THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable
Case No: 85/2017

In the matter between:

CITY CAPITAL SA PROPERTY HOLDINGS LIMITED **APPELLANT**

and

CHAVONNES BADENHORST ST CLAIR COOPER NO **FIRST RESPONDENT**

JOHANN DEMETRIUS APPIES NO **SECOND RESPONDENT**

SADECK AHMED NO **THIRD RESPONDENT**

Neutral citation: *City Capital SA Property Holdings Ltd v Chavonnes Badenhorst St Clair Cooper NO* (85/2017) [2017] ZASCA 177 (1 December 2017)

Coram: Leach and Saldulker JJA and Plasket, Tsoka and Schippers AJA

Heard: 20 November 2017

Delivered: 1 December 2017

Summary: Companies Act 71 of 2008 : when making an order under s 20(9)(*a*), a court has no power to order a person to act as the liquidator of a company : only the Master may do so : relief sought by appellant having no practical effect : for this reason appeal dismissed.

ORDER

On appeal from: Western Cape Division , Cape Town (Van Rooyen AJ sitting as court of first instance):

1 Paragraph 2 of the order of the court a quo is set aside and replaced with the following:

'2(a) The counter application of the intervening party for the relief in paragraph 3.1 and 3.2 of the notice of counter-application is dismissed, as such relief is unnecessary.

(b) There is no order as to the costs of the counter-application.'

2 Save as aforesaid, the appeal is dismissed with costs, including the costs of two counsel.

JUDGMENT

Schippers AJA (Leach and Saldulker JJA and Plasket and Tsoka AJJA concurring):

[1] On 8 July 2014 the Western Cape High Court made an order that five separate companies, all of which had been wound up, were declared 'a single entity as envisaged by ss 20(9), 22, 141(2)(*c*) and 141(3) of the Companies Act 2008'; that the five companies would henceforth be known as the Dividend Investment Scheme; and that the respondents, who had already been appointed as liquidators in the winding-up of two of the five companies, would be the liquidators of the Dividend Investment Scheme.

[2] The central issue in this appeal is whether the order appointing the existing liquidators of the two companies as liquidators of the Dividend Investment Scheme, was competent. The appellants say that it was not: they contend that only the Master of the High Court (the Master) has the power to appoint a liquidator and consequently, the order is a nullity.

Factual background

[3] The matter arises from a property syndication scheme conducted by the Dividend Investment Group, which consisted of Div-Vest Holdings (Pty) Ltd (Div-Vest Holdings)] and its two wholly-owned subsidiaries.

[4] The Dividend Investment Group promoted some 70 syndications. The typical property syndication was structured as follows. Members of the public acquired 100% of the shareholding in a holding company. The holding company usually acquired about 85% of the shareholding in a property owning company with the balance of 15% of the shareholding held by one of the promoter companies. The property owning company would acquire a commercial property with funds borrowed mainly from the holding company and in some instances, a financial institution. The scheme was promoted on the basis that the property would be sold at a profit. This would allow the property owning company to repay the holding company. The profit would then be distributed as a dividend to the shareholders in the holding company and the remaining minority shareholder.

[5] City Capital contends that it acquired the minority shareholding of Div-Vest Holdings in the property owning companies and that it is a creditor of those companies because it made loans to them. This is in dispute, but need not be decided for purposes of this judgment.

[6] The two property syndications in issue in this case relate to a single commercial property development, a shopping centre called ‘Zambezi Retail Park’ in Pretoria. This shopping centre was developed in two phases involving a single sectional title scheme. Two property owning companies, Div-Prop 11 (Pty) Ltd (Div-Prop 11) and Div-Prop 12 (Pty) Ltd (Div-Prop 12), each owns about half of Zambezi Retail Park.

[7] The shares in Div-Prop 12 are held as follows: 45.5% of the shares are held by Blue Beacon Investments 52 (Pty) Ltd (Blue Beacon Investments 52) as one of the holding companies; 44.5% by Div-Hold Income 12 (Pty) Ltd (Div-Hold Income 12) as the other holding company; and 10% allegedly by City Capital (this is in dispute). The shares in Blue Beacon Investments 52 are held by 89 investors and in Div-Hold Income 12, by 125 investors.

