IN THE HIGH COURT OF SWAZILAND

JUDGMENT

Case No.2034/2004

Case No. 1275/2011

Case No. 1276/2011

Consolidated

In the matter between

SWAZILAND DEVELOPMENT AND SAVINGS BANK **APPLICANT**

And

MARTINUS JACOBUS DEWALD BREYTENBACH N.O. **1ST RESPONDENT**

BRIAN ST CLAIR COOPER N.O. **2ND RESPONDENT**

JACOBUS HENDRIKUS JANSE

VAN RENSBURG N.O. **3RD RESPONDENT**

SIMONE LIESEL MARGADI N.O. **4TH RESPONDENT**

PAUL MHLABA SHILUBANE N.O. **5TH RESPONDENT**

THE ATTORNEY GENERAL **6TH RESPONDENT**

THE MASTER OF THE HIGH COURT **7TH RESPONDENT**

Neutral citation: *Swaziland Development and Savings Bank vs Martinus Jacobus Dewald and six others (2034/2004, 1275/2011 and 1276/2011)* [2012 SZHC 179

Coram: **OTA J.**

Heard: **26th June 2012**

Delivered: **10th August 2012**

Summary: **Recognition of foreign Trustees and liquidators: Whether local court competent to remove foreign trustees and liquidators: Statutory obligations of trustees and liquidators: Whether breach thereof.**

OTA J.

[1] Following the demise of Dumisa Mbusi Dlamini, his insolvent estate was placed under sequestration by the High Court of South Africa, Transvaal Provincial Division, on the 14th of August 2003, for the benefit of his creditors, in South Africa. Four trustees (1st, 2nd , 3rd and 4th Respondents herein) were subsequently appointed for the insolvent estate placed under sequestration, by the Master of the High Court of South Africa, Transvaal, Provincial Division. Prior to these events, the Applicant had successfully sued and obtained judgment in the sum of E56,089,304=54, against Dumisa Mbusi Dlamini on or about 19th March 1999, before his death. In the wake of Dumisa Dlamini's death and his estate being placed under sequestration in South Africa, the Applicant proceeded to South Africa where it proved a claim as a creditor in South Africa, in the said sum of E56,089,304=54.

[2] It is on record that the Trustees of the insolvent estate moved an exparte application before the High Court of Swaziland for recognition of the sequestration order issued by the High Court of South Africa Transvaal, Provincial Division. The High Court of Swaziland per **Matsebula J**, issued the recognition order on the 28th of July 2004, in the following terms:-

“

1. *The order of the High Court of South Africa (Transvaal Provincial Division) made under Case No. 1399/2003 on the 14th August 2003, in terms of which the estate of Dumisa Mbusi Dlamini was sequestrated, is hereby recognized*
2. *The appointment of the following Trustees is hereby recognized:-*
   - *Marthinus Jacobus Dewald Breytenbach*
   - *Jacobus Hendrikus Janse Van Rensburg*
   - *Brain st clair Cooper*
   - *Simone Liesel Magardie*
3. *Section 5-17 of the Recognition of External Trustees and Liquidators Act No. 51 of 1932 shall apply to the Administration of the Insolvent Estate in Swaziland.*
4. *Paul Mhlaba Shilubane be and is hereby appointed jointly with the Trustees in 2 above as a co-trustee of the insolvent Estate*
5. *The costs of this application shall be costs in the administration of the insolvent estate*
6. *Such further and alternative relief as the Honourable court deems fit”*

[3] It is the foregoing recognition order and the acts performed or not performed by the Trustees recognized therein, as well as the liquidators appointed for two companies of the Insolvent estate namely **BHK (Pty) Limited (in liquidation) and Broadlands (Pty) Limited (in liquidation)** that have come under attack by the Applicant, in three applications launched under Case No. 2034/04, Case No. 1275/11 and Case No 1276/11, which I consolidated and heard as one.

[4] Now in Case No. 2034/04, the Applicant contends for the following reliefs against the 5 trustees of the Insolvent Estate:-

"

1. *The 1st, 2nd, 3rd, 4th and 5th respondents be and are hereby removed as Trustees of the Insolvent Estate of Dumisa Mbusi Dlamini, and,*

   Alternatively

2. *The 1st, 2nd, 3rd, 4th and 5th Respondents recognition as Trustees of the insolvent Estate of Dumisa Mbusi Dlamini be and is hereby withdrawn.*

3. *An order directing the Master to convene a meeting of creditors of the Insolvent Estate of Dumisa Mbusi Dlamini for the purpose of electing new Trustees within 14 days from the date of this order.*
4. *The 1st, 2nd, 3rd, 4th and 5th Respondents be and are hereby directed to render an account of their administration of the Insolvent Estate of Dumisa Mbusi Dlamini to the Master of the High Court within 3o days from the date of this order*
5. *Costs of suit*
6. *Such further and alternative relief as the Honourable court deems fit*

[5] In Case No. 1275/2011, the Applicant sued the liquidators of BHK (Pty) Limited (in liquidation)1st Respondent, Brian st Clair Cooper N.O. and 2nd Respondent Paul Mhlaba Shilubane N.O. (deceased), amongst others, claiming for the following reliefs:-

"

1. *The 1st and 2nd Respondents be and are hereby removed as liquidators of BHK (Pty) Limited (in liquidation) and*

Alternatively;

2. *An order directing the Master to convene a meeting of creditors of BHK (Pty) Limited (in liquidation) for the purpose of electing new liquidators within 14 days from the date of this order.*

4. *The 1st and 2nd Respondents be and are hereby directed to render an account of their administration of BHK (Pty) Limited to the Master of the High Court within 30 days from the date of this order.*

5. *Costs of suit*

6. *Such further and alternative relief as the Honourable court deems fit".*

[6] Similarly, in Case No. 1276/2011, Applicant sued 1st and 2nd Respondents, Brian St Clair Cooper N.O. and Paul Shilubane N.O. respectively, the liquidators of Broadlands (Pty) Limited (in liquidation) amongst others claiming the following reliefs:-

"

1. *The 1st and 2nd Respondents be and are hereby removed as liquidators of Broadlands (Pty) Limited (in Liquidation) and,*

   Alternatively;

2. *An order directing the Master to convene a meeting of creditors of Broadlands (Pty) Limited (in liquidation) for the purpose of electing new liquidators within 14 days from the date of this order.*
3. *The 1st and 2nd Respondents be and are hereby directed to render an account of their administration of the Insolvent Estate of Broadlands (Pty) Limited (in liquidation) to the Master of the High Court within 30 days from the date of this order.*
4. *Costs of suit*
5. *Such further and alternative relief as the Honourable court deems fit*."

[7] It is beyond dispute that the Applicant seeks the removal of the Trustees and Liquidators in the three actions as consolidated. There are several affidavits filed by the parties in support of their respective stanze on the issues raised herein.

[8] It is apposite for me at this juncture, to first address the points of law raised and argued by the Respondents, seeking to defeat these applications in *limine*. I will proceed to deal with all the points raised *in limine* in the different applications together. The Respondents raised the following points *in limine.*

1. Locus standi
2. Non joinder of Swaziland Electricity Board
3. Prayer for removal of Trustees (incompetent)
4. Prayer for withdrawal of recognition (incompetent)
5. Prayer for election of new Trustees (incompetent)
6. Prayers 4 and 3 in 1275/11 & 1276/11 respectively, for the lodging of accounts (incompetent)

[9] Let me say it categorically here from the outset, that the issue of non joinder of Swaziland Electricity Board, raised in 2 above, has been overtaken by events. It is common cause that the Swaziland Electricity Board, which is the only other creditor of the insolvent estate in Swaziland, has since filed a supporting affidavit to the effect that it has no objection to the action taken

by the Applicant. This state of affairs renders any further consideration of this issue nugatory.

[10] I will treat the question of locus standi together with the other questions raised in 3, 4, 5 and 6 above.

[11] Now, the Respondents contend that the Applicant lacks the requisite standing to bring these actions. The Respondents take is that even though the Applicant had proved a claim in South Africa, the relevant statutes require that it proves a claim in Swaziland to be entitled to payment in Swaziland. Therefore, the Applicant has no right to demand any form of performance in any country other than where it has proved a claim. Learned counsel for the Respondents Ms JM Van der Walt, referred the court to several sections of the Insolvency Act and section 8(c) of the Recognition of External Trustees and Liquidators Act 1932 (The recognition Act), and contended, that the question of *locus standi* must be considered vis a vis these statutes when juxtaposed with the prayers sought i.e removal of the Trustees and Liquidators and the rendering of account.

[12] It is further the Respondents position that the dilatory activities employed by the Applicant in proving its claim in Swaziland, is sufficient for the Applicant to be deemed to have waived any rights it may have had on the question of *locus standi.*

[13] It is also the Respondents position, that the prayer for the removal of Trustees is incompetent, in the sense that the Trustees were appointed in a foreign country by a foreign authority, therefore, this court has no jurisdiction to remove them. Similarly, that the prayer for election of new Trustees is also incompetent because this court granted no sequestration order, as such, the provisions of the Insolvency Act, 1955 as to the election of Trustees cannot find application. Further, that the prayer for withdrawal of the order of recognition is also incompetent as neither the order nor the applicable provisions of the Recognition Act provide for same. The court who granted the order is now functus officio. The only avenue open to the Applicant in the circumstances was to apply for a rescission or setting aside of the order or appeal against same.

[14] Further, that prayers 4 and 3 in 1275/11 and 1276/11 respectively, are not legally competent because section 342 (1) of the Companies Act, 2009, stipulates that the court may only be approached by the Master or a person having an interest in the company, for an order for the lodging of such account after giving the liquidator not less than two weeks notice. That no such notice was received.

[15] It was contended replicando for the Applicant by Applicant's counsel Mr Magagula, that the Applicant has *locus standi* to institute these proceedings because it is a creditor within the meaning of the term creditors in terms of section 2 of the Insolvency Act. That the Applicant has proved a claim both in South Africa and in Swaziland. That the fact that Applicant is a creditor was recognized by the Respondents when they made the application for the recognition of the sequestration order and Trustees in Swaziland as is depicted in page 235 of the book of pleadings. Therefore, the Respondents cannot approbate and reprobate on this issue at the same time. That once an order was issued by the court recognizing the sequestration and external Trustees and liquidators, such an order assumed the status of an order issued by a competent court in Swaziland. Therefore, this court has the jurisdiction

to remove the Trustees, order election of new trustees or withdraw the recognition.

[16] The whole point taken in limine by the Respondents hinges on the allegation that the Applicant lacks the standing to institute these proceedings because it has failed to prove a claim in Swaziland. From a close reading of the papers, it appears to me that the Applicant eventually proved a claim in Swaziland albeit belatedly. I will come to this matter anon. However, for the sake of completeness and for the sake of the growth and advancement of the jurisprudence of the Kingdom, I deem it expedient to still embark on a determination of the points which the Respondents raised *in limine.*

[17] Now, locus standi simply means an interest in the subject matter of the action, which gives a person the right to bring the action.

