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REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL LOCAL DIVISION, DURBAN

CASE NO. 11033/2014

In the matter between:

VAN DER MERWE, LIEBENBERG DAWID RYK N.O.	1st Applicant
MONYELA KGASHANE CHRISTOPHER N.O.	2nd Applicant
JACOBS, WELCOME NORMAN N.O.	3rd Applicant
LUKHELE MOTSWANA GRACE N.O.	4th Applicant
MAHANYELE JOHANNA NINI N.O. [the first to fifth applicants are cited in their capacity as Joint provisional liquidators of the sixth applicant]	5th Applicant
PELA PLANT PROPRIETARY LIMITED (IN LIQUIDATION)	6th Applicant

and

UTI SOUTH AFRICA PROPRIETARY LIMITED	1st Respondent
TRANS-MED SHIPPING CC	2nd Respondent
COMMISSIONER SOUTH AFRICAN REVENUE SERVICE	3rd Respondent
ABSA BANK LIMITED	4th Respondent
FIRSTRAND BANK LIMITED	5th Respondent

BIDVEST BANK LIMITED 6th Respondent

JUDGMENT

ANNANDALE AJ:-

[1] The main issue in this case is whether the Commissioner, South African Revenue Services ("SARS") enjoys what might be called a "*super preference*" in respect of unpaid duty and VAT on the liquidation of a company liable to pay such charges.

<u>The background facts</u>

[2] The issue arises in the following circumstances. The first to fifth applicants are the joint provisional liquidators of the sixth applicant, to which I will refer as "*the company*". Prior to its liquidation, the company had sent 23 items of heavy duty earth moving equipment to the Democratic Republic of Congo for operations in that country. Some of the equipment is subject to instalment sales agreements with the fourth to sixth respondents with the usual reservations of ownership.

[3] When the company's operations in the Congo were complete, the equipment was returned to South Africa. The first respondent acted as the company's clearing and forwarding agent in respect of the importation of the

machinery which was entered for storage with deferment of customs duty and VAT in the second respondent's customs and excise storage warehouse when it arrived back in South Africa. The second respondent acted as the first respondent's sub-agent in this regard. The company was unable to secure the release of the property at that time due to its inability to pay duties and levies to SARS.

[4] Thereafter the company was placed under winding-up because it was unable to pay its debts. Upon their appointment, the liquidators became obliged in terms of section 391 of the Companies Act 61 of 1973[1] forthwith to recover and reduce into their possession all the assets and property of the company and apply them in satisfaction of the costs of the winding-up and the claims of creditors. By virtue of section 84 of the Insolvency Act 24 of 1936[2] ownership of the equipment subject to the instalment sales agreements passed to the liquidators who became entitled to claim possession of that equipment wherever it might be found[3].

[5] SARS, which is the third respondent, refuses to enter the equipment for home consumption and release it to the liquidators, contending that provisions in the Customs and Excise Act, 91 of 1964 ("the Customs Act") and the Value Added Tax Act 89 of 1991 prevent it from doing so unless and until duty and VAT are paid.

1 Which remains applicable to the winding-up of companies unable to pay their debts by virtue of item 9(1) and schedule 5 to the Companies Act, 2008
2 Which applies by virtue of s339 of the Old Companies Act
3 **Hubert Davies v The Body Corporate 1981 (3) SA 97 (D) at 103 D - F**

[6] The first and second respondents align themselves with SARS' interpretation of the Customs Act. They refuse to release the goods until the liquidators pay customs duty and VAT as well as the fees and charges due to them in respect of clearing and storage of the equipment. The total amounts due as at August 2014 were said to be in the region of R12 million in respect of duty and VAT and some R2 million for storage, which was accruing at R12 000 a day. They also contend that by virtue of section 83 of the Insolvency Act, they are entitled to retain possession of the equipment until the second meeting of creditors and would be entitled to sell the equipment themselves until that meeting is convened.

[7] It is not in dispute that the company, as importer of the equipment, is obliged by section 39 of the Customs Act to pay duty. There is some dispute about whether VAT is payable but that is not a question that falls to be decided in these proceedings. To the extent that VAT is payable, section 13(6) of the VAT Act stipulates that the provisions of the Customs Act relating to importation and clearance of goods and payment and recovery of duty apply *mutatis mutandis* to the payment of VAT.