[8] The shareholding in Div-Prop 11 is as follows: 90% of the shares are held by Div-Hold 11, the holding company; and 10% allegedly by City Capital (this is also in dispute). The shares in Div-Hold 11 are held by 201 investors.

[9] In February 2013 the three holding companies, Blue Beacon Investments 52, Div-Hold Income 12 and Div-Hold 11, applied for the winding-up of Div Prop 11 and Div-Prop 12. Provisional winding-up orders were granted and in March 2013 the Master of the High Court appointed Mr C Cooper (the first respondent), Mr G Gainsford and Mr J Appies (the second respondent) as the provisional liquidators of Div-Prop 11. Subsequently, Mr Cooper and Mr Appies were appointed as final liquidators of the company. Mr Cooper and Mr S Ahmed (the third respondent) were appointed as the provisional liquidators and later final liquidators, of Div-Prop 12.

[10] In March 2013, the board of directors of Blue Beacon Investments 52, Div-Hold Income 12 and Div-Hold 11 each adopted resolutions in terms of s 129(1) of the Companies Act 71 of 2008 (the 2008 Act), placing these companies in business rescue. Mr J Van Rensburg was appointed the business rescue practitioner of all three companies. In June 2014, he applied to court for an order discontinuing the business rescue proceedings and placing all three companies in liquidation, in terms of s 141(2)*(a)*(ii) of the 2008 Act.

[11] In an application heard on the same day as the liquidation applications, Mr Van Rensburg successfully applied, inter alia, for an order declaring that Div-Hold 11, Div-Hold Income 12 and Blue Beacon Investments 52, together with Div-Prop 11 and Div-Prop 12 (both in liquidation), 'be declared a single entity as envisaged by ss 20(9), 22, 141(2)(*c*) and 141(3) of the 2008 Companies Act' (the s 20(9) application).

[12] The grounds for the s 20(9) application were essentially the following. The five companies were part of an unsustainable syndication scheme which had engaged in reckless trading and defrauded members of the public. The use of the companies, or the acts by or on behalf of them, constituted an unconscionable abuse of their juristic personality, justifying an order that they should not be regarded as juristic persons as contemplated in s 20(9) of the 2008 Act. Members of the public had invested some R140 million into Zambezi Retail Park, whereas the property was worth only about R45 million, leaving investors with a loss of nearly R100 million. The syndication value of the property was about R125.5 million, its purchase price was some R107.3 million, and the promoter of the scheme had made a profit of more than R19 million, which immediately reduced the value of the investors' money. In addition, investors were liable for about R10

million raised through a mortgage bond. The only way they would recover anything in the liquidation proceedings was if the promoter and other companies in the scheme were held liable by holding the persons behind the promoter personally responsible for the losses incurred.

[13] Zambezi Business Park was run as a single indivisible commercial enterprise. The corporate identity of the five companies had not been maintained, their financial affairs were not kept apart, and funds flowed to and from the various companies as investors were paid dividends promised to them. It was therefore contended that the five companies had to be treated as a single entity and the liquidators of Div-Prop 11 and Div-Prop 12 should be appointed as the liquidators of the Dividend Investment Scheme because they had extensive knowledge of the scheme, had already incurred costs, and their appointment was to the advantage of creditors.

[14] On 8 July 2014, Samela J made the following order in the s 20(9) application (the July order).

‘1. Simultaneously with the liquidation orders pertaining to the first to third respondents (under case number 10687/2014, 10688/2014 and 10689/2014), the first to third respondents, Div-Prop 11 (Pty) Ltd and Div-Prop 12 (Pty) Ltd [are] declared a single entity as envisaged by Sections 20(9), 22, 141(2)(c) and 141(3) of the Companies Act 2008;

2. The five entities referred to in paragraph 1 above shall henceforth be known as the “Dividend Investment Scheme” to be administered as a company in continuance of the liquidation proceedings of the 4th to 7th Applicants;

3. It is declared that the appointed liquidators in the estates of the 4th to 7th applicants to be the appointed liquidators of the combined company (“the Dividend Investment Scheme”).’