[18] The term locus standi denotes legal capacity to institute proceedings in a court of law and is used interchangeably with terms like “standing” or “title to sue”. It has also been defined as the right of a party to appear and be heard

on a question before any court or tribunal. Whether or not a party or plaintiff has locus standi in an action is easily decipherable from the pleadings . For a plaintiff to be said to have locus standi, the facts pleaded must established his right and obligations in the suit. In other words the facts pleaded must demonstrated his interest in the action. It is therefore the interest in the subject matter of the action that gives the standing.

[19] Now, the first part of the contention of the Respondents on this question is that the Applicant has no standing because it failed to prove a claim in Swaziland and therefore the action is incompetent. This argument in my view cannot however apply to the prayers sought in paragraph I of the said application, where the Applicant prayed for the removal of the Trustees. I say this because by the clear and unambiguous language of section 60 of the Insolvency Act, it is the Master or any other person interested that has the standing to launch an application for the removal of a Trustee from his office. That legislation is couched in the following language:-

"*Upon the application of the Master or <u>of any other person interested</u> the court may remove a trustee from his office"* (underline mine)

[20] To my mind the term *"<u>any other person interested"</u>* cannot be construed as limited to only creditors who have proved a claim in the Insolvent estate, without any express provision in the statute to that effect. To my mind, any person with a legal or equitable interest in the insolvent estate, whether proved or unproved, falls within the contemplation of the phrase "*any other person interested"* and has the competence to institute proceedings for the removal of the Trustees from office on any of the grounds detailed in section 60, which are as follows:-

"

(a) That he was not qualified for election or appointment as trustee or that his election or appointment was for any other reason illegal, or that he has become disqualified from election of appointment as a trustee, or

(b) That he has failed to perform satisfactorily any duty imposed upon him by the Act or to comply with a lawful demand of the Master or

(c) That he is mentally or physically incapable of performing satisfactorily his duties as trustee"

[21] In casu, it is common cause on the state of the pleadings, that the Insolvent Dumisa Dlamini owed the Applicant the amount of R56,089,304=54, This fact was recognized by the Respondents in their papers. The Applicant was therefore a creditor to the Insolvent prior to the sequestration. Section 2 of the Insolvency Act defines the term creditor as *"any person who, or the estate of any person which, is a creditor in the usual sense of the word"*

[22] The usual sense of the word *"creditor"* as ascribed to that word by The New International Websters Comprehensive Dictionary, page 308 is *"one to whom another is pecuniary indebted"* It is therefore the indebtedness of the Insolvent Estate in the tune of E56,089,304=54, to the Applicant that makes it an entity with interest in the Insolvent estate and confers the Applicant, with the standing that gives it the right to launch this application for the removal of the Trustees on the grounds of non compliance with statutory requirements. I therefore hold that the Applicant as an entity with pecuniary

interest in the Insolvent estate, has the right to launch the application instant for the removal of the Trustees on the grounds of non compliance with statutory requirements. I will come to the question of whether or not the Applicant has proved a claim in Swaziland in a moment.

[23] Further the Respondents contend that the prayer for the removal of the Trustees and appointment of new trustees are in competent regard being had to the fact that the sequestration of the insolvent Estate and appointment of the Trustees was ordered by a court in South Africa and was merely recognized by the court in Swaziland. Therefore, so goes the argument, since no sequestration was ordered or Trustees appointed by the courts in Swaziland, this court lacks the jurisdiction or competence to order the removal of the foreign Trustees or the appointment of new Trustees.

[24] Now, the recognition of foreign Trustees and Liquidators in Swaziland is regulated by statute. It is thus to the enabling statute that I must of necessity have recourse in defining the purport of such an order of recognition once made. Now, sections 4(1) and 6 of the recognition Act state as follows:-

"4 (1) The High Court may order the recognition within Swaziland of any external trustee or external liquidator who has specified in writing a place in Swaziland as domicilium citandi on production to it of the letter of appointment of such external trustee or external liquidator and thereupon the property in Swaziland of the bankrupt, insolvent or company in liquidation, in respect of which the letter of appointment was made shall vest in such external trustee or external liquidator for the purpose of the bankruptcy, insolvency or liquidation as though such property were the property of an insolvent estate sequestrated, or company placed in liquidation, by order of a competent court of Swaziland but subject to the provisions of this Act (underlining mine).

6. The proof and admission or rejection of claims against such estate or company and its liability for them to the extent of its property, the application of such property, as well as questions of mortgage or preference in respect thereof, shall be regulated as if the estate were sequestrated or the company placed in liquidation by order of a competent court in Swaziland". (emphasis mine)

[25] There is no doubt that a judicial Act carried out in South Africa, such as a sequestration order or the appointment of Trustees and Liquidators will not have effect in Swaziland. However, if the sequestration order and the external Trustees and Liquidators are recognized pursuant to a recognition order in Swaziland, such an order now forms the decision of a competent court in Swaziland. In these circumstances, a court in Swaziland would have the requisite jurisdiction to remove such Trustees or Liquidators from office if approached by an interested party.

[26] That is why the enabling statute, which I have detailed ante, states that upon such a recognition order, the property of the Insolvent estate shall be regulated as if the estate were sequestrated or the company placed in liquidation by order of a competent court in Swaziland. The effect of such order of recognition is essentially the same as an order of sequestration. To hold a contrary view to my mind would be unrealistic and absurd. I say this because such a view tends to suggest that whilst the Trustees and liquidators are bound by the laws of Swaziland in the performance of their duties, their appointment as such Trustees and liquidators is however, above reproach of the laws of Swaziland. The Trustees are high priests that cannot be touched

by the local courts, and any party wishing to remove them from their position would have to approach the courts in South Africa to do so. This cannot have been the legislative intent. The legislature could not have intended such an absurdity. I therefore hold that the recognition order empowered the courts in Swaziland to deal with the Trustees and the Insolvent estate, as though the original order of sequestration and appointment of trustees was made by the court in Swaziland.

[27] My learned brother **Annandale J** in paragraph 114 of his judgment of 2008, in one leg of the panoply of litigation between the parties herein, as appears on page 146 of the book, clearly recognized this fact, when he made the following remarks:-

"114 the Bank has it that the Insolvent Act does not empower the court to appoint a trustee in an insolvent estate but that it can only remove one. Yet, at the same time, it is so that external trustees who are recognized in Swaziland are in effect appointed by the court, as was done in casu, ----"

[28] I respectfully align myself with **Annandale J** on the foregoing pronouncement.

[29] The prayers sought in paragraph 3 of 2034/11 as well as 2 of 1275/11 and 1276/11 respectively, for the court to order the Master to convene a meeting of creditors of the Insolvent Estate and the companies in liquidation for the purposes of electing new Trustees and Liquidators, also derive their competence from the foregoing source.

[30] I therefore hold that this court has the jurisdiction not only to order the removal of the external Trustees and liquidators but also to order the Master of the High Court to convene a meeting of the creditors for the appointment of new trustees and liquidators, if the justice of the matter demands same.

[31] Now let me turn to the relief sought in paragraph 2 of 2034/11, wherein the Applicant prays the court in the alternative, to withdraw the recognition order. The stanze of the Respondents is that this court once it granted the order of recognition is functus officio and cannot set aside or withdraw

same, except where the order was expressly made subject to a possible withdrawal. That such an order can only be set aside or withdrawn if new facts were ignored or not taken into consideration when the order was granted. That since the Applicant had unsuccessfully applied for the order to be set aside before **Annandale J,** the only course open to it was to appeal against the order.

[32] Respondents relied on the following Cases **Bekker N.0 Kotze and Another 1996 (4) SA 1287 (NM) Clegg v Priestley 1985 (3) SA 950 (W) Ckaplin N.O Gregory (or Wyld) 1950 (3) SA 55S (C) Ex parte Meinke 1954 (4) SA 391 (T), Ex parte Reckitt & Coleman (Africa) Ltd 1971 (2) SA 545 (L), Exparte Haslam NO in re shell Co of SA Ltd 1961 (3) SA 904(C).**

[33] Let me say it straightaway here, that I agree with the posture of the Respondents on this question. It is a trite principle of law that once a court pronounces a final judgment or order, like a recognition order, it loses its jurisdiction to alter or review its decision. The court is then functus officio.

[34] This principle of law found expression in the case of **Firestone South Africa (Pty) Ltd v Genticuro AG 1977 (4) SA 298 (A) at page 306,** where **Trollip J.A** declared as follows:-

"The general principle, now well established in our law, is that, once a court has duly pronounced a final judgment or order, it has itself no authority to correct, alter or supplement it. The reason is that it thereupon become functus officio, its jurisdiction in the case having been fully and finally exercised, its authority ceased ---- There are however, a few exceptions to that rule which are mentioned in the old authorities and have been authoritatively accepted by this court. This, provided the court is approached within a reasonable time of its pronouncing the judgment or order, it may correct, alter or supplement it in one of the following cases---"

[35] The court then went on to detail four exceptions and that the court may correct or alter or supplement its judgment or order in the following instances:-

“

(i) In respect of accessory or consequential matters e.g costs or interest on a judgment debt which the court overlooked or inadvertently omitted to grant

(ii) In order to clarify if its meaning is obscure, ambiguous or uncertain, provided it does not alter the “sense or substance” of the judgment or order

(iii) To correct a clerical, arithmetic or other error in expressing the judgment or order but not altering its sense or substance

(iv) Making an appropriate order for costs which had not been argued, the question of costs depending on the courts discretion on the merits of the case”

[36] It is worthy of note that the court of Appeal of Swaziland adopted the foregoing principle of law and the exceptions thereto, in the case of **The Swaziland Motor Vehicle Accident Fund v Senzo Gondiwe Civil Appeal No. 66/2010,** wherein **Ramodebedi CJ,** declared thus, at page **11 paragraph 11:-**

"I am mainly attracted by the more enlightened approach which permits a judicial officer to amend or supplement his pronouncement or order provided he does not change its sense or substance. I consider that this approach should guide this court as the highest court in the country so as to enable it to do justice according to the circumstances. This is such a case"

[37] It appears to me therefore, that the prayer for an order withdrawing the recognition order cannot lie at this stage as this court is functus officio. I say this because an order withdrawing the recognition would effectively extinguish or terminate the recognition, which event will change the sense or substance of the recognition order, which is not allowed at this stage of the proceedings. See **Bekker NO v Kotze and another 1996 (4) 1287 (NM).**

[38] It is however the overwhelming judicial accord, that the court will only grant an order of withdrawal in these circumstances, if the recognition order is expressed to be subject to such withdrawal. This is a condition of the recognition order which the court is at liberty to include in order to protect

local creditors. See **Moolmanm v Builders and Developers (Pty) Ltd (in provincial liquidators) : Jooste Intervening (Supra)**

[39] This is however not such a case. The recognition order was not subjected to a condition of possible withdrawal. The order sought in this regard cannot lie in the circumstances. The only way the courts jurisdiction can be invoked to tamper with the order is via an application for rescission of same either predicated on Rule 31 of the Rules of the High Court or on common law, which both require an applicant for the rescission of a judgment to show good or sufficient cause for such rescission, as well as Rule 42 (1) (a) which empowers a court either mero motu or upon the application of any party affected, to rescind or vary an order or judgment erroneously sought or erroneously granted in the absence of any party affected thereby.