The Questions Arising

[8] The principal question is whether the respondents are entitled or obliged by legislation to retain possession of the imported equipment until duty and VAT are first paid in full or whether they can be ordered to release the equipment to the liquidators and then prove and be paid their claims in terms of a liquidation and distribution account compiled in accordance with the

provisions regarding preference, security and the ranking of claims prescribed by the Insolvency Act.

[9] A subsidiary question, which only arises in the event that I find the Customs Act does not constitute an embargo on the release of goods without any payment of duty, is whether the first and second respondents are nonetheless entitled to retain possession of and realise the equipment until such time as the second meeting of creditors is convened.

[10] The questions are complex and I am indebted to all counsel for their helpful submissions and heads of argument.

The scope and purpose of the applicable legislation

[11] Mr Pammenter SC, who appeared on behalf of SARS and Mr Sawma SC who appeared for the first and second respondents, point to various provisions of the Customs Act which they submit create an embargo on the relief sought by the liquidators. Before dealing with these specific sections in detail, it is in my view important to consider the apparent scope and purpose of provisions relating to the winding up of companies unable to pay their debts, in the Companies Act and the Insolvency Act as well as the Customs and VAT Acts as these inform the interpretive exercise I am required to undertake[4]. As far as possible that exercise should render a result which does not create conflicts

[4] **Natal Joint Municipal Pension Fund v Endumeni Municipality 2012 (4) SA 593 (SCA) at [18]**

between various statutes, achieve absurd or unbusinesslike results or undermine the purpose of the statutes[5].

[12] The fundamental principle of insolvency law is that all creditors are subject to its provisions, save in exceptional cases where statutes specifically provide otherwise. This fundamental principle is given effect to in two ways. Firstly by the creation of a *concursus creditorum* in terms of which the claims and rights of all creditors of an insolvent company are determined as at the date of insolvency, with the result that one creditor is not entitled to improve its position in relation to others after the date of the *concursus*[6]. Secondly, by ensuring that every asset belonging to the insolvent company is properly realised by its liquidator so that the proceeds can be distributed amongst the company's creditors in the order of preference dictated by insolvency law and determined as at the *concursus*. So it is then that section 391 of the old Companies Act obliges a liquidator to recover "*all the assets and property*" of the insolvent company '*all*' being a word of the widest possible import.

[13] The purpose of the Insolvency Act as recorded in the preamble thereto is "*to consolidate and amend the law relating to insolvent persons and to their estates*". The aim of consolidation suggests that the Insolvency Act is intended to deal comprehensively with what will happen upon insolvency. It reflects and gives effect to the fundamental principle of insolvency law and contains an array of detailed provisions regarding the ranking of claims and how security claimed in respect of claims must be dealt with.

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5 **Endumeni** ***supra***
6 **Walker v Syfret 1911 AD 141 at 166**

[14] The rights and ranking of claims within the Insolvency Act does not countenance any creditor being granted an exceptional preference such as contended for by the respondents in this case. Consequently, if other legislation were to create such a preference and so detract from the scheme of the Insolvency Act as a whole and the rights of creditors in an insolvent estate, it would need to do so in the clearest of terms.

[15] The focus of the Customs and VAT Acts are entirely different. Their purpose is to regulate the flow of goods in and out of South Africa and ensure, *inter alia*, that customs duty and VAT is properly assessed and collected when payable. As taxation laws they fall to be interpreted contrary to the *fiscus* in a matter of doubt[7].

[16] Unsurprisingly the Customs Act contains no express provision as to what is to happen if anyone liable for Customs Duty or VAT becomes insolvent although section 1 does include an insolvent estate in the definition of "*person*". The VAT Act does however deal expressly with the issue of insolvency of a VAT vendor. Section 53 of the VAT Act provides that the trustee of the insolvent estate shall become a vendor and be treated as being the same person as the insolvent. There is no provision in the VAT Act which suggests that the law of insolvency does not apply to the collection of VAT.

[17] Section 99 of the Insolvency Act on the other hand deals specifically with customs duty and VAT which was due prior to liquidation. Section 99(1)(cA)

[7] **Estate Reynolds and others v Commissioner for Inland Revenue 1937 AD 57 at 70**

and (cD) accords such claims preference. That tends to suggest that the legislature considered claims by SARS both for VAT and customs duty to be subject to the provisions of the Insolvency Act. In my view the specific mention and the according of preference to unpaid customs duty and VAT is all the more significant given that the Land Bank retains its powers in relation to any property belonging to an insolvent estate and is therefore not subject to the provisions of the Insolvency Act[8].