[15] After the July order was granted a dispute arose between the respondent and the Master as to whether a first meeting of creditors had to be held in the estate of the single entity, the Dividend Investment Scheme. The Master's position was that the Scheme was a new entity, and the fact that it had been declared a single entity did not prevent him from exercising his power to summon the first meeting of creditors in terms of s 364 of the Companies Act 61 of 1973 (the 1973 Act); and that all interested parties, including investors, creditors and shareholders could in this way nominate and vote for liquidators of their choice.[1]

[16] The respondents' stance was that the process of liquidation in relation to Div-Prop 11 and Div-Prop 12 included the single entity, which merely had to continue. They said that if the liquidation had to start afresh, numerous practical problems would arise. A first meeting of creditors had already been held in the Div-Prop 11 and Div-Prop 12 estates at which members and creditors (including the holding companies) had already proved claims, certain resolutions were adopted, and the respondents had already been appointed as liquidators of those two companies. They had already commenced with s 417 and s 418 enquiries

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[1] Section 364 of the 1973 Act provides:

'Master to summon first meetings of creditors and members and purpose thereof

(1) As soon as may be after a final winding-up order has been made by the Court or a special resolution for a creditors' voluntary winding-up of a company has been registered in terms of section 200, the Master shall summon-

(a) a meeting of the creditors of the company for the purpose of-

(i) considering the statement as to the affairs of the company lodged with the Master under section 363;

(ii) the proof of claims against the company; and

(iii) nominating a person or persons for appointment as liquidator or liquidators; and

(b) a meeting of the members of the company or, in the case where the winding-up concerns a company limited by guarantee, a meeting of the contributories in respect of that company, for the purpose of-

(i) considering the said statement as to the affairs of the company; and

(ii) nominating a person or persons for appointment as liquidator or liquidators,

unless the company in general meeting, when passing a resolution provided for in section 349, has already disposed of the matters referred to in subparagraphs (i) and (ii).

(2) Meetings of creditors under this section shall be summoned and held as nearly as may be in the manner provided by the law relating to insolvency, and meetings of members or contributories in the manner prescribed by regulation: Provided that, in the case of a meeting of creditors, the Master may direct the company concerned or the provisional liquidator to send a notice of such meeting by post to every creditor of the company.'

under the 1973 Act. The respondents contended that in these circumstances, there would be uncertainty about the status of: the claims proved and the resolutions adopted at the first meeting of creditors; the s 417 and 418 enquiries; and their appointment as liquidators of the two companies.

[17] The dispute could not be resolved, and the respondents applied to the Western Cape High Court for an order directing the Master to comply with the July order. Mr Cooper made the founding affidavit in that application and it is necessary to refer to paragraphs 14, 16 and 25 thereof because they were incorporated in the order issued on 3 December 2014 (the December order), pursuant to the application. Those paragraphs read as follows:

'14. It was always our intention and the intention of the business rescue practitioner that the process of liquidation should merely continue.

16. What was envisaged is that there would be a second meeting of the combined entity "Dividend Investment Scheme", but for some or other reason the Master differs from this interpretation of the court order.

25. Dealing with the problems to be encountered by the Applicants should they have to go back to a first meeting can be summarised as follows:

25.1 The Dividend Investment Scheme consisted of approximately 166 different companies representing approximately 70 syndications.

25.2 It is intended to join the companies to the Dividend Investment Group and the applicants believe that at the end of the day all 166 companies will be liquidated and will be declared to be part of the same scheme.

25.3 If the Master is correct in his attitude then that would mean that every time companies are joined to the dividend investment scheme the position will revert to a time before the first meeting and we would have various first meetings of creditors.