[40] It appears to me that it was in apparent appreciation of this position of the law that the Applicant had prior to the application instant, launched a previous application in Case No. 2035/04, wherein it prayed for a rescission

of the order of recognition. For the avoidance of doubts, in Case No. 2035/04, paragraph 1, sought for an order in the following terms:-

"That the order granted by His Lordship the Honourable ***Justice Matsebula*** *on the 23rd of July 2004 under case No. 2035/04 be and is hereby rescinded"*

[41] It is worthy of note that the order referred to in that paragraph was the recognition order.

[42] Case No. 2035/04 was consolidated with Case No. 346/07 and heard as one by **Annandale J**. In its judgment, the court dismissed the application for rescission of the order of recognition for the many reasons which are extant in the said judgment. This order of the High Court per **Annandale J**, is valid, definitive and subsisting until it is set aside by an appellate or reviewing court. It appears to me, that what the Applicant is entreating the court to do by its alternative prayer in 2034/11 for a withdrawal of the recognition order at this stage of the proceedings, is essentially to rescind

the said order, nomenclature in these circumstances is not important. The paramount factor to my mind is that the two orders, whether that of rescission or withdrawal, will have the same effect, which is to void or take away the recognition order. I do not therefore think that having previously launched a rescission application, that it is open to the Applicant to seek to reopen same by way of an application for a withdrawal. This is because this issue has already been canvassed and settled by the court in the rescission application in 2035/11, and the judgment of the court in that case has not been reviewed or varied by an appellate or reviewing court. It therefore remains valid and binding upon the parties as well as this court.

[43] As I said in my decision in the case of **Clement Nhleko v M H Mdluli Company and another Case No. 1393/09, pages 11, 12 and 13.**

"By the nature of the application the Applicant enjoins the court to adjudicate upon matters already decided by the Magistrates Court and in respect of which a definitive judgment subsists. I see no rule of practice or procedure which gives me the latitude to proceed as the Applicant urges and

none is urged by the Applicant. This court lacks the jurisdiction to embark on the adventure it is entreated to embark on, in the way and manner it has been approached. I say so because the summary judgment given by the Magistrates Court is valid and subsisting and must be presumed to be right until it is set aside by an appellate or reviewing court. So long as the judgment is not appealed against, it is unquestionably valid and subsisting. This is so no matter how perverse it may be perceived. It is binding and must be obeyed by all including this court. This is because a court is powerless to assume that a subsisting order or judgment of another court can be ignored because the former, whether it is a superior court in the judicial literachy presumes the order as made or judgment as given by the latter to be manifestly invalid without a pronouncement to that effect by an appellate or reviewing court"

[44] Similarly, in **Bezwidenhout v Patensie Sitrus Beherend Bpk 2001 (2) SA 224 (E) at 229 B-C, Froneman J,** declared as follows:-

"An order of a court of law stands until set aside by a court of competent jurisdiction. Until that is done the court order must be obeyed even if it may be wrong ----

The matter is one of public policy which requires that there shall be obedience to orders of court and the people should not be allowed to take the law into their own hands" **(Kotze v Kotze 1953 (2) SA 184 (c)"**

See **Sibongile Fudzile Xaba v Lindiwe Bridget Dlamini N.O and Others Case No. 1080/2009 and 844/2010 and Mariah Duduzile Dlamini v Augustine Divorce Dlamini and Others Case No. 550/2012**

[45] Since the judgment of **Annandale J** refusing the order of rescission is valid and subsisting, the proper course to my mind would be for the Applicant to appeal against the said order and not to embark upon twisting the arm of the court to grant the same order of rescission, now clothed as an application for withdrawal.

[46] In the light of the totality of the foregoing, I agree in toto with the Respondents that the relief sought in paragraph 2 of Case No. 2034/04, for a withdrawal of the order of recognition is clearly incompetent.

[47] Now, I turn to the contention of the Respondents that failure of the Applicants to prove a claim, deprived them of the requisite standing to pray for the relief sought in paragraph 4 of 2034, wherein the Applicant seeks an order directing the Trustees to render account to it, as well as paragraph 4 of 1275/11 and paragraph 3 of 1276/11, wherein the Applicant prays for an order directing the liquidators to render an account of their administration of BHK (Pty) Limited (in liquidation) and Broadlands (Pty) Limited (in liquidation).

[48] This fact is clearly decipherable from paragraph 7.13 of the answering affidavit to be found on page 55 of the book of pleadings in 2034/11, where the Respondents contend as follows:-

"7.1.3 It then follows, not having proved its claim, that the Applicant does not have a legal interest in the administration of the estate, or any matter relating to the administration of the estate, which by necessary implication excludes a legal say as regards the manner of administration of the estate (with reference to the alleged non – compliances by the trustees) or the rendering of any account (with reference to the prayer for an account of administration"

[49] Now, it is clear from the pleadings that the Applicant has a liquidated claim against the Insolvent estate which arose before the sequestration of the Estate. Section 44 (1) of the Insolvency Act provides that

"Any person or the representative of any person who has a liquidated claim against an Insolvent estate, the cause of which arose before the sequestration of that estate may, at any time before the final distribution of the estate in terms of section 113, but subject to the provisions of section 104, prove that claim in the manner hereinafter provided.

Provided that no claim shall be proved against an estate after the expiration of a period of three months as from the conclusion of the second meeting of creditors of the estate, except with the leave of the court or the Master, and on payment of such sum to cover the cost of any part thereof, occasioned by the late proof of the claim, as the court or the Master may direct"

[50] By section 44 (3) *" A claim made against an insolvent estate shall be proved at a meeting of the creditors of that estate to the satisfaction of the officer presiding at that meeting who shall admit or reject the claim---"*

[51] It follows from the above that all claims must be proved against the insolvent estate at a meeting of creditors in accordance with the provisions of the Insolvency Act. It is the master on application of the Trustee / liquidator that fixes a time within which the creditors of the estate must prove their claim. It is also the position of section 44 of the Insolvency Act that each claim must be proved by an affidavit in the prescribed form in which is set out the nature of the claim and any security held. This affidavit

with any documents in support of the claim must be lodged with the presiding officer or lies for the inspection of the liquidator / trustees and creditors for twenty four hours before the commencement of the meeting of creditors. The presiding officer must examine each claim carefully and decide whether it can be admitted. After the meeting of creditors the liquidator / trustee must examine each proved claim. If the liquidator or trustee disputes any proved claim he must report the fact in writing to the Master and state his reasons for disputing the claim in his report. The Master may either confirm the claim or after having afforded the creditor the opportunity of substantiating his claim, reduce or disallow the claim. A creditor whose claim is reduced or disallowed, may bring the Master's decision under review by the court.

[52] I agree entirely with the Respondents that the effect of a proved claim is that the creditor is recognized as such within the administration of the Insolvent estate. This fact is evident in several sections of the Insolvency Act. For instance, section 52 (1) provides that save where the claim is a conditional one, every creditor of an insolvent estate shall be entitled to vote at any meeting of the creditors of that estate as soon as his claim against the estate

has been proved. Section 53 (1) states that a creditor may vote at a meeting of creditors upon all matters relating to the administration of the estate. In terms of section 104 (1) a creditor who has not proved a claim against the Insolvent estate before the date upon which the trustees of that estate submitted a plan of distribution in that estate to the Master, shall not be entitled to share in the distribution of assets brought up for distribution in that plan, provided the Master may, at any time before the confirmation of the said plan, permit any such creditor who has proved his claim after the said date to share in the distribution of the said assets, if the Master is satisfied that the creditor has a reasonable excuse for the delay in proving his claim. Section 104 (2) provides that a creditor who proves a claim against that estate after the date upon which the trustee submitted a plan of distribution in that estate to the Master and who was not permitted to share in the distribution of assets under that plan in terms of sub section (1), shall be entitled to be awarded under any further plan of distribution submitted to the Master after the proof of his claim, the amount which would have been awarded to him under the previous plan of distribution if he had proved his claim prior to the submission of that plan to the Master, provided that the

Master shall first be satisfied that the creditor had a reasonable excuse for the delay in proving his claim.

[53] It is beyond controversy from the foregoing, that a creditor who fails to prove a claim in the insolvent estate or company under liquidation is excluded from voting and benefiting from any distribution under an account lodged with the Master before the claim in question is proved. Put in very plain words, for a creditor to be recognized as such in the sequestration of an insolvent estate or in a winding up of a company, he must have proved a claim.

[54] It appears to me therefore, that for the Applicant to contend for an order for rending of an account or for an order for an account of the administration of the Insolvent estate, it must demonstrate that it has proved a claim in terms of the Insolvency Act. This issue is quite different from an interested party contending for the removal of Trustees and liquidators for breach of their statutory duties.

[55] In casu, the first contention of the Applicant in showing its standing vis a vis the orders sought in these respects, is that it has already proved a claim in South Africa which was recognized by the Respondents in their application for recognition in Swaziland. That the fact that it proved a claim in South Africa rendered the necessity of proving a claim in Swaziland, otiose.

[56] I cannot agree with the Applicant that the mere fact that it proved a claim in South Africa exempted it from proving a claim in Swaziland. This proposition runs counter to the Recognition Act, which in clear and unambiguous words requires that every creditor in Swaziland should prove a claim pursuant to the recognition of the Foreign Trustees and Liquidators. This duty the Act imposed on creditors, via section 6 of the Recognition Act in the following words:-

> *"6 The proof and admission or rejection of claim against such estate or company and it's liability for them to the extent of its property---- shall be regulated as if the estate were sequestrated or the company placed in liquidation by order of a competent court in Swaziland.*

Provided that the Maser shall appoint not less than two public meetings of creditors (to be held at such times and places as he shall deem most convenient for all concerned) for receiving proofs of debt against the estate, and the second of such meetings shall be held not less than fourteen days after the first, and none but local creditors shall be entitled to prove their claim thereat"

[57] Furthermore, according to the Recognition Act, the effect of a creditor proving a claim is that it is included in the plan of distribution as one of those entitled to payment from the Insolvent estate. This fact can be discerned from section 8 of the Recognition Act, which states as follows:-

"8 The plan of distribution shall show:-

(a) All claims entitled to be preferably ranked against the proceeds of the local assets and the proposed application of such assets in satisfaction thereof;

(b) The balance remaining in Swaziland for distribution among the general body of creditors, and

(c) The names of all creditors who have proved their claim in Swaziland to the satisfaction of the Master together with the amounts of such claims."

