a dictum in *SIP Project Managers* which holds that until an assessment has been issued and a date set as to when the amount claimed in the assessment is to be paid, the taxpayer cannot be said to be indebted to SARS.[16] In contrast SARS relies on longstanding authority holding to the contrary, namely, *Namex*.[17] In *Namex*, Van Heerden JA writing for the court concluded that a tax debt cannot be regarded as a contingent debt until an assessment has been released. The reasoning for this holding is that tax claims come into existence before a relevant assessment is issued as a tax liability arises at the end of the particular tax year. On this reasoning SARS claims that it is not a contingent creditor but an actual creditor. I have accepted the veracity of the claim in SARS' supplementary affidavit that the assessment for a total amount of R279 343 833.48 is soon to be issued. In the same vein I have accepted the submission (based on the co-operation of Mssrs Nyhonyha and Pillay with SARS) that Regiments intends to settle all debts owed to SARS even if that amount is R279 343 833.48. There is therefore no need to engage in the debate as to whether *Namex*, or *SIP Project Managers* is correct, save to say that *Namex* is a judgment of the Appellate Division – now Supreme Court of Appeal - and is binding on this court.

<u>Costs</u>

[53] The applicants seek costs from SARS should they succeed in setting aside the winding-up order. In the light of Mssrs Nyhonyha and Pillays' conduct referred to in [40] and [41] above, I take the view that SARS was correct to oppose the

[16] *SIP Project Managers (Pty) Ltd V Commissioner for the South African Revenue Service* [2020] ZAGPPHC at [20] – [21]
[17] *Namex (Edms) Bpk v Kommissaris van Binnelandse Inkomste* 1994 (2) SA 265 (A)

application as were the provisional liquidators. I also hold that SARS' contribution to matter as a whole – the contents of its papers and the submissions made on its behalf – were constructive and valuable. For this reason, I believe that the applicants should pay their own costs. As for the costs incurred by the provisional liquidators and Vantage, the applicants have agreed to pay all their costs. The order will reflect this.

[54] I thank all the counsel and the attorneys involved in this matter for their valuable assistance.

<u>Order</u>

[55] The following order is made:

1. The winding-up of Regiments Capital (Pty) Ltd (Regiments) is hereby set aside.
2. The 21st respondent (SARS) must within 15 calendar days of this order issue its assessments of the tax liabilities of Regiments.
3. Regiments must only commence paying the entities referred to in Table A in [8] of this judgment after the expiry of the 30 days from the date of this order.
4. Regiments must not pay any of the entities referred to in Table B in [8] of this judgment until all creditors listed in Table A and SARS, should it become one, have been paid in full.
5. The value of Regiments interests in Kgoro Consortium (Pty) Ltd and Little River Trading 191 (Pty) Ltd must not be dissipated in any way whatsoever until Regiments has settled any claim SARS makes in terms of para 2 of

this order or until this court amends this paragraph of the order.

6. Any applicant or respondent seeking an amendment of para 5 of this order may do so within thirty days of this order.
7. Regiments is to pay:
   - 7.1 the taxed costs of the first and second respondents (including the costs of this application) in the administration of Regiments; and
   - 7.2 the costs of Vantage in the application under Case Number 2019/8365.
8. Save for the contents of para 7 of this order each party is to pay its own costs.

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Vally J
Gauteng High Court (Witwatersrand Local Division)

Date of hearing:	26 January 2021
Date of judgment:	22 February 2021
For the 1st to 9th applicants:	IV Maleka SC with AC McKenzie and T Scott
Instructed by:	Smit Sewgoolum Inc
For the 10th applicant:	D Dorfling SC
Instructed by:	Moroka Attorneys
For the 11th applicant:	JG Cilliers SC
Instructed by:	Govender Patel Dladla Inc
For the 1st and 2nd respondents:	PG Cilliers SC with J L Myburgh and J L Verwey
Instructed by:	Rabie Botha and Associates Inc
For the 9th respondent:	K van Huysteen of Van Huysteen attorneys
For the 21st respondent:	S Smith Sewgoolunm SC with N Komar
Instructed by:	Savage, Jooste and Adams Inc