25.4 In the meantime, the liquidation process, as we proceed, is being held up for instance if a second meeting of creditors was held tomorrow then the liquidators would be entitled to

sell Zambezi Retail Park (the property owned by the Investment Scheme) and pay investors their dues [and as] far as is possible, bearing in mind that the total syndicated value of Zambezi Retail Park was some R110 000 000,00 (approximately 145 investors), but the best offer received to date is approximately R54 000 000,00 provided that a problem with the electricity account is sorted out with the City of Tshwane (litigation is also underway in that matter).

25.5 This would militate against the effective administration of the various estates who will come into the fold as soon as we get to those companies.

25.6 The question we pose to our attorneys of record and counsel is that what would happen if the estate proceeds to a second meeting of creditors and the resolutions of creditors are passed and thereafter more companies are joined to the scheme.

25.7 How can the status of the liquidation then revert to the position as it was before the first meeting of creditors and what happens to the resolutions which [were] taken at the second meeting of creditors.'

[18] On 3 December 2014 the matter came before Meer J who issued the December order. It reads:

'The respondent is ordered to immediately comply with the order of this court dated 8 July 2014 which is attached to the notice of motion as annexure "A" [the July order] and interpret the order as set out in paragraph 14, 16 and 25 of the founding affidavit.'

[19] In May 2015 City Capital launched a counter-application in the court a quo in which it sought, inter alia, the reconsideration and setting aside of both the orders granted on 8 July 2014 and 3 December 2014 in their entirety, in terms of rule 6(12)*(c)* of the Uniform Rules of Court.[2] Subsequently, in the court a quo and in argument before us, City Capital confined the relief sought to paragraph 3 of the July order, ie that the court was not empowered to appoint the respondents as

[2] Rule 6(12)(c) reads:
'A person against whom an order was granted in such person's absence in an urgent application may by notice set down the matter for reconsideration of the order.'

liquidators of the Dividend Investment Scheme. It contended that paragraph 3 was a nullity, and consequently that the December order should suffer the same fate as it purported to give effect to the July order.

[20] The court a quo dismissed the counter application in October 2016. In essence it held that paragraph 3 of the July order was a necessary consequence of paragraphs 1 and 2 thereof; that read contextually, it did not constitute the appointment of liquidators contemplated in Chapter 14 of the 1973 Act; and that as a result, the December order was not impugnable. This appeal is with the leave of the court a quo.

[21] Before dealing with the issues in this appeal, it is necessary to address a preliminary point taken by the respondents for the first time at the hearing of the matter, namely that City Capital had no standing to challenge paragraph 3 of the July order, and consequently, the December order. The point may be dealt with briefly. City Capital alleged that it had acquired the minority shareholding of Div-Vest Holdings in the property owning companies and that it was a creditor of those companies because it had advanced loans to them. This, the respondents submitted, did not give City Capital standing to challenge the appointment of liquidators to the holding companies, namely Div-Hold 11, Div-Hold Income 12 and Blue Beacon Investments 52.

[22] The question whether a litigant's interest is sufficient to clothe it with standing must be determined in the light of the factual and legal circumstances of the case.[3] The founding affidavit in the counter-application states that City Capital

[3] *JDJ Properties CC & another v Umngeni Local Municipality & another* [2012] ZASCA 186; 2013 (2) SA 395 (SCA) para 27.

is a shareholder and creditor in all the respondent companies referred to in that application and, accordingly, that it has a direct and substantial interest in the relief sought. It appears that those allegations were not challenged. But in any event, City Capital was not given an opportunity to deal with the point in its papers, and it is impermissible for the respondents to raise it now.

The issues

[23] Against the above background, the first issue is whether paragraph 3 of the July order, in terms of which the court ostensibly appointed the liquidators of the single entity, the Dividend Investment Scheme, was competent. Put differently, can a court order a person to act as the liquidator of a company when making an order under s 20(9) of the 2008 Act? If the answer to that question is 'no', then the second issue arises: whether, in the circumstances, that finding would have any practical effect as contemplated in s 16(2)*(a)*(i) of the Superior Courts Act 10 of 2013, given that the Master had on 10 December 2014 appointed the liquidators of the single entity.