[58] Therefore, the effect of proving a claim is that the creditor is regarded as such in the process of the sequestration. Little wonder then section 14 of the Recognition Act states that the external Trustees or external liquidators may be released if no creditors prove a claim within the appointed time. What section 14 effectively purports is that failure of creditors to prove a claim in Swaziland means that there are no creditor in Swaziland, and the external trustees and external liquidators will be released in those circumstances, of course after payment of the requisite fees to them.

[59] It appears to me therefore, that the Applicant was required to prove a claim in Swaziland, to be recognized as a creditor in the sequestration of the Insolvent estate in Swaziland.

[60] Applicant contends in the alternative that it has proved a claim in Swaziland. It took this alternative stanze in paragraph 11 of its replying affidavit in the following terms:-

> *"11 In any event, on or about 9 October, 2009, at a meeting held at the 7th Respondents offices which was attended by the 5th Respondent representing the 1st to 4th Respondents, the Applicants claim was admitted and the Applicant was required to pay the sum of E4,296-47 as a fee for late filing of its claim. I attached hereto marked "SM7", "SM8" and "SM9" respectively, a copy of the minutes of the meeting dated 9th October, 2009, a letter dated 10th October 2009 from the 5th Respondent to the Applicant's then Attorneys Messrs. Maphanga Howe Masuku Nsibanze and a statement of Account dated 10 October, 2010. The Applicant duly paid the account"*

[61] I notice that the Applicant omitted to exhibit annexures. SM7, SM8 and SM9 referred to in the allegation ante. I however do not wish to embark on any long and winding consideration as to whether or not the Applicant did

prove a claim in Swaziland. This is because from the papers filed of record, it seems to me that the Applicant did prove a claim in Swaziland albeit belatedly. This fact is extant in annexures BSC 2.3, BSC 2.4, BSC 4.5 and BSC 4.6. In annexures BSC 4.6 Paul Shilubane the only local trustee of the Insolvent estate was responding to BSC 4.5 a faxed message in which the foreign Trustees requested him to provide to them certain information including all proved claims. Annexure BSC 4.6 is dated 1st February 2011 and in it Paul Shilubane states as follows:-

"RE: INSOLVENT ESTATE: DM DLAMINI

1. *The above matter refers*
2. *Please find enclosed herein the following documentation:-*
   - *(i) Proved claims, in respect of the Swaziland Electricity company (SEC) and Swazi Bank*
   - *(ii) Copies of the Deeds of Sale of the sold properties ----------"*

[62] It is worthy of note that annexure BSC 4.6 was urged by the Respondents in these proceedings. It thus appears to me that the Applicant has proved a

claim in Swaziland. This state of affairs entitles the Applicant to contend for the order of rending of accounts, which it seeks, in casu, at least as it relates to 2034/04. I say that because it is obvious from the papers that no claims have been proved in the liquidation of the two companies in 1275/11 and 1276/11. I will come to the question of whether or not the liquidators can be properly ordered then to render accounts.

[63] Now, let us deal with the substance of this matter. I will commence this exercise with Case No 2034/04 and it is convenient for me from this juncture to refer to the Respondents as Trustees . The basis for the Applicant's quest to remove the Trustees pursuant to that action, is the allegation that the Trustees failed to discharge their duties in accordance with the fiduciary office they hold. Particularly, that they failed to perform satisfactorily duties imposed upon them by the Insolvent Act, the Recognition Act and the Companies Act.

[64] The Applicant detailed the alleged statutory failings of the Trustees in paragraphs 45 to 57 of its founding affidavit, to be found on pages 26 to 31

of the book. I will now proceed to canvass the issues raised by the Applicant in those paragraphs.

[65] 1. Failure to prepare an inventory as required by section 69 of the Insolvency Act read with section 5 of the Recognition Act.

Now section 69 of the Insolvency Act requires a trustee upon appointment to immediately take into his possession or under his control all movable property, books and documents belonging to the estate of which he is a trustee. Section 5 of the Recognition Act states that

"The external Trustee or external liquidator shall forthwith lodge with the Master an inventory verified by affidavit showing the assets of such estate or company in Swaziland and the value thereof-----"

[66] The Applicant contends that in the absence of such inventory, it is not ascertainable whether the assets sold by the Trustees were sold at their true value. The Trustees are obliged by law to sell the assets at the best possible price in order to maximize the benefit to creditors. That the conclusion from the failure to prepare an inventory is that the Insolvent estate may have been sold for far below their value.

[67] The Trustees who are denying any willful non compliance with statutory obligations, met the foregoing allegations of the Applicant in paragraphs 36 and 37, of their answering affidavit as appear on page 77 of the book.

[68] What the Trustees are essentially saying in those paragraphs is that during the sequestration in South Africa, the Insolvents shareholdings in certain companies in South Africa were unconverted as is shown by annexure BSC 5, a copy of Mr Shilubane's letter listing the said shareholdings, which was uplifted from the Masters file, that these are the only known movable assets of the Insolvent. That also in the Masters file are the bulky valuations of immovable properties owned by the Insolvent which was traced via the

office of the Registrar of Deeds. That these comprise the inventory of the known assets and were accepted by the Master without an affidavit and has been proved to be correct, That the trustees took control of the known assets, which were sold at their true value, after proper valuation and by way of public auction to the highest bidder. That the Applicant who consented to the upliftment of its interdicts over these properties, was satisfied with the offers received.

[69] I notice that the Applicant in its replying affidavit failed to deny in substance these allegations made by the Trustees that there has been an inventory of the assets of the Insolvent, which inventory is in the Masters office, and that the assets were sold for their true value and the Applicant who consented to the upliftment of the interdicts placed over the properties was satisfied with the offers received. The effect of failure by the Applicant to deny these allegations of fact, is that they are deemed in law to have admitted them.

[70] More to the foregoing, is that I have taken the liberty of perusing annexure *"BSC 5"* and it is indeed a letter from one of the Trustees, Mr Paul

Shilubane in which he detailed an inventory of the assets of the Insolvent. Since the Applicant failed to deny that annexure BSC 5 is such an inventory or that it was curled from the Masters file, these allegations must be taken as established. I therefore hold that there has been an inventory of the assets of the Insolvent estate contrary to Applicant's contentions.

2. Failure to open a bank account in Swaziland in terms of section 70 of the Insolvency Act, (paragraph 49 founding affidavit.)

[71] The Applicant contends that the Trustees were required to open a bank account in the name of the Estate with a Bank in Swaziland, where all monies to the credit of the Estate are deposited. However, no such Bank account was opened, as is apparent from annexure SM5, the consent order, showing that the monies realized from the sale of the first assets were deposited in the Trust Account of the Trustees' Attorneys, Messrs Currie and Sibandze.

[72] In answer to the foregoing allegations by the Applicant, the Trustees stated as follows in paragraph 38 of the answering affidavit as can be found on page 78 of the Book:-

"38 Ad paragraph 49

It is not correct that no bank account was opened.

38.1 A trust account was opened with Standard Bank of Swaziland, Mbabane Branch in the name of "Insolvent Estate Dumisa M Dlamini: on the 30th September 2006. A copy of the opening bank statement is attached hereto as annexure "BSC 6.1" and a copy of the most recent statement available to me, as annexure "BSC 6.2

38.2 Prior to the opening of the trust account, the proceeds of the sales were paid into the trust account of Mr Shilubane who acted as the conveyancer, and those moneys were under his direct control.

38.3 The deposit into the attorney's trust account referred to by the Applicant was in terms of the consent order (annexure "SM 4 to the founding affidavit) i.e as directed by the above Honurable court (until finalization of the matter between the government as Applicant and

Vans Auctioneers and Phil Van der Merwe as Respondents.) The Trustees were not parties in that application and the moneys referred to are the purchasers deposit"

[73] Once again, the Applicant failed to dispute the foregoing allegations of fact in its replying affidavit. These allegations of fact are therefore taken as established in the circumstance.

[74] I have taken the liberty of scrutinizing annexures *"BSC 6.1"* and *"BSC 6.2"*. BSC 6.1 clearly shows that a bank account was indeed opened in the name of the Insolvent Estate of Dumisa M Dlamini on the 30th of September 2006 and BSC 6.2 demonstrates the statement of said account as at the 31st of January 2011.

[75] Further, it is on record in this application, that in the wake of the recognition of the sequestration and Foreign Trustees in Swaziland, that the Trustees sought to sell the assets in the sequestrated Insolvent Estate by auction. The Applicant on the 31st march 2005, launched an application in the High Court

on the premises of urgency, seeking for an order to suspend the impending auction sale, setting aside the recognition order and removal of the trustees. This application which was opposed by the Trustees was dismissed on the premise of lack of urgency and no judgment on the merits emanated therefrom. It is on record that in the wake of the dismissal of the Applicants application, the Swaziland Government commenced yet another application seeking for an order to stop the auction sale schedule for the 6th of April 2005. That application which was also opposed resulted in a consent order. It is that consent order that directed that all the monies received at the auction should be kept in the trust account of Currie and Sibandze attorneys, who acted for the auctioneers, who were in turn instructed by the Trustees. That consent order is evidenced by annexure SM4 which appears on page 43 of the book. It states as follows:-

"Consent order in the following terms

1. *That the normal time limits and forms of service as presented by the Rules of court are dispensed with and the matter dealt with urgently.*

2. *That the application be postponed pending full compliance by the Trustees with all relevant laws, after which the applicant and the Respondents may file affidavits, if required.*
3. *No offer received at the auction may be accepted until duly approved by the creditors*
4. *All deposits and monies received in respect of the Auction remain in the trust account of Currie and Sibandze Attorneys until finalization of the matter.*
5. *That the Registrar of Deeds be and is hereby interdicted from transferring any of the properties contained in annexure "A" hereto pending the outcome of the Application*" (underline mine)

[76] There is thus much force in the contention of the Trustees that the monies of the Insolvent estate which was paid into the account of Attorneys Currie and Sibandze Associates, was by a consent order of the court in the action between the Swaziland Government and the auctioneers instructed by the Trustees. That order of the court was binding upon the parties until set aside or reviewed. In the light of the totality of the foregoing, I do not think that

the Trustees could be said to have violated the terms of section 70 of the Insolvency Act, in these circumstances.

3. Failure to seek the authority or direction of the creditors prior to the sale of the assets of the Insolvent Estate, pursuant to section 83 of the Insolvency Act (paragraphs 50 and 51 of founding affidavit.)

[77] In this regard the Applicant contends that the assets of the Insolvent Estate were sold by the Trustees without any imput or direction from the creditors. That by section 83 of the Insolvency Act, the sale of the assets of the Insolvent Estate has to be authorized by the creditors at the second meeting of creditors. It is in that meeting that the creditors give directions on the manner and condition under which the assets have to be sold. That the Trustees failure to meet this most basic and all important requirement means that they acted outside the scope of their powers and accordingly acted in breach of the fiduciary duties they owe to the creditors.