[18] If the Customs Act does indeed constitute an embargo to the release of the equipment so it can be realised by the liquidators unless duty is paid first, that runs counter to the whole scheme of insolvency law. Firstly, a single creditor would be settled in full without needing to prove or have its claims tested. Secondly, as most companies are wound up due to an inability to pay their debts, almost inevitably their insolvent estates will be unable to pay SARS claims with the result that SARS, a single creditor, will become entitled to realise or destroy the equipment at its discretion[9], denying all other creditors the protections afforded to them by sections 83 and 89 of the Insolvency Act.

[19] In the light of the purpose of insolvency law, the manner in which those purposes are achieved as discussed above, and the specific provisions in section 99 of the Insolvency Act for the payment of customs duty and VAT upon insolvency, it seems to me that unless these provisions are overridden by other legislation, the position of SARS upon the liquidation of company liable for

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8 Section 90 of the Insolvency Act reads : "***Land Bank not affected by this Act*** *– the provisions of this Act shall not affect the provisions of any other law which confer powers and impose duties upon the Land and Agricultural Bank of South Africa in relation to any property belonging to an insolvent estate*".

9 In terms of s43 of the Customs Act.

payment of duty and VAT is no different to that of any other creditor. As was held in **Matanzima v Minister of Welfare and Pensions and Others 1990 (4) SA 1 (TKAD) at 3** "*the Commissioner is not given the right to elect or select the source from which he can obtain payment of tax due before sequestration. He is compelled to claim like any other creditor upon the insolvency of the debtor*"[10].

[20] Embargo provisions which pertain to insolvency are not unknown in our law but, where they exist, they are expressed in the clearest possible language and are specifically recognised by or subject to the Insolvency Act, as one would expect, given their effect on the *concursus* and the insolvency regime as a whole. As was said in **Gardiner, NO v London and South African Exploration Company and another (1893 – 1895) 7 HCG 190 at 195** in a similar contest : "*if it was intended by this section to give the landlord an exceptional preference in cases of insolvency, and thus to diminish pro tanto the rights of other creditors, this should and would have been enacted in express terms*".

[21] For example, section 118 (1) of the Local Government : Municipal Systems Act 32 of 2000[11] prohibits the registration of transfer of an immovable

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[10] **Matanzima** however dealt with income tax, not duty or VAT although s101 of the Insolvency Act accords SARS a similar preference in relation to income tax as s99 does in respect of duty and VAT

[11] Which reads in relevant part as follows:

property until all amounts due in respect of municipal service fees, rates and other charges due to the municipality within whose jurisdiction the property falls have been paid in full. The language of the embargo is clear and sub-section (2) specifically provides that the provisions of section 118 are subject to section 89[12] of the Insolvency Act[13] in the case of a transfer by a trustee of an insolvent estate.

[22] Section 15B(3)(a)(i)(aa) of the Sectional Titles Act 95 of 1986 contains a similar embargo provision, but again, it is in the clearest possible language[14]. In

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"(1) A registrar of deeds may not register the transfer of property except on production to that registrar of deeds of a prescribed certificate –

(a) ....

(b) Which certifies that all amounts that became due in connection with that property for municipal service fees, surcharges on fees, property rates and other municipal taxes, levies and duties during the two years preceding the date of application for the certificate have been fully paid."

[12] Section 89(4) of the Insolvency Act provides:
"(4) Notwithstanding the provisions of any law which prohibits the transfer of any immovable property unless any tax as defined in subsection (5) due thereon has been paid, that law shall not debar the trustee of an insolvent estate from transferring any immovable property in that estate for the purpose of liquidating the estate, if he has paid the tax which may have been due on that property in respect of the periods mentioned in subsection (1) and no preference shall be accorded to any claim for such tax in respect of any other period"

[13] The statement in City of Johannesburg v Even Grand 6 CC 2009(2) SA 111 (SCA) at [10] that the transfer of the properties was not subject to the provisions of s.89 of the Insolvency Act, refers to the fact that the transfers in that case occurred pursuant to s34(2) of the Administration of Estates Act. The court was not concerned with the transfer of a property by a trustee of an insolvent estate.