[24] As stated above, City Capital abandoned its attack on paragraphs 1 and 2 of the July order, in terms of which the five companies in liquidation were declared a single entity (the Dividend Investment Scheme) to be administered as a company in continuance of the liquidation proceedings of Div-Prop 11 and Div-Prop 12. It is thus unnecessary to consider the proper construction and application of s 20(9) of the 2008 Act in any detail, which in any event was not argued before us. Consequently, s 20(9), which appears to supplement the common law in relation to

piercing the corporate veil,[4] is construed only in the context of whether it authorises the appointment of a liquidator.

[25] Section 20(9) of the 2008 Act provides:

'If, on application by an interested person or in any proceedings in which a company is involved, a court finds that the incorporation of the company, any use of the company, or any act by on behalf of the company, constitutes an unconscionable abuse of the juristic personality of the company as a separate entity, the court may-

(*a*) declare that the company is to be deemed not to be a juristic person in respect of any right, obligation or liability of the company or of a shareholder of the company or, in the case of a non-profit company, a member of the company, or of another person specified in the declaration; and

(*b*) make any further order that the court considers appropriate to give effect to a declaration contemplated in paragraph (*a*).'

[26] It is settled that words in a statute must be given their ordinary meaning unless to do so would result in an absurdity. Statutory provisions should always be interpreted purposively, in context and consistently with the Constitution.[5] Stated differently, when interpreting legislation, what must be considered is the language used; the context in which the relevant provision appears; the apparent purpose to which it is directed; and the material known to those responsible for its production.[6]

[27] It is trite that a company is a legal entity distinct from its shareholders. It has rights and liabilities of its own, separate from those of its shareholders. Its property

[4] P Delport and Q Vorster *Henochsberg on the Companies Act 71 of 2008* (Service Issue 13, 2017) Vol 1 at 100(3).
[5] *Cool Ideas 1186 CC v Hubbard & another* [2014] ZACC 16; 2014 (4) SA 474 (CC) para 28.
[6] *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] ZASCA 13; 2012 (4) SA 593 (SCA) para 18.

is its own and not that of its shareholders.[7] This follows from the separate legal existence with which a company is by statute endowed.[8] Thus, in *The Shipping Corporation of India Ltd* [9] Corbett CJ said:

'It seems to me that, generally, it is of cardinal importance to keep distinct the property rights of a company and those of its shareholders, even where the latter is a single entity, and that the only permissible deviation from this rule known to our law occurs in those (in practice) rare cases where the circumstances justify "piercing" or "lifting" the corporate veil. And in this regard it should not make any difference whether the shares be held by a holding company or by a Government. I do not find it necessary to consider, or attempt to define, the circumstances under which the Court will pierce the corporate veil. Suffice it to say that they would generally have to include an element of fraud or other improper conduct in the establishment or use of the company or the conduct of its affairs. In this connection the words "device", "stratagem", "cloak" and "sham" have been used …'

[28] Section 20(9) of the 2008 Act provides a statutory basis for piercing the corporate veil. On its plain wording, s 20(9) permits a court to disregard the separate juristic personality of the company where its incorporation, use or an act performed by or on its behalf 'constitutes an unconscionable abuse of the juristic personality of the company as a separate entity'. The term 'unconscionable abuse' is not defined in the 2008 Act and must therefore be given its ordinary meaning.