[78] In answer to the foregoing allegations, the Trustees allege in paragraph 39, of their answering affidavit to be found on page 79 of the book, that the creditors agreed to these sales and ratified all the actions of the trustees, as evidenced by the minutes of the second meeting recorded by the Master, annexure *"BSC3.2"* as well as paragraph 44 of the judgment of 2008.

[79] It is on record that the Applicant in its replying affidavit did not deny the foregoing allegations of fact by the Trustees. They are thus established.

[80] More to this is that annexure *"BSC3.2"* on page 172 of the book confirms that at the second meeting of the creditors held before the Acting Deputy Master of the High Court, that Swaziland Electricity Board which was the only creditor in Swaziland at the time confirmed the sales. The Applicant Swazi Bank who was represented by Dumsani Mazibuko, was advised to lodge a claim in Swaziland to be recognized. These facts are evident from the last two paragraphs of annexure *"BSC3.2"* which state as follows:-

"We request that the Master through votes of the creditors confirm the sales for purposes of progress. S.E.B. represented by Currie confirms the sale.

Apparently Swazi Bank did not lodge any claim in this estate and Chairperson advised that Swazi Bank file (Sic) a claim in Swaziland with the Master of the High Court before they can be recognized"

[81] Further to the above, is that the question of the sale of the assets of the Insolvent by public auction and the fact that the creditors were aware of this and consented to same, was settled by **Annandale J** in **paragraphs 44 and 45** of his judgment of 2008, in the following words:-

"44) In the Master's report, she states that Mr Dumisani Mazibuko represented Swazi Bank at two creditors meetings. She goes on to add that he lodged no claim on behalf of the Bank "even though request were made that he does so". The Master further reports that "the second to the last meeting of creditors was postponed and rescheduled for the 16th November 2005 where Swazi bank would state its position with regards to filing its claim and the resolution of creditors to sell the properties belonging to Dumisa Mbusi Dlamini" and "Swaziland Development and Savings Bank did not attend to (Sic) this meeting

nor made apologies. The meeting took place and resolutions made therein were adopted, to sell the properties"

45) From this, it is clear that the bank did not become a proven creditor when the concursus creditorum was established. It had the opportunity to do so and was even encouraged to do so. It furthermore cannot claim to have been unaware of the meetings or of resolutions taken thereat, inter alia, to confirm the sale of properties which went under the hammer"

[82] The foregoing findings of **Annandale J** have not been varied or set aside by an appellant or reviewing court. They are thus binding upon the parties and cannot now be reopened by this court under any guise.

4. <u>Failure by the Trustees to furnish security in terms of section 5 of the Recognition Act, (para 55 founding affidavit).</u>

[83] The Applicant contends that in terms of section 5 of the Recognition Act the Trustees are required to forthwith give security to the satisfaction of the Master for the due administration of the assets in Swaziland. That no such security has been given by the Trustees. The Applicant further alleges that the Trustees have in the past produced a document titled an undertaking and Bond of security which was prepared by the Trustees themselves and has no value as security. That the security for the due administration of an Estate is usually a bond of security from an insurer and is fixed based on the value of the assets of the Insolvent Estate. However, that there is no inventory of valuation of the assets which would form the basis for the amount of security to be provided by the Trustees, as is required by the Recognition Act.

[84] The Trustees response to the foregoing allegation is contained in paragraph 40 of the answering affidavit to be found in page 79 of the book and is as follows:-

" I attach hereto as annexure "BSC 7.1" a copy of my undertaking and bond of security, which was accepted by the Master, as appears from

paragraph 1 of the Master's letter dated 8th June 2010, a copy of which is attached hereto as annexure "BSC 7.2", stating that neither Mr Shilubane nor the First Respondent had given the requisite security. In the premises, I and the Third and Fourth Respondents have furnished security "to the satisfaction required by the relevant section 5 and the Applicant appears to be clutching at straws"

[85] I notice that the Applicant again failed to refute the above allegations of fact in its replying affidavit. They are therefore taken as established. I myself have taken the liberty of perusing the contents of annexures *"BSC 7.1"* and *"BSC 7.2"* and they indeed demonstrate that the 1st Respondent Martinus Jacobus Dewald Breytenbach N.O. and the 5th Respondent Paul Shilubane are the Trustees that failed to furnished security as required by the Act. The question here is what steps if any did the Trustees take to ensure that they furnished the said security in view of the fact that their office demands a high standard of care and diligence not only to the creditors but also the Insolvent estate.

[86] In the confirmatory affidavit of Paul Shilibane (deceased), he averred that he could not get the necessary bond of security either in Swaziland or South Africa. I notice that he also made depositions to the effect that he was not appointed a Trustee by the Master in terms of the Insolvency Act after his recognition and thus he could not carry out his duties without such appointment. I will not concern myself with this aspect of Mr Shilubane's confirmatory affidavit. This is because the question of his appointment as trustee by the court contrary to the appointment of Trustees as prescribed by the Insolvency Act, was raised by the Applicant in Case No 2035/11 and was exhaustively canvassed and settled by **Annandale J** in his judgment. His Lordship pronounced the said appointment valid. That decision is definitive, valid, and subsisting. It has not been varied or reviewed by an appellate or reviewing court. It is thus binding upon the parties and this court and cannot be reopened.

[87] What I want to concern myself with is the correspondence written by Paul Shilubane as contained in annexures PMS1, PMS2, PMS3, PMS4, PMS5, PMS6, PMS7 and PMS8 (see pages 214 to 226 of the book). These annexures which I have perused carefully and in details, show that Paul

Shilubane took copious steps to ensure that he furnished security in compliance with the law. He wrote to trust or insurance corporations both in South Africa and Swaziland, in quest of a Bond of Security but was unsuccessful. Upon his quest for a bond of security being rejected by the Swaziland Royal Insurance Corporation via a letter dated 27th July 2010 (page 221 of the book) Paul Shilubane immediately fired off a letter of appeal to Swaziland Royal Insurance Corporation by letter dated 11th August 2010 (page 222 of the book). The content of that letter is as follows:-

"RE: BOND OF SECURITY FOR INSOLVENT ESTATE DUMISA DLAMINI M1E/001"

We refer to your letter of 27th July 2010 in which you declined to furnish us with a bond of security in respect of the above estate. We hereby appeal to you to reconsider the matter on the grounds that:-

"

1. *The write being one of the trustees has a bond of security issued by a South African Financial Institution which has now lapsed.*

2. *There has been a delay in the finalization of the insolvent estate because of the litigation between the trustees and Swazi Bank which has been resolved in favour of the trustees.*

We enclose proof of the monies held at Standard Bank on behalf of the estate and return herewith the papers of our earlier application and request you to review your previous decision"

[88] The content of this letter which has not been challenged by the Applicant, shows clearly that Paul Shilubane had procured a bond of security from a South African Financial Institution which lapsed. His attempts to procure further bonds of security from both South Africa and Swaziland at the end of the delay in the sequestration process, imposed by litigation between the Applicant and the Trustees, proved abortive, as no such security in his favour ensures in these proceeding.

[89] There is however nothing in the record to show that the 1st Respondent took any steps in these regards. In paragraph 54.1 of the answering affidavit

(page 87 of the book) the Trustees conceded the removal of the 1st and 5th Respondent in the face of their failure to furnish such security.

[90] I agree that failure to furnish such security would justify the removal of said Trustees. This is because the Trustees cannot act as such except they furnish security to the satisfaction of the Master. Failure by the 1st and 5th Respondents to furnish said security deprived them of the legal right to act as such Trustees in the estate. Implicit from this is that the Trustees cannot then act jointly as is required by section 56(4) of the Insolvency Act, which will in turn clog the wheel of the sequestration process. These state of affairs justify the removal of the 1st and 5th Respondents as Trustees. The removal of the 5th Respondent, Paul Shilubane is however overtaken by events since he is now regrettably deceased.

5. Failure to lodge with the Master an account of their administration of the property in Swaziland and a plan for distributing contrary to sections 7, 8 and 9 of the Recognition Act and section 92

and 109 of the Insolvency Act. (paragraphs 54, 55 56 and 57 of founding affidavit.)

Applicant contends that the Trustees failed to furnish an account of their administration of the estate and a plan of distribution of the assets in Swaziland.

[91] In answer to the above allegations the Trustees agree that no account of administration and plan of distribution has been lodged as statutorily required. They however contend that this was not done willfully. They state that all moneys collected in respect of the sales of the immovable properties were paid to Mr Shilubane as the conveyancer, and he has and had direct control over all cash books, cheque books, the trust account and related relevant documentation. They further stated that the Trustees have to act jointly, that they were dependant on Mr Shilubane being the only local Trustee and were thus dependants on his imput which was not forth coming despite several demands. Since the Trustees owe a high standard of care, diligence and good faith to the creditors and the Insolvent estate, it is apposite for me to consider what steps if any the Trustees took to ensure the imput of Mr Shilibane.

[92] The Trustees detailed the efforts they made to get the imput of Paul Shilubane in these respects as follows in paragraphs 43.2 to 43.9 of the answering affidavit (pages 80 to 83 of the book,)

"

43.1 I deny that I or any of the South African trustees (I have been the anchor person of the South African trustees) acted improperly. As aforestated, we were dependant on Mr Shilubane for his input but despite various demands, very little had been forthcoming.

*43.2 As afforested, Mr Chevannes St Clair Cooper met with Mr Shilubane in December 2010, in Swaziland, in order to obtain documentation pertaining to the estate including a statement of the conveyancer's account and complete reconciliation of all moneys received and paid, as was followed up with a letter (annexure **"BSC 4.5").** All that was received response thereto (in February 2011, annexure **"BSC 4.6")** were copies of claims and deeds of sale.*

*43.3 I attach hereto as annexure **"BSC 8.1"** a copy of my attorney's e-mail to Mr Shilubane dated the 29th March 2011, the body of which reads as follows: "Chavonnes is coming down tomorrow and he has asked me to get the estate cashbook, all bank statements, signed contracts, transfer recons where you accounted to the estate, all income and expenses of the estate of copies of proved claims and unproven. He is only here for 2 days and we need to do a lot so I was wondering if you could get your accountant to get all these out. I do hope you are feeling better"* (underline mine)

43.4 Mr Chavonnes St. Clair cooper, my agent, travelled to Swaziland on Wednesday the 30th March 2011 to collect the relevant documentation only to discover that Mr Shilubane is in hospital and not available. Mr. Chavonnes St Clair Cooper also attended the offices of the Master in order to ascertain what documents are contained in the Master's file. However, the relevant file could not be located. (Mr Chavonnes St Clair Cooper on the 31st march 2011 returned to the master's office and managed to locate some documents.)