[14]

"(3) The registrar shall not register a transfer of a unit or of an undivided share therein, unless there is produced to him-

(a) A conveyancer's certificate confirming that as at date of registration-
(i)(aa) if a body corporate is deemed to be established in terms of section 36(1), that body corporate has certified that all moneys due to the body corporate by the transferor in respect of the said unit have been paid, or that provision has been made to the satisfaction of the body corporate for the payment thereof;"

<u>Nel NO v Body Corporate of the Seaways building and Another</u> 1996 (1) SA 131 (AD), the Appellate Division found that the provision applied whether or not the transferor was solvent[15]. Of significance to the present case, s89 of the Insolvency Act was thereafter amended to cater for the very problem the wording of s15B(3) created.

[23] None of the provisions which the respondents contend are embargo provisions are couched in similarly clear terms nor are they recognised by the Insolvency Act.

[24] It is against this background that I turn to consider the provisions of the Customs Act relied upon by the respondents, which do not speak directly to what is to happen in insolvency, oust or override the specific provisions of both the Insolvency Act and the old Companies Act.

<u>Relevent provisions of the Customs Act</u>

[25] Section 38 of the Customs Act provides that every importer of goods is obliged to make due entry of those goods as contemplated within section 39 which sets out the procedure and documents required for entering imported goods for any purpose in terms of the Customs Act.

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[15] At 135 C – D and 136 C - D

[26] Section 47A of the Customs Act stipulates that "*subject to the provisions of this Act, no person shall remove, receive, take deliver or deal with or in any imported or excisable goods or fuel levy goods unless such goods have been duly entered*".

[27] Section 20(1)(a) of the Customs Act permits dutiable imported goods to be entered for storage in a customs and excise warehouse with deferment of payment of duty. Section 20(1)(b) of the Customs Act stipulates that such entry shall be "*deemed to be due entry in respect of such goods ... for the purposes of the Customs Act*". It would appear that the need for a deeming provision arises from the fact that section 39(1)(b) of the Customs Act requires the payment of duties at the same time due entry is made. In the case of entry in terms of section 20(1)(a), duty is deferred. The effect of section 20(1)(b) is therefore that goods entered for storage are duly entered even though duty has not yet been paid.

[28] In the present case the equipment has been entered for storage with deferment of duty in the second respondent's customs and excise warehouse. By virtue of the deeming provision in section 20(1)(b), the equipment has been duly entered. Section 47A does not therefore constitute an impediment to the relief sought by the liquidators.

[29] Section 20(4) goes on to provide[16] "*no goods which have been stored or manufactured in a customs and excise warehouse shall be taken or delivered from such warehouse except in accordance with the rules and upon due entry*

[16] (subject to section 19A which does not apply in this case)

for any of the following purposes – (a) home consumption and payment of duty thereon".

[30] As the equipment has been duly entered, it is only if the words "*and payment of duty*" mean that such payment is a precondition to release of goods that section 20(4) might be said to prohibit the release of the equipment at present.

[31] Section 20(4) specifically refers to the purposes for which goods may be removed. The plain wording of the provisions does not require payment of duty prior to removal for home consumption. Mr King SC, who appeared together with Mr Gilbert for the applicants, submitted that had the legislature intended payment of duty to be a precondition it could have said so quite easily: "*home consumption upon payment of duty thereon*", or words to similar effect. I agree.

[32] By itself then, section 20(4) does not in my view create an embargo which disentitles the liquidators to the relief they seek. Section 20 (4) cannot however be viewed in isolation.

[33] Section 47(1) of the Customs Act provides for duty to be paid "*at the time of entry for home consumption*". Mr King SC submitted that those words do not mean the duty must be paid before imported goods are entered for home consumption, they merely record the point of time at which SARS becomes entitled to actually require payment. Mr Pammenter SC however submits that the words of section 47 constitute a form of embargo upon goods being cleared

for home consumption and points to the provisions of section 39(1)(b) of the Customs Act which requires payment of duty at the time of entry.

[34] Section 47 commences with the words "*subject to the provisions of this Act*". Section 20(1)(a) and (b) create exceptions to the ordinary regime of payment of duty upon entry to which sections 39(1)(b) and 47 speak. Section 47 must consequently be read subject to that exception and thus likewise does not debar the liquidators from the relief they claim.

[35] SARS also relies on section 107(2)(a)(i) which reads: "*Subject to the provisions of this Act, the Commissioner shall not except on such conditions, including conditions relating to security, as may be determined by him or her, allow goods to pass from his or her control until the provisions of this Act or any law relating to the importation, exportation, trans-shipment or transit carries through the Republic of goods, have been complied with in respect of such goods*".