[29] The meaning of 'unconscionable' in the Oxford English Dictionary includes, 'Showing no regard for conscience . . . . Unreasonably excessive . . . . egregious, blatant . . . . unscrupulous.' It is in my view undesirable to attempt to lay down any

[7] *Salomon v A Salomon & Co* [1897] AC 22 at 51, affirmed in *Dadoo Ltd & others v Krugersdorp Municipal Council* 1920 AD 530 at 550.
[8] *Dadoo* fn 5 *ibid*.
[9] *The Shipping Corporation of India Ltd v Evdomon Corporation & another* 1994 (1) SA 550 (A) at 566C-F.

definition of 'unconscionable abuse'.[10] It suffices to say that the unconscionable abuse of the juristic personality of a company within the meaning of s 20(9) of the 2008 Act, includes the use of, or an act by, a company to commit fraud; or for a dishonest or improper purpose; or where the company is used as a device or facade to conceal the true facts.[11]

[30] Thus, where the controllers of various companies within a group use those companies for a dishonest or improper purpose, and in that process treat the group in a way that draws no distinction between the separate juristic personality of the members of the group, as happened in this case, this would constitute an unconscionable abuse of the juristic personalities of the constituent members, justifying an order in terms of s 20(9) of the 2008 Act.[12] This is not new. In *Ritz Hotel*[13] this Court referred to English authority in which Lord Denning MR observed that, as regards piercing the corporate veil, there was a general tendency to ignore the separate legal entities of various companies within a group and to look instead at the economic entity of the whole group, especially where a parent company owns and controls the subsidiaries.[14]

[31] What is however clear from the provisions of s 20(9) of the 2008 Act, is that they have nothing to do with the appointment of a liquidator to a company in liquidation, let alone authorise a court to appoint a liquidator. The respondents accept, as they must, that the power to appoint liquidators vests solely in the

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[10] Leslie Brown *The New Shorter Oxford English Dictionary on Historical Principles* (third edition 1993) Vol 2 p 1466.
[11] *Cape Pacific Ltd v Lubner Controlling Investments (Pty) Ltd & others* 1995 (4) SA 790 (A) at 804C-D.
[12] *Ex Parte Gore & others NNO* [2013] ZAWCHC 9; 2013 (3) SA 382 (WCC) para 33.
[13] *Ritz Hotel Ltd v Charles of the Ritz Ltd & another* 1988 (3) SA 290 (A) at 315F.
[14] *DHN Food Distributors Ltd v Tower Hamlets London Burough Council* [1976] 1 WLR 852 (CA) at 860B; [1976] 3 All ER 462 at 467b-c.

Master.[15] However, on the authority of *Natal Pension Fund*,[16] they contended that the court a quo's interpretation of the July order is sensible and businesslike: Div-Prop 11 and Div-Prop 12 and the three holding companies were to be regarded as a single entity, the Dividend Investment Scheme, and administered 'as a company', ie as if the five companies were one entity; and that the Div-Prop liquidators had to continue with the liquidation of the single entity (paragraphs 1 and 2 of the July order). The order appointing the liquidators (paragraph 3), so it was contended, was 'a necessary consequence' of paragraphs 1 and 2 of the July order.

[32] The respondents are mistaken. First, there is nothing in either s 20(9) or any of the other provisions of the 2008 Act referred to in paragraph 1 of the July order, which authorised a court to appoint the liquidators. Second, s 367 of the 1973 Act makes it clear that the Master appoints liquidators for the purpose of conducting the winding-up of a company.[17] The Master's office, which controls every stage of the administration of companies under winding-up, from the launching of liquidation applications to the deregistration of companies, has the institutional knowledge and expertise to apply policy and assess the ability and integrity of liquidators who may wish to be appointed. Although the South African insolvency system is creditor-driven and the majority of creditors have the right to elect liquidators, their choice of liquidator is subject to the Master's approval and the exercise of the functions of liquidators is subject to the Master's control.[18]

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[15] *The Master of the High Court (North Gauteng High Court, Pretoria) v Motala NO & others* 2011 ZASCA 238; 2012 (3) SA 325 (SCA) paras 7 and 14, affirming *Ex Parte the Master of the High Court of South Africa (North Gauteng)* [2011] ZAGPPHC 105; 2011 (5) SA 311 (GNP).

[16] *Natal Joint Municipal Pension Fund* fn 6 para 18.