*43.5 On the morning of the 30th March 2011 an e-mail, copy attached as annexure **"BSC 8.2",** was received from Mr Hamilton Mabaso of Mr Shilubane's office, the body of which reads as follows: "on behalf of Mr Paul Shilubane, I confirm receipt of your e-mail on documents in respect of the above estate. In view of the urgency and substance of this matter, I have twice made efforts to consult with him as my principal for his endorsement but with no success as he is on a four hour dialeces cession in Mbabane Government hospital. On this regard, it makes it difficult for me to furnish classified information without his consent. However, I would be seeing him before 1500hrs today and shall duly inform you on what had transpired from my meeting with him".* (underline mine)

*43.6 On the morning of the 31st march 2011 the following e-mail message, copy attached as annexure **"BSC 8.3"** was received from Mr Mabaso: "I consulted with Mr Paul Shilubane on the subject matter as per my e-mail yesterday afternoon. He suggested he would handle the dispensation of the required information on his return which is either today or tomorrow latest"* (underline mine)

43.7 Save for Mr Shilubane assisting in obtaining the trust account bank statements, nothing else was forthcoming and Mr Chavonnes St Clair Cooper again flew to Swaziland on the 19th April 2011. He telephoned Mr Shilubane who told him it was a public holiday in Swaziland and that he will attend to matters, which would necessitate going through his files. On the 20th April 2011. Mr Chavonnes St Cair Cooper again telephoned Mr Shilibane, who advised that he had instructed someone from his office to attend to it and to provide a breakdown of all moneys received and disbursed. He was unable to advise when this information could be expected.

43.8 Mr Chevannes St Clair Cooper had to fly back to South Africa on the afternoon of the 20th April 2011, at which time the relevant documentation and information had not yet been provided.

43.9 As at the time of deposing to this affidavit, nothing further has been heard or received from Mr Shilubane .

[93] It is on record that the Trustees filed a supplementary answering affidavit in which they demonstrated further steps taken to deal with the issue of Mr Shilubane on this question. To this end the Trustees averred as follows in paragraphs 4 to 10 of the said supplementary answering affidavit:-

"

4 Pursuant to the difficulties experienced in obtaining documentation and information from the Fifth Respondent, Mr Shilubane (as set out in the Second Respondent's Answering Affidavit) and on the 25th May 2011,I in accordance with my instructions addressed a letter to the Seventh Respondent, the Master of the above Honorable Court (hereinafter referred to as the "Master")

*4.1 A copy of said letter is attached hereto marked annexure "**BSC 1",** and 1 respectfully pray that same be read as if specifically incorporated herein.*

4.2 The main thrust of the above letter was a request that the master invokes Section 71(2) of the Insolvency Act, 1955 against Mr Shilubane.

5. The Master then, on the 10th June 2011, urgently requested Mr. Shilubabe to submit for the Master's attention all books confirming of all monies, goods, books, accounts and other documents belonging to the estate. A copy of said letter is attached hereto as annexure ***"BSC2"***

6. I thereafter on several occasions attempted to contact the Master, without success, and left several messages, none of which were returned.

7. On the 1st August 2011 I addressed a further letter to the Master, enquiring after any response and requesting to be advised what action the Master intends taking since the finalization of the estate is greatly prejudiced by the fact that Mr Shilubane has not accounted for the money from the sale of assets which was received by him. A copy of said letter is

*attached hereto as annexure **"BSC 3",** which I respectfully pray be read as if specifically incorporated herein.*

8. *On Friday the 5th August 2011 I addressed a further letter to the Master, requesting the Master's position in the matter. A copy of said letter is attached hereto as annexure **"BSC 4",** which I respectively pray be read as if specifically incorporated herein.*

9. *As at the time of deposing to this affidavit no further communication has been received by the master, and no documentation or information originating from Mr. Shilubane.*

10 *It is respectively submitted that the above facts are material to the adjudication of this matter in that it is of crucial importance to establish, amongst others, what happened to monies received on behalf of the estate by Mr Shilubane".*

[94] I notice that the Applicant did not depose to any facts contradicting the totality of the foregoing allegations of fact by the Trustees both in their answering affidavit and supplementary answering affidavit. All that the Applicant contented itself with in its replying affidavit, is that the Trustees are meant to act jointly and cannot be exonerated by the inertia of Mr Shilubane on this issue. The facts alleged by the Trustees in this regard are thus taken as established.

[95] Now, it is beyond controversy from the foregoing allegations of the Trustees that they indeed took copious steps to ensure the imput of Mr Shilubane who was seized of the entire accounts of the sequestration, but their efforts proved futile.

[96] The Trustees faxed annexure BSC 4.5 dated 7th December 2010 (page 183 of the book) to Paul Shilubane requesting him to provide to them as a matter of urgency (1) all proved claims, (2) statement of account of conveyances (3) copies of the Deed of Sale of the sold properties and (4) complete reconciliation of all monies received and paid in the Insolvent Estate.

[97] In response Paul Shilubane wrote BSC 4.6 dated 1st February 2011, tendering (a) proved claims in respect of the Swaziland Electricity Company (SEC) and Swazi Bank and copies of the Deeds of sale of the sold properties, but failed to account as requested by the Trustees.

[98] The Trustees not only wrote to Paul Shilubane requesting meetings on this account, but they also wrote to the Master to compel Paul Shilubane to submit this account. The Master therefore invoked section 7.1 (2) of the Insolvency Act and on the 10th of June 2011, urgently requested Paul Shilubane to submit for the Master's attention all books confirming statement of all monies, goods, books, account and other documents belonging to the estates (BSCS 2). It cannot be gainsaid that all these efforts by the Trustees and the Master proved abortive, as Paul Shilubane failed to submit said account up until his demise. It is obvious from the papers that as at the time of these transactions, Paul Shilubane had regrettably fallen under the ailment from which he eventually passed on.

[99] In the circumstances, I find that I cannot agree with the Applicant that the Trustees cannot be exonerated on this wise by the attitude of Paul Shilubane. The Trustees to my mind took careful and diligent steps after litigation between them and Applicant came to an end, to ensure that they procured said account from Paul Shilubane. Paul Shilubane was the only local Trustee appointed in the sequestration of the Estate. He was on ground in Swaziland. The foreign trustees thus relied on him completely and placed on him huge responsibilities with regards to the account. They placed in his possession the material books, documents and the proceeds of the properties sold and his failure to hand over and account for same to his Co Trustee despite demands, made it impossible for the Trustees to draft a liquidation and distribution account. I am firmly convinced that the conduct of Paul Shilubane which was regrettably unavoidable due to his illness, should not be held against his Co Trustees, as they were in the circumstances unable to perform their duties as prescribed by statute.

[101] In coming to these conclusions, I am guided by the case of **Bekker v Republick Trustees (EDMS) BPK N Ander 1988 2 SA 25.** In that case, the Applicant had been employed by the 1st Respondent as liquidator,

trustee and administrator of estates. He was appointed by the Master in his personal capacity as trustee or liquidator of approximately 240 estates. When applicant resigned from his services from 1st Respondent, he was requested to vacate his office and to cooperate in finalizing the estates in respect of which he held appointments. Applicant subsequently applied to court for an order compelling 1st Respondent to hand over the files pertaining to those estates. He alleged that he was not able to comply with the statutory duties emanating from his appointments whilst the relevant files were under the control and in possession of the 1st Respondent. (Applicant did not have access to the files but only on 1st Respondents premises and under its control).

[102] The court held applying the decision in **Grove v Marico Board of Executors Ltd 1908 TS11, that (1)** where a person was burdened with a statutory duty, the court would not prescribe where and how he should comply with that duty, and would in no way place him in a position where he could not satisfactorily comply with that duty.

2. That a person in the position of the applicant could only optimally comply with his statutory duties, if he was at all times in possession and control of the relevant files.

[103] By the time litigation between he Applicant and Trustees abated, Paul Shilubane had unfortunately fallen ill, which rendered him incapable of jointly acting with the rest of the Trustees as required by law. He was however in possession of all the document and information on the accounts of the sequestration, his inability to account to his fellow Trustees made it impossible for the Trustees to act in these respects. His situation should therefore not be held against the other Trustees.

[104] Now, the Applicant has also argued that the Trustees have breached the fiduciary duty they owe to the creditors in the sense that they are no longer independent and impartial towards the Applicant who is the major creditor in Swaziland. Applicant says that the Trustees lack of independence is evident from their refusal to recognized the Applicant as a creditor in Swaziland

even though it had proved a claim in south Africa, and also the history of bickerings between the Trustees and the Applicant.

[105] I do not however think that it lies in the mouth of the Applicant to advance these complaints. This is because the Applicant was obliged pursuant to the Insolvency Act and Recognition Act to prove a claim in Swaziland, irrespective of the fact that it had already proved a claim in the sequestration in South Africa. The Applicant having abandoned the claim it proved in the sequestration in South Africa, rather chosing to pursue the said claim in the sequestration in Swaziland was required, as I have already copiously demonstrated in this judgment, to prove a claim in Swaziland to be recognized as such creditor in the sequestration in Swaziland. Applicant however blatantly refused to prove said claim, irrespective of several appeals from both the Master and the Trustees to do so. This fact is glaringly evident from the totality of the processes before court and was recognized by **Annandale J** in paragraphs 44 and 45 of the judgment of 2008, which I have herein before recited. The recognition order was granted in 2004. The Applicant only proved a claim on 9th October 2009, by its own showing in paragraph 11 of its replying affidavit, which I have already reproduced in

extenso above. The Applicant therefore proved a claim 5 years after the recognition order was granted in 2004. The Applicant rather than expeditiously prove a claim so that the administration of the Insolvent Estate could proceed, rather chose to engage the Trustees in a plethora of protracted litigations. I agree with the Trustees that the litigation which the Applicant commenced as far back as 2005, operated to stall the entire sequestration process, causing undue delays. The spate of litigations is still evident from case number 2034/11 which is presently under consideration. The whole sequestration has therefore been bugged down by litigation from the Applicant, save for one commenced by the Government of Swaziland.

[106] These actions launched by the Applicant birthed several interdicts over the assets of the Insolvent Estate, causing the delay in the process of administration of the estate. The fact of the havoc these interdicts and general conduct of the Applicant caused to the sequestration process was deprecated by **Annandale J**, in paragraphs 53, 54, 56 and 57 of his judgment in the following language:-

"(53) This consent order obtained by Government after the Applicant Bank failed to secure an interdict against the intended auctions, was discharged about one year later---- notice of the application was served on the Attorney General, being the party who sought and obtained the consent order after the Bank failed to stop the auction. The consent order was discharged in toto, which translates into the interdicts on the Registrar of Deeds to also have fallen away.

(54) This aspect is not needlessly emphasized. The consent order of 11th April 2005 interdicted the Registrar of Deeds from transferring any of the specified properties, pending the outcome of the application. This resulted in the Registrar of Deeds in giving effect to it by imposing interdict number 31 of 2005 over the properties. In his report, the Registrar also says that over and above this interdict, he also imposed a further interdict, number 62 of 2005, to give effect to the writ of attachment which he received on the 29th June 2005.