[36] Upon a plain wording of that section, it is not an absolute embargo. On the contrary, the fact that the Commissioner may impose conditions relating to security and then allow goods to pass from his or her control before the provisions of the Customs Act had been complied with, indicates in my view that sections such as section 20(4) and 47(1) are not absolute embargos.

[37] Finally SARS relies on a statutory lien as evidence that payment of duty must precede the release of the equipment for home consumption.

[38] Section 114(1)(aC) creates a lien in favour of SARS over any dutiable goods stored in a customs and excise warehouse as security for the duty on such goods[17]. Section 114(1)(b)(i) goes on to provide that the claims of the State shall have priority over the claims of all persons upon anything subject to a lien contemplated in terms of paragraph (aC) and may be enforced in accordance with the provisions of section 114 if the debt is not paid.

[39] Statutory liens such as those created by section 114(1)(aC) are not dependent upon the lien holder being in possession of the goods. Section 83 read with section 95 of the Insolvency Act ensure that such party's claim to security is retained despite their relinquishing possession of goods to the liquidators. (See also **Roux en Andere v Van Rensburg NO 1996 (4) SA 271 AA at 276 F – I**). In **Roux**'s case, the Appellate Division, as it then was, approved of and applied what had been said in **Kahan NO v Hydro Holdings (Pty) Ltd 1980 (3) SA 511 (T) 514 to 515**, which is instructive also in the present matter. In **Kahan** the court was dealing with whether a person claiming an improvement lien over immovable property in an insolvent estate was required to relinquish possession to the trustee. The lien holder had sought to argue that the duty to relinquish possession of goods by the holder of a real right over an asset in the insolvent estate extended only to movables and not immovables. King J rejected this contention because, were it right it would have "*the result that a trustee could not and cannot fulfil his duty to realise*

[17] The section reads as follows:
"*(aC) Any dutiable goods of whatever nature, which are stored in any customs and excise warehouse licensed for any purpose under this Act shall be subject to a lien, as if the goods are detained in accordance with the provisions of subsection (2), as security ...*"

assets and finalise an estate, and an estate would remain alive at the whim of a creditor holding real right over immovable property".

[40] Mr King SC submitted that the very existence of such a statutory lien supports the notion that the Customs Act was never intended to create an embargo against clearance for home consumption unless duty and VAT were first paid in full. If such an embargo existed, he submitted, there would be no need for any such lien. At a level of logic there is much force in that submission.

[41] The genesis of section 114 (1)(aC) is also instructive. It appears to have been introduced to accord SARS security in goods where duty and VAT have not been paid but because the goods had not been detained under the provisions of section 114(1)(iv) of the Customs Act, SARS was left only with a claim which was unsecured and subject to the limited preference afforded by section 99 of the Insolvency Act. That was the situation which arose in **Secretary for Customs and Excise v Millman NO 1975 (3) SA 544 (A)** and section 114(1)(aC) was inserted into the Customs Act some years later.

[42] I am satisfied that, in the scheme of the Customs Act as a whole and given the protection afforded by sections 83 and 95 of the Insolvency Act, the statutory lien created by section 114(1)(aC) serves only to provide SARS with additional security and is not a bar to the relief sought by the liquidators.

[43] In my view it follows then that properly construed, the Customs and VAT Acts do not preclude the respondents from releasing the equipment to the liquidators.

[44] It will have been apparent from the consideration of the statutory provisions referred to above that there is a degree of uncertainty and ambiguity which arises when the provisions of the Old Companies Act and the Insolvency Act are considered together with the Customs Act. Although I have found that, properly interpreted, the provisions in the Customs Act upon which the respondents rely are not a bar to the relief sought by the liquidators, it is as well in the light of the apparent tension between the various provisions to consider the result which would be produced were section 47(1) interpreted as imposing an embargo against entry for home consumption until duty was paid. To the extent that there is uncertainty or ambiguity, I should in any event prefer an interpretation which does not result in "*some injustice, absurdity, anomaly or contradiction*"[18].

[45] In my view, interpreting section 47(1) as an embargo provision is likely to cause injustice to other creditors of the insolvent estate of the company and lead to a potentially absurd result.