[17] Section 367 reads:

'Appointment of liquidator

for the purpose of conducting the proceedings in a winding-up of a company the Master shall appoint a liquidator or liquidators as hereinafter provided'

[18] *Ex Parte the Master of the High Court of South Africa (North Gauteng)* fn 15 paras 25-28.

[33] By issuing paragraph 3 of the July order, the court usurped a power expressly conferred on the Master by the 1973 Act. Consequently, I am driven to conclude that paragraph 3 is a nullity and of no force and effect.[19]

[34] This brings me to the December order. It was founded on the relief sought in prayer 2 of the notice of motion in that application, which read:

'Ordering the Respondent [the Master] to immediately comply with an order of this Honourable Court, dated 8 July 2014 and which is attached hereto as annexure "A" and interpret the order as set out in paragraphs 14, 16 and 25 of the Founding Affidavit.'

[35] Section 165(5) of the Constitution provides that an order or decision of a court binds all those to whom and organs of state to which it applies. This Court has held that parties who are required to comply with court orders must know with clarity what is required of them; otherwise they risk being held in contempt of court.[20] The doctrine of vagueness, which is founded on the rule of law, is a foundational value of our constitutional democracy. It requires laws to be written in a clear manner, with reasonable certainty and not perfect lucidity.[21] Orders of court must comply with this standard: vague provisions in a court order violate the rule of law.[22]

[36] The December order is both erroneous and vague. It is, firstly, erroneous as it purportedly directs the respondent, the Master, 'to immediately comply with the order of this court dated 8 July 2014'. But the Master was not ordered to do anything at all in the order of 8 July 2014: it did not apply to him. In terms of that

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[19] *Motala* fn 15 para 14.
[20] *Minister of Home Affairs & others v Scalabrini Centre & others* [2013] ZASCA 134; 2013 (6) SA 421 (SCA) para 77.
[21] *Affordable Medicines Trust & others v Minister of Health & others* 2006 (3) SA 247 (CC) para 108.
[22] *Minister of Water and Environmental Affairs v Kloof Conservancy* [2015] ZASCA 177; [2016] 1 All SA 676 (SCA) para 14.

order, two property owning companies and three holding companies were declared to be a single entity known as the Dividend Investment Scheme; and the liquidators of the property owning companies were appointed as the liquidators of the single entity.

[37] Secondly, the December order is 'so open-ended and vague as to render the relief incompetent'.[23] It states that the Master is ordered to 'interpret the order as set out in paragraph 14, 16 and 25 of the founding affidavit', whatever that may mean. In paragraph 14 of the founding affidavit, Mr Cooper stated that it was always the intention of the liquidators and the business rescue practitioner that 'the process of liquidation should merely continue'. As already quoted, in paragraph 16 he said that a 'second meeting of the combined entity' was envisaged but that the Master 'differs from this interpretation of the court order'. And in paragraph 25 of the affidavit Mr Cooper outlined the difficulties which the liquidators would encounter if they had to convene a first meeting of the single entity.

[38] In the light of this, the December order is vague. It does not tell the Master with any measure of certainty, let alone reasonable certainty, what he or she is required to do to comply with the order of 8 July 2013[24] - which was never granted against him in the first place. It follows that the December order is both void for vagueness, and because it is inextricably linked to paragraph 3 of the July order, which is a nullity.

[23] *Mazibuko NO v Sisulu NO & others NNO* [2013] ZACC 28; 2013 (6) SA 249 (CC) para 24.
[24] *Kloof Conservancy* fn 20 para 13.

[39] It is trite that, as a general rule, what is done contrary to the prohibition of the law is of no effect and must be regarded as never having been done.[25] Whether non-compliance with a statutory prohibition nullifies an act must be determined according to the language of the relevant statute.[26] Section 367 of the 1973 Act confers on the Master, exclusively, the power to appoint a liquidator in the winding-up of a company. Inasmuch as paragraph 3 of the July order and the December order in its entirety, are nullities, a pronouncement to that effect is unnecessary.[27]

[40] The remaining issue is whether the finding that the July and December orders are invalid, would have any practical effect. The position is governed by s 16(2)*(a)*(i) of the Superior Courts Act. It reads:

'When at the hearing of an appeal the issues are of such a nature that the decision sought will have no practical effect or result, the appeal may be dismissed on this ground alone.'