(56) The applicant does not explain how it came about that it served the writ of attachment on the Registrar of Deeds after such a further delay nor, why the interdict which prevented transfer was not good enough, or why a second interdict had to be imposed. In any event, it does not

seem that the trustees in the insolvent estate were informed of the second interdict that the writ of attachment was made known to them, by the Bank. Nor were the purchasers of the properties, who bought them on the auction of 6th April 2005, notified by the Bank. This is the first manifestation by the Bank on how it seeks to obtain an advantage over other creditors in the Insolvent estate of Dlamini. It first failed to timeously execute its judgment, then failed to prove its claim which arises from the unsatisfied judgment at meetings of the creditors held at the Masters offices by the trustees, then it seeks to not only attach the properties, after establishment of the concursus creditorum, but also causes its own interdict to be recorded after the court had already made an order which resulted in an interdict.

(57) What the Applicant did, without having proved a claim against the Insolvent estate, which it ready could have done but failed to do, was to move outside the ambit of sequestration and sought to bypass the process. It was not competent for it to do so and its complaint about having the interdict uplifted is thereby self defeating".

[107] I do not in the light of the totality of the foregoing, see how the Trustees could be remotely said to have breached their fiduciary duties towards the Applicant or to have acted in bad faith. The Applicant is clearly the author of the bickerings that pervades the sequestration process. The Trustees notwithstanding Applicants conduct have continued to demonstrate good faith by accommodating the Applicant and have also offered to provisionally include Applicants claim in the first liquidation and distribution account prior to Applicant proving a claim (see paragraph 26.4 of the answering affidavit pages 72 to 73 of the book).

[108] The grounds upon which the Applicant predicated its prayers for the removal of the Respondents as Trustees of the Insolvent estate, are therefore not sustainable. In any case, I do not think that the removal of the Trustees at this stage would aid the sequestration of the Insolvent estate. This is because they have already taken copious steps towards the administration of the estate. All the immovable properties known to have been owned by the Insolvent have already been sold. To appoint new Trustees would set back the sequestration in huge ramifications. **Annandale J,** appreciated these

consequences in paragraph 89 of the judgment of 2008 in the following terms:-

> *"(89) I respectfully agree with the approach taken by my late brother to avoid legal niceties and technical argument causing undesirable dismantling of the work that has been done by the co-trustees over a very long period. Properties have been sold to bona fide purchasers and they have expended huge amounts of money on it. Bonds were registered and properties were transferred. Creditors have proved claims and the Master has been satisfied in the winding up of the Insolvent estate. --- an enormous vacuum will be created when the very foundation on which numerous acts, events and expenditures over a number of years has rested, is to suddenly evaporate. It would result in gross unfairness to all affected parties, with the exception of the Applicant, if this was to be sanctioned by the court"*

[108] Furthermore, I agree with the Trustees that the prayer sought by the Applicant for them to render an account within 30 days of this judgment is unrealistic in view of the fact that the requisite documentation and information for such an account are in the possession of Paul Shilubane (deceased). The Trustees have to take the appropriate steps, through the appropriate channels to retrieve the said documentation and information from the estate of Paul Shilubane.

[110] It appears to me that the proper cause would be for the Trustees to be put to terms to take the appropriate steps to retrieve the said documentation and information from the estate of Paul Shilubane and to hold the Trustees to their undertaking in paragraph 55 of their answering affidavit (page 89 of the book), to render said account within 30 days of the receipt of all relevant documents and information.

[111] I now turn to the applications contained in 1275/11 and 1276/11. These two applications were premised upon exactly the same facts and circumstances. I'll thus proceed to deal with both applications together.

[112] In these two applications, the Applicant seeks the removal of the two liquidators of the two companies in liquidation, the appointment of new liquidators and the rendering of accounts. I have already set out the prayers sought by the applicant in extenso and they do not bear repetition.

[113] I must of necessity say from the outset, that the question of the removal of the 2nd Respondent Mr Paul Shilubane is rendered otiose, by reason of the fact that Paul Shilubane is now regrettably deceased. The 1st Respondent is however opposed to this application and has duly filed papers in pursuit of his opposition of same.

[114] The Applicant's case as can be deciphered from the papers filed of record, is that the liquidators failed to comply with statutory obligations which were designed to ensure proper winding up of the companies in liquidation and to discharge the fiduciary duty they owe to the creditors as well as the companies in liquidation.

[115] The grounds upon which the Applicant contends for the removal of the liquidators are set out in paragraphs 35 to 36.5 of founding affidavit in 1275/11 (pages 21 to 24 of the book) and in paragraphs 35 to 36.5 of the founding affidavit in 1276/11 (pages 20 to 23 of the book). The liquidators responses are found in pages 75 to 76 and 74 to 75 respectively, of the book of pleading in both applications. The facts are all the same and I will treat both applications as one.

[116] The Applicant raised some other issues in its objections and supplementary objections filed with the Master, as is evidenced by annexures SM3 and SM4, exhibited in the both applications. Some of the objections raised in SM3 and SM4, basically those on non compliance with statutory duties were replicated in the founding affidavit. I'll first deal with the other issues raised in SM3 and SM4 before proceeding to those that enure in the founding affidavit.

[117] In paragraph 2.4 of SM3, the Applicant took objection to the final appointment of the liquidators on grounds that the High Court does not have

the authority to appoint final liquidators. The Applicant urged section 125 of the Companies Act of 1912 (repealed Act) and contended that section deals with only the appointment of provisional liquidators.

[118] Now it is on record that on the 7th October 2005, the High Court ordered a provisional winding up of both companies, BHK (Pty) Limited and Broadlands (Pty) Ltd and appointed provisional liquidators. A final winding up order was issued by the court on the 18th November 2005. It is this final winding up order which appointed the liquidators that elicited the cries of the Applicant in this regard.

[119] Now section 125 (1) (2) & (3) of the repealed Act upon which the Applicant predicated it's objection states as follows:-

"

(1) For the purpose of conducting the proceedings in winding up a company and performing such duties in reference thereto as <u>the court may impose</u>, <u>the court may appoint a liquidator or liquidators</u>

(2) <u>The court may make such appointment provisionally</u> at any time after the presentation of a petition and before the making of an order of winding up.

(3) *If a provisional liquidator is appointed before the making of a winding up order, any fit person may be appointed"* (underline mine).

[120] The forgoing legislation clearly accords the court the discretion to appoint liquidators or provisional liquidators. This can be deduced from the word *"may appoint a liquidator or liquidators"* and *"may make such appointment provisionally"* as appear therein. I am therefore inclined to agree with the liquidators that this legislation does not limit the powers of the High Court to only the appointment of provisional liquidators. We must also not lose sight of the fact that the High Court has inherent and unlimited original jurisdiction to deal with all criminal and civil causes in the land via section 151(1) (a) of the Constitution, except where it's jurisdiction is ousted by clear and unambiguous wards of statute. If it was the intention of the legislature to limit the powers of the High Court to only provisional appointment of liquidators, it would have said so in clear and unambiguous language. It appears to me therefore, that having granted the order

provisionally winding up the companies and appointing the provisional liquidators, that the High Court was well within its powers to grant the final orders. Applicant's objection in this regard lacks merits and is dismissed accordingly.

[121] Further, in paragraph 2.1 of SM3 the Applicant took issue with the appointment of the 1st Respondent, Mr Brain St Clair Cooper as a liquidator, on the premises that he is disqualified from such appointment in terms of section 55 (d) of the Insolvency Act, since he does not reside in Swaziland.

[122] Now section 55 (d) of the Insolvency Act provides as follows:-

> *"55 Any of the following persons shall be disqualified from being elected or appointed a trustee*
>
> *(b) Any person who does not reside in Swaziland"*

[123] I agree entirely with the liquidators that the foregoing provision cannot be read in isolating of the provisos that appear at the foot of section 55 which are as follows:-

"Provided that notwithstanding anything in paragraph (d), any person who, though not resident within Swaziland, maintains a bona fide office within Swaziland to the satisfaction of the Master (whose opinion shall be final)may be elected trustees.

Provided further that such person is not otherwise disqualified from election and that immediately after his election he chooses for the purpose of his administration of the estate a domicilium citandi et executandi within Swaziland which shall be notified by him in the gazette"

[124] It was in compliance with the foregoing statute that the 1st Respondent who is ordinarily resident outside Swaziland, chose a domicilium citandi et executandi within Swaziland. The Applicant by its own showing acknowledged this fact in paragraph 6 of both applications, where it states as follows:-

"The 1st Respondent is BRIAN ST CLAIR COOPER N.O., an adult male, Insolvency practitioner, practicing as such at Suite I, Cooper Chambers, 4 Ruthland Street, Corner of Jan Smuts Avenue, Kraighall Park, Johannesburg, Gauteng Province, Republic of South Africa, being his last known address and a Trustee in the Insolvent Estate of Dumisa Mbusi Dlamini, with his chosen domicilium citandi et executandi as MESSRS, CURRIE & SIBANDZE, 1ST FLOOR DEVELOPMENT HOUSE, SWAZI PLAZA MBABANE"

[125] The objection taken by Applicant on this issue therefore lacks merits. It fails and is dismissed accordingly.

[126] Now, let us proceed to the alleged non compliance with statutory obligations by the liquidators.

[127] A catalogue of the alleged statutory failings of the liquidators are set out by the Applicant in both applications and are best summarized as follows:-

[128] The liquidators failed to hold the first creditors meeting within 21 days of the winding up order, in terms of the 5th schedule to the Repealed Act. The final winding order was made on the 18th November, 2005, the first meeting of the creditors was billed to take place on the 26th of June 2007, almost 2 years later. However, the meeting of the 26th of June 2007 did not take place because the liquidators were absent and the 1st Respondent had purported to give a power of Attorney to Mrs J. Currie of Currie and Sibandze Attorneys, who is the Attorneys who acted for the Swaziland Electricity Board in Placing the companies (in liquidation). That the Applicants Attorney objected to this arrangement and the meeting was postponed to 31st July 2007. Applicant also raised the issue of Mrs Currie acting for the 1st Respondent in annexure SM4, I will come to this matter, anon. Suffice it to say that after a couple of postponements the first meeting of creditors was finally held on the 28th of August 2008.

[129] The Applicant further contends, that the liquidators have failed to provide security to the satisfactory of the Master as required by Section 125(5) of the repealed Act. That without such security the liquidators cannot act as such in the winding up process.

[130] Further that the liquidators failed to take into their custody and under their control all the property, movable and immovable to which the companies are is or appear to be entitled, pursuant to section 125 of the Repealed Act.

[131] Also that the liquidators did not comply with their general duty to realize the assets of the company and distribute the proceeds thereof to the creditors in accordance with the order of preference.

[132] Furthermore, the liquidators failed to frame and lodged a liquidation account and the plan of distribution within six (6) months from the date on which they were appointed, as in required by section 133, read with section 134 of the Repealed Act.