[46] As companies in liquidation are almost always unable to pay their debts, there will ordinarily be no prospect that the liquidators could, out of the insolvent company's own resources, pay customs duty and VAT before disposing of the equipment. Ordinarily, the logical source of funds with which

[18] E A Kellaway, Principles of Legal Interpretation at p160

to pay customs duty and VAT would be the proceeds of the sale of the equipment itself. Few purchasers would be willing first to pay SARS before being able to take delivery of the equipment which they have bought. Of course no purchaser would be prepared to pay SARS if the value of duties and VAT outstanding exceeded the value of the equipment itself. In that event, if the respondents' interpretation of the legislation is correct, the goods would likely never be realised because there would not be enough money to overcome the embargo. That would result in the equipment ending up in a state warehouse to be sold by SARS in terms of section 43 of the Customs Act.

[47] That is in my view an absurd result, particularly given the purpose of the insolvency regime which is to realise all the property of the company at best value in the interests of all creditors. It was precisely these types of difficulties that caused the court in **London and South African Exploration Co v Official Liquidator of North-Eastern Biltfontein and The Registrar of Deeds (1895) 12 SC 225**, to read a provision which apparently created an embargo on transfer of property before certain payments were made, as applying only to voluntary transfers, not those consequent upon insolvency.

[48] The interpretation contended for by the respondents also results in the anomaly that assets which form part of the insolvent estate are dealt with not by the liquidators but by SARS (which need not even prove a claim) and without any input from or control by the liquidators or other creditors. It could not have been the intention of the legislature that assets of an insolvent estate, in respect of which other creditors also have real rights, should be dealt with completely outside the machinery of insolvency.

[49] I am therefore satisfied that any other interpretation of the relevant provisions would lead to these absurd and anomalous results and so, to the extent that there is uncertainty or ambiguity in the wording of the sections themselves, my interpretation must be correct.

[50] In the light of the conclusion I have come to in relation to the embargo question, it is necessary to consider whether the liquidators are entitled to claim possession of the equipment before the second meeting of creditors in the light of section 83 of the Insolvency Act.

Section 83 of the Insolvency Act

[51] The applicants contend that the first and second respondents are not entitled to rely on a right of retention until the second meeting of creditors because that approach is inconsistent with the attitude they adopted on the papers. Mr King SC submitted that correspondence exchanged prior to the institution of the present application revealed that the first and second respondents wished to ensure that their right to security would not be prejudiced if the goods were released to the applicants but they viewed the fundamental obstacle to such relief as being SARS refusal to clear the equipment for home consumption. Having made that election, so it was argued, they are not now entitled to insist upon retaining the equipment pending the holding of a second meeting of creditors.

[52] I am not satisfied that the correspondence goes as far as Mr King SC suggests. The first and second respondents indicated that they were more than amenable to reaching an agreement with any party in respect of the release of the equipment provided their costs were paid to date as well as the additional disbursements relating to VAT and customs duty. That does not amount to a waiver of any rights they may have in terms of section 83. It is so that the first and second respondents indicated in correspondence that they would seek to give notice in terms of section 83(1) in relation to the equipment but that too is not an unequivocal statement that the first and second respondents waived any other rights in terms of section 83 they might have.

[53] The question therefore arises whether section 83 accords the first and second respondents the rights for which they contend. The section reads in relevant part as follows:

> *"83. Realisation of securities for claims*
>
> *(1) A creditor of an insolvent estate who holds as security for his claim any movable property shall, before the second meeting of the creditors of that estate, give notice in writing of that fact to the Master, and to the trustee if one has been appointed.*
>
> *(2) ……………………*
>
> *(3) If such property does not consist of a marketable security of bill of exchange, the trustee may, within 7 days as from the receipt of the notice mentioned in sub-section (1) or within 7 days as from the date which the certificate of appointment issued by the*

Master in terms of sub-section (1) of section 18 or sub-section (2) of section fifty-six reached him, whichever be the later, take over the property from the creditor at a value agreed upon between the trustee and the creditor or at the full amount of the creditor's claim, and if the trustee does not so take over the property the creditor may, after the expiration of the said period but before the said meeting, realise the property in the manner and on the conditions mentioned in sub-paragraph

(4) ……………………………

(5) *the creditor shall, as soon as possible after he has realised such property prove in terms of section 44 the claim thereby secured and he shall attach to the affidavit submitted in proof of his claims a statement of the proceeds of the realisation and of the facts on which he relies for his preference. (6) if he has not so realised such property before the second meeting of creditors, he shall as soon as possible after the commencement of that meeting deliver the property to the trustee, for the benefit of the insolvent estate ……………."*

[54] On the strength of these provisions Mr Sawma SC argued that in terms of section 83(6), it is only if a secured creditor has not realised the movable property before the second meeting of creditors that he or she becomes obliged to deliver the property to the trustee for the benefit of the insolvent estate. That being so, he submitted that section 391 of the 1973 Companies Act was not

intended to deal with a specific situation of a creditor enjoying a right of retention in respect of the property of any insolvent company. Secured creditors, so he argued, need to be dealt with in accordance with the provisions of section 366 of the Old Companies Act read with the applicable provisions of the Insolvency Act, in particular section 83 which provides that a secured creditor and the liquidator shall have the same right respectively to take over the security as a secured creditor as a trustee would have under the laws relating to insolvency.

[55] In support of these submissions, Mr Sawma SC relies on **Millman NO v Twiggs and Another 1995 (3) SA 674 (A)**, particularly the following passage at 679A to D:

> "*I am by no means convinced that such a pledgee is indeed obliged to surrender the object of his pledge; but even if he is, what we have been urged to do is to deprive the pledgee of his lawful rights and to grant to concurrent creditors a benefit to which they are not entitled. I cannot find any justification for, or any indication of, an intention to achieve such a startling result in either Act. Apart from the presumption against the forfeiture of rights which generally affects the interpretation of statutes, one finds, in respect of property pledged to secure the cedent's own debt, provisions (such as ss 19(1), 19(3)(a) and 83 of the Insolvency Act read with s366 of the Companies Act) plainly preserving the rights of the pledgee and in fact extending them so that he may himself realise the pledged property before the second meeting of creditors. Moreover, until that meeting he is not obliged to surrender*".

[56] In Millman the court was not required to decide whether section 83 entitled a creditor as of right to retain possession of property until the second meeting of creditors.

[57] The references in the judgment to section 391 of the Companies Act and section 83 of the Insolvency Act arose in considering the appellant's contention that because the third party was not a creditor in the insolvent estate of the cedent, section 391 of the Companies Act meant that his rights could be ignored and the liquidator could receive the full proceeds of the right to payment which had been ceded by the insolvent[19]. The reference to "*such a pledgee*" is a reference to a pledgee who holds as security one right securing two different debts, one of which is owed by the insolvent and the other by an outside third party. The first and second respondents do not fall into that category.

[58] In any event, by reason of the fact that the court in Millman was considering a different issue to that which presently arises, the passage relied on by counsel for the first and second respondents is *obiter* and does not form an essential part of the court's reasoning on the issue with which it was seized[20]. The judgment deliberately did not deal with the pledgee's obligation to surrender the pledge but instead, assuming he was so obliged, considered the question of whether that would deprive the pledgee of his right to security[21].

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[19] **Millman *supra* at 678 G to H**
[20] **Pretoria City Council v Levinson 1949 (3) SA 305 at 317; Fourie v Edkins 2013 (6) SA 576 SCA at [112]**
[21] **Millman *supra* at 679 A to D**

[59] It is however correct, as Mr Sawma points out, that the court in Millman referred to the judgments in Wells NO v Molan and Another **1965 (4) SA 480 (T) at 483 B to C** and Soane v Lyle NO **1980 (3) SA 183 (D) at 186 G to 187 A** where certain observations were made about the scheme of section 83, one of which was that the section pre-supposes that the creditor shall remain in possession of the property until the second meeting of creditors, if the creditor has not realised the property before then[22].

[60] That supposition does appear to be inherent in the scheme of section 83(3) of the Insolvency Act as the creditor is given the right, subject to the notice provisions in section 83(1), to realise the property in the event that the trustee does not avail himself of his rights to take over the property from the creditor at an agreed value or the full amount of the creditor's claim.

[61] The very fact however that the creditor is given the right to realise the proceeds in the manner and on the conditions mentioned in section 83(8), which in the present instance means sale by public auction, reveals a further supposition in the scheme of section 83 not mentioned either in Wells or Soane. That is, that the creditor is in fact able to realise the property in the manner and on the conditions mentioned in sub-section 8. In the present instance, the first and second respondents are not the importers of the equipment and cannot realise the equipment by public auction as the section envisages. It would lead to anomalous and absurd results to find that section 83(3) of the Insolvency Act applied in such circumstances where a continued right to retention would serve no purpose for the creditor and could, as in this case, have an overall damaging

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[22] See Wells NO *supra* **at 483 B to C** quoted with approval in Soane *supra* **at 186 G to 187 A**

effect on the insolvent estate because claims for storage would continue to mount for so long as the creditor retained possession.

[62] There is, in my view, a further supposition inherent in section 83 of the Insolvency Act and that is that the property in question secures only the claim of the creditor in possession thereof. Here, the equipment is subject to a statutory lien in favour of SARS and some items of equipment provide security for the claims of the sellers in terms of the instalment sales. In such circumstances it makes no sense to place the realisation of such assets solely in the hands of the first and second respondents thereby depriving the liquidators of their usual powers to realise the insolvent company's assets to best advantage, having regard to the wishes and instructions of all creditors. Particularly as a creditor exercising its rights in terms of section 83(8) of the Insolvency Act may only realise the goods by way of public auction where it is corporeal movable property such as the equipment at issue in this case, such creditor may well achieve a sales price far below that which the liquidators might achieve through sales by private treaty. That would be prejudicial to the rights of other creditors in respect of whose claims the goods provide security and which creditors are afforded no right to object to the sales in the scheme of section 83. It is inconceivable that section 83 of the Insolvency Act was intended to apply in such circumstances given the general scheme of the Insolvency Act and the fundamental principles which underlie it.

[63] I consequently find that section 83 does not apply in the present circumstances and does not afford the first and second respondents a right to refuse to deliver the equipment to the liquidators.

[64] It follows too then, that there is no basis upon which the first and second respondents can resist delivery of the equipment to the applicants, provided of course the applicants provide the correct documentation to have the goods cleared for purposes of home consumption.

Order

[65] At the hearing of the application, the applicants sought to amend the relief as originally framed in the notice of motion so as to provide for entry and clearance of the equipment only upon the production of the proper documentation. The amendment of that relief was not opposed and is essential to give proper effect to the substantive relief sought by the liquidators.

[66] I consequently make the following order:

(a) The first to fifth applicants are granted leave in terms of Section 387(3) as read with Section 386(5) of the Companies Act, 1973 ("the Act") read with item 9(1) of Schedule 5 to the Companies Act, 2008 to bring this application in the name and on behalf of the sixth applicant.

(b) Provided that the applicants first submit the usual documentation required by the third respondent when importers wish to have imported goods for home consumption, the third respondent is ordered to enter for home consumption the property referred to

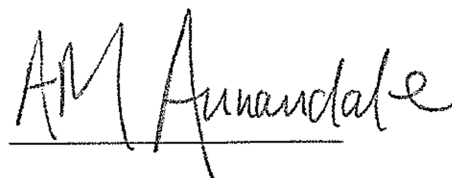
in annexure "X" to the notice of motion, notwithstanding that the applicants do not pay any customs duty or VAT which might otherwise become payable to the third respondent upon such clearance.

(c) Provided that the applicants comply with paragraph (b) hereof, the first and second respondents are ordered to release the property listed in annexure "X" to the notice of motion into the possession and control of the first to fifth applicants, notwithstanding that the applicants do not, at the time of such release, pay to the first and/or second respondents any amounts in respect of which a *lien* is claimed over the said property.

(d) That the claims of the respondents are to be dealt with in the winding up of the sixth applicant in terms of the law relating to insolvency as contemplated in section 339 of the Act read with items 9(1) of schedule 5 to the Companies Act, 2008.

(e) That the release of the property into the possession and under the control of the first and fifth applicants shall not detract from any claim, right, lien or hypothec the respondents or others may have over the property, subject to the laws relating to insolvency as contemplated in section 339 of the Act, read with item 9(1) of schedule 5 to the Companies Act 2008.

(f) The first, second and third respondents are to pay the costs of this applicant, jointly and severally, the one paying the other(s) to be absolved.



A M ANNANDALE

Date of Hearing : 7 November 2014

Date of Judgment: 17 ~~15~~ December 2014

For Applicants: J King SC with him B Gilbert

Instructed by: Reitz Attorneys

For first & second respondents: A G Sawma SC

Instructed by: Wright Rose-Innes Inc.

For third respondent: C J Pammenter SC

Instructed by : Ngubane & Partners Inc.