[41] On 10 December 2014, and presumably to regularise the liquidation proceedings, the Master appointed the respondents as the liquidators of the Dividend Investment Scheme, in terms of s 367 read with s 375(1) of the 1973 Act. According to the certificate of appointment, the five companies in liquidation were registered as 'one file' with the Master.

[42] The consequences of the certificate of appointment are that it is valid throughout the Republic;[28] the respondents are entitled to act as liquidators of the Dividend Investment Scheme from the date of the certificate of appointment;[29] and

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[25] *Schierhout v Minister of Justice* 1926 AD 99 at 109; *Cool Ideas* fn 5 para 90
[26] *Cool Ideas* fn 5 para 91.
[27] *Motala* fn 15 para 14.
[28] Section 375(2) of the 1973 Act.
[29] Section 375(3) of the 1973 Act.

all acts of the respondents as liquidators of the Scheme are valid, notwithstanding any defects that may be discovered in their appointment afterwards.[30]

[43] The Master's decision to appoint the respondents as liquidators of the Dividend Investment Scheme constitutes administrative action as defined in the Promotion of Administrative Justice Act 3 of 2000.[31] As such, the decision by the Master is valid and stands until it is reviewed and set aside.[32] City Capital has not sought to review the Master's decision appointing the respondents as liquidators; nor has it applied to set aside that certificate of appointment.

[44] Consequently, because the Master's appointment of the respondents as liquidators of the Dividend Investment Scheme remains unaffected, the finding that paragraph 3 of the July order and the December order in its entirety are nullities, would have no practical result as envisaged in s 16(2)*(a)*(i) of the Superior Courts Act. For this reason the appeal falls to be dismissed.

[45] Although the appeal falls to be dismissed because the decision sought will have no practical effect, paragraph 2 of the order of the court a quo insofar as it sought to affirm the July order and the December order, must be set aside. In my view, it cannot be said that City Capital should have succeeded in the court a quo and accordingly, that it should have been awarded the costs of the counter-application. It was in exactly the same position in the court a quo, as it is in this Court: paragraph 2 of the court a quo's order had no practical effect because the

[30] Section 375(4) of the 1973 Act.
[31] *Nel & another NNO v The Master (Absa bank Ltd & others intervening)* 2005 (1) SA 276 (SCA) para 28.
[32] *Oudekraal Estates (Pty) Ltd v The City of Cape Town & others* 2004 (6) SA 222 (SCA) para 26.

Master's decision to appoint the liquidators of the Dividend Investment Scheme had not been set aside.

[46] On the other hand, it appears from the record that the respondents did not take the point that the relief sought in the court a quo would be academic because the Master's decision appointing them had not been set aside. Instead, they supported the July and December orders. In the circumstances, fairness dictates that there should be no order of costs in relation to the proceedings in the court a quo.

[47] In the result, the following order is made:

1 Paragraph 2 of the order of the court a quo is set aside and replaced with the following:

'2(a) The counter-application of the intervening party for the relief in paragraph 3.1 and 3.2 of the notice of counter-application is dismissed, as such relief is unnecessary.

(b) There is no order as to the costs of the counter-application.'

2 Save as aforesaid, the appeal is dismissed with costs, including the costs of two counsel.

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A Schippers
Acting Judge of Appeal

Appearances

For Appellant:	A Oosthuizen SC (with R J Howie) Instructed by: Werksmans Attorneys, Cape Town Rozendorff Reits Barry Attorneys, Bloemfontein
For Respondent:	S du Toit SC (with T D Prinsloo) Instructed by: Lombard & Kriek Attorneys, Cape Town Webber Attorneys, Bloemfontein