[133] That the liquidators have failed to administer at all the estate of the companies (in liquidation). That apart from the one meeting of creditors, there have been no other meeting of creditors nor have creditors proven their claims. That the liquidators have not even started the liquidation process almost six (6) years after the final winding up order.

[134] It is against a backdrop of the foregoing alleged statutory failings that the Applicant contends as follows in paragraphs 37 to 41 of its founding affidavit in both applications:-

"37 As a result of the liquidators failure to observer even the most basic duties as liquidators and not performing any of their functions for almost six(6) years renders them unsuitable to continue as liquidators of the company. I am advised that the liquidators owe fiduciary duties to creditors and to the company (in liquidation). The dereliction of duty by the liquidators is serous breach of the duty owed to creditors and the company (in liquidation).

38. As a fiduciary act (sic) only and in good faith and must excise his powers for the benefit of the company and the creditors as a whole, and not for his own benefit or benefit of a third party for any other collateral purpose. He must act in the best interest and for the benefit of the creditors and for the company being wound up, that is to say he must act in the best interest of everyone concerned in the liquidation.

39. In the circumstances of the present case viewed in totality are such that it is not in the best interest of liquidation that the liquidators continue in office.

40. The liquidators have failed to act with care and diligence and have abdicated their responsibility by not performing any of the functions which they were appointed for.

41. For the aforementioned reasons, it is submitted that there is good cause to remove the liquidators from office"

[135] In his answering affidavit the 1st Respondent admits that he was not able to furnish security as is required by the relevant statute. He also admits that after the first creditors meeting, no other meeting of creditors have been held. The 1st Respondent however distanced himself completely from any

statutory failings in this regard, laying the blame squarely at the Masters door. The 1st Respondent contends, which contention was echoed by Ms Van der Walt, in oral argument, that in terms of the repealed Act, it is the Master to set the bond for security, and the failure by the Master to set said bond made it impossible for the 1st Respondent to carry out his duties as a liquidator. This is as stated by 1st Respondent in paragraph 12.7 of his affidavit as follows:-

"No security being capable of being furnished in the circumstances, I could not legally exercise the powers of a liquidator as set out in section 127 of the 1912 Act and / or section 328 of the 2009 Act, and had I attempted to perform of any act the Applicant avers we should have performed, same would have been open to (further) legal challenges".

[136] It is common cause is these applications that without filing the security to the satisfaction of the Master, a liquidator cannot act as such in a winding up process. While I agree with the 1st Respondent that the Master is required to set bond of said security, I do not however agree with him that the failure of

the Masters to set the said bond of security, automatically exonerated the 1st Respondent from any liability for his failure to meet this statutory duty. This is because the liquidator just like the Trustees owe a fiduciary duty to not only the creditors but also the companies in liquidation. This fiduciary duty demands of the liquidators a high degree of standard of care and diligence in the conduct of their office, having taken up office as such liquidators.

[137] I agree with the position of Mr Magagula on this subject matter. I say this because, liquidators owe a high standard of care not only to the creditors but also to the Insolvent Estate placed under sequestration. They are thus required to display a high degree of care, skill and diligence in the conduct of their office. This position of the law found expression in the case of **Standard Bank of South Africa v The Master of the High Court and others Case No. 103/09,** which was rightly urged by the Applicant in these proceedings. In that case, the court in South Africa considered the duty imposed on a liquidator in the winding up of a company. The court stated as follows in that case:-

"In the winding up of companies, liquidators occupy a position of trust, not only towards creditors but also the companies in liquidation whose assets vests in them. Liquidators are required to act in the best interest of creditors. A liquidator should be wholly independent, should regard equally the interest of all the creditors and should carry out his or her duties without fear, favour or prejudice-----. A liquidator must act with care and skill in the performance of his duties. He has a duty to exercise particular professional skill, care and diligence in the performance of his duties, and will incur liability if he fails to display that degree of care and skill which, by accepting office, he holds himself out as possessing. Thus a high standard of care and diligence is required of a liquidator. He must act reasonably in the circumstances. The test as to what is or is not reasonable in any given circumstance is not whether the conclusion arrived at is reasonable, but is that of a reasonable man "applying his mind to the conditions of affairs" which means "considering the matter as a reasonable man normally would and then deciding as a reasonable man normally would decide"

[138] I hold the view that a reasonable man vested with the high degree of care and diligence required of the liquidators would take all reasonable steps to ensure that the Master sets the bond of security, to enable them furnish same and proceed to the administration of the estate.

[139] Even though the Master is the pivot upon which this issue spins, he has kept quiet, filed no processes and has not participated in these proceedings.

[140] I therefore hold the view, that to be held to have discharged their duties in this regard with the standard of care and diligence required, the liquidators must demonstrate that they took steps to compel the Master to set said bond of security. The question arising here therefore, is, what steps did the 1st Respondent take to compel the master to set the said bond of security?

[141] The 1st Respondent detailed the steps he took in this regard in the following paragraphs of his affidavit:-

“

12.4.1 *Letter from my office dated the 14th October 2005 (i.e. before the final winding up order was granted, which was on the 18th November 2005) to the second Respondent (hereinafter refereed to as “Mr Shilubane”), the local liquidator based in Swaziland. This letter requested assistance in obtaining certificates of appointment from the Master, estate numbers in order to proceed with arranging the necessary bonds of security, and to take charge of the estate and value the assets. A copy thereof is attached hereto as annexure “BSC 1”*

12.4.2 *Letter from Mr Shilubane dated 17th October 2005, providing the Master’s reference number, copy attached as annexure “BSC 2”*

12.4.3 *Letter from my office dated 13th December 2005 to Mr Shilibane, requesting him to ensure that the necessary valuations be obtained as a matter of urgency, copy attached as annexure “BSC 3” not Shilubane or I were able to obtain same because we were not able to act, as the Master had not determined the security to be filled with her.*

12.4.6 Letter from Mr Shilubane to the Master dated the 21st July 2010, formally and is writing requesting him to ensure that the necessary valuations be obtained as a matter of urgency, copy attached as annexure "BSC 6" ".

[142] Having carefully considered the above allegations and carefully dissected the accompanying annexures, I come to the ineluctable conclusion that the 1st Respondent did not do enough to compel the Master to do what she was required to do in the winding up process. I say this because the final winding up order was given on the 18th of November, 2005. Annesure BSC 1 and BSC 2 dated 14th October 2005 and 17th October 2005 respectively to which 1st Respondent referred me, were written before the final winding up order.

[143] It appears that after the final winding up order was issued, that the 1st Respondent only wrote two letters in relation to this issue namely annexure BSC3 dated the 13th of December 2005, written to Mr Shilubane requesting him to ensure that the necessary valuations are obtained, and annexure BSC

6 letter from Mr. Shilubane to the Master dated 21st July 2010, requesting the bonds for security.

[144] It appears therefore, that after BSC 3 was written on the 13th of December 2005, that is if this annexure can be taken as one compelling the Master to furnish bond of security, the next step was taken by the 1st Respondent on the 21st of July 2010, almost 5 years later. What the 1st Respondent appears to have done is to have folded his arms waiting for the Master to provide the said bonds of security to enable him commence the winding up process. This does not demonstrate the due care and diligence imposed on him by the fiduciary duty he owes to the creditors and the companies (in liquidation.)

[145] The question that has most agitated my mind is, when the Master failed to furnish the said bond of security, why did the 1st Respondent not compel him by Mandamus to do so. The 1st Respondent had this alternative remedy for the Masters failure to act punctually and failure to act at all. This is because where a statute vests a statutory duty in a person, if he fails to discharge it, a party aggrieved can compel him by an order of Mandamus to do so. I hold

the view that if the 1st Respondent was diligent he would have explored this option.

[146] The totality of the foregoing to my mind goes to demonstrate, that the 1st Respondent was not serious in discharging this statutory responsibility on which the entire winding up process hinged. The unseriousness of the 1st Respondent in discharging his duties is also evident from the fact that he failed to attend the first meeting of creditors slated for the 26th of July 2005. He rather nominated Mrs Currie to act in his stead. It is common cause that Mrs Currie is the same Attorney that represented one of the creditors, Swaziland Electricity Board in moving the applications for the winding up of the two companies (in liquidation). It appears to me therefore, that Applicants contention that in these circumstances, Mrs Currie whom the 1st Respondent nominated to represent him in the 1st creditors meeting, is not an independent person and this automatically affects the independence of the 1st Respondent himself, has much to commend itself for.

[147] In these circumstances, I am inclined to agree with the Applicant, that the 1st Respondent is wanting in the standard of care and diligence, which his fiduciary duty as such liquidator demands. This state of affairs demands his removal as liquidator in the companies (in liquidation) upon his removal, it is only proper that he be ordered to render account of his administration of the companies (in liquidation) to the Master.

[148] It is by reason of the totality of the foregoing, that I come to the conclusion that the Applicants applications in 1275/11 and 1276/11 have merits. They succeed.

[149] On these premises I make the following orders in Case No. 2034/04:-

(1) That the prayers for the removal of the 2nd 3rd and 4th Respondents as Trustees of the Insolvent Estate of Dumisa Mbusi Dlamini, be and is hereby dismissed.

(2) That the 1st Respondent be and is hereby removed as Trustee of the Insolvent Estate of Dumisa Mbusi Dlamini.

(3) That the Trustees of the Insolvent Estate of Dumisa Mbusi Dlamini be and are hereby ordered to take all legal steps to recover all relevant information and documentation from the estate of Paul Shilubane (deceased), within 3 months of the order hereof, for the purposes of rendering of an account to the creditors of the Insolvent Estate.

(4) That the Trustees of the Insolvent Estate of Dumisa Mbusi Dlamini be and are hereby ordered to render an account and distribution of the Insolvent Estate, to the creditors of the Insolvent Estate, within 30 days of receipt of the said relevant documents and information.

(5) Each party to bear its own costs.

[150] I also make the following orders in 1275/11 and 1276/11, respectively:-

1. That the 1st Respondent be and is hereby removed as a liquidator of BHK (Pty) Limited (in liquidation) and Broadlands (Pty) Limited (in liquidation) respectively.
2. That the Master of the High Court be and is hereby ordered to convene a meeting of creditors of BHK (Pty) Limited (in liquidation) and Broadlands (Pty) Limited (in liquidation) respectively, for the purpose of electing new liquidators, within 30 days from the date of this order.
3. That the 1st Respondent be and is hereby ordered to render an account of his administration of BHK (Pty) Limited (in liquidation) and Broadlands (Pty) limited (in liquidation) respectively, to the Master of the High Court within 30 days from the date of this order.
4. Costs of suit.

For the Applicant **Magagula**

For the Respondent **J M Van der Walt**

(Instructed by Attorney Currie)

DELIVERED IN OPEN COURT IN MBABANE ON THIS

THE …… DAY OF ……..2012

OTA J.

JUDGE OF THE HIGH